DRAFT DETR CIRCULAR

DEPARTMENT OF THE ENVIRONMENT, TRANSPORT AND THE REGIONS

[Draft] DETR Circular
Department of the Environment, Transport and the Regions
Eland House, Bressenden Place, London SW1E 5EU

[February 2000]

Environmental Protection Act 1990: Part IIA
CONTAMINATED LAND

1 I am directed by the Secretary of State for the Environment, Transport and the Regions to draw your attention to the entry into force of the new statutory regime for the identification and remediation of contaminated land with effect from [1 April 2000].

2 For this purpose, the Secretary of State has made the Environment Act 1995 (Commencement No. [n] and Saving Provision) Order 1999 (S.I. 1999/[n]), which brings into force Part IIA of the Environmental Protection Act 1990 (the "1990 Act"). Part IIA was inserted into the 1990 Act by section 57 of the Environment Act 1995. He has also made the Contaminated Land (England) Regulations 1999 (SI 1999/[n]), which have been made under sections 78C, 78E, 78G, 78L 78R and 78X.

PURPOSE OF THIS CIRCULAR

3 This circular has two functions: first it promulgates the statutory guidance which is an essential part of the new regime; secondly, it sets out the way in which the new regime is expected to work, by providing a summary of Government policy in this field, a description of the new regime, a guide to the Regulations and a note on the saving provision in the Commencement Order.

4 The new regime as described in this circular does not apply to any radioactive contamination of land. Part IIA makes provision for the regime to be applied to such contamination with such modifications as the Secretary of State considers appropriate. Consultation started in February 1998 on how such an application might be made.

5 This circular applies only to England. Responsibility for implementing Part IIA in Scotland and Wales rests with the Scottish Executive and the National Assembly for Wales, respectively.

STATUTORY GUIDANCE

6 [I am therefore further directed by the Secretary of State for the Environment, Transport and the Regions to say that he hereby issues the statutory guidance in Annex 3 to this circular. This guidance is issued under the following powers:

(a) *The Definition of Contaminated Land* – Chapter A of Annex 3 to this circular sets out guidance issued under section 78A(2) and (5);

(b) *The Identification of Contaminated Land* – Chapter B of Annex 3 to this circular sets out guidance issued under section 78B(2);

(c) *The Remediation of Contaminated Land* – Chapter C of Annex 3 to this circular sets out guidance issued under section 78E(5);

(d) *Exclusion from, and Apportionment of, Liability for Remediation* – Chapter D of Annex 3 to this circular sets out guidance issued under section 78F(6) and (7); and

(e) *The Recovery of the Costs of Remediation* – Chapter E of Annex 3 to this Circular sets out guidance issued under section 78P(2).]

7 Section 78YA states that before the Secretary of State can issue any guidance under Part IIA, he must consult the Environment Agency and such other persons as he considers it appropriate to consult. Drafts of all the guidance were published for consultation in September 1996, October 1998 and September 1999. The guidance contained in Annex 3 to this Circular has been prepared in the light of responses to those consultation exercises.

8 In addition, section 78YA requires the Secretary of State to lay a draft of any guidance he proposes to issue under sections 78A(2) or (5), 78B(2) or 78F(5) or (6) before each House of Parliament for approval under the negative resolution procedure. The guidance now issued in Chapters A, B and D of Annex 3 to this Circular was laid in draft before both Houses on [December 1999].

FINANCIAL AND MANPOWER IMPLICATIONS

9 The Explanatory and Financial Memorandum to the Environment Bill stated that the creation of the Part IIA regime would have neither any financial nor any manpower implications, as it largely restated existing functions of local authorities and the Environment Agency. However, in the light of responses received to the consultation on the draft statutory guidance, published in September 1996, the Government decided that the successful operation of the new regime would necessitate the provision of additional resources for local authorities and the Environment Agency.

10 Accordingly, as part of the outcome of the Comprehensive Spending Review announced in July 1998, and after consulting the Local Government Association, the Government announced that an additional £50 million would be provided over the next three years to help local authorities develop inspection strategies, carry out site investigations and take forward enforcement action. This funding would be in addition to £45 million already planned to be spent over the same period through the Contaminated Land Supplementary Credit Approval (SCA) programme, which provides support for capital costs incurred by local authorities in inspecting and remediating land. Of the new funding, £12 million has been added to the figure for Total Standard Spending for local authorities in each of the three years, with the remainder being added to the SCA programme.

11 The additional cost burdens placed on the Environment Agency were taken into account in setting the level of grant-in-aid to be paid to the Agency.

REGULATORY IMPACT ASSESSMENT

12 A Regulatory Impact Assessment (RIA) on the implementation of the Part IIA regime has been prepared. A draft of the earlier style of Compliance Cost Assessment was published for consultation in November 1996; comments received in response to this have been taken into account in the [draft] final RIA.

13 [The draft RIA is included with this draft circular as part of the consultation exercise].

ENQUIRIES

14 Enquiries about particular sites and how they may be affected by the new regime should be directed, in the first instance, to the local authority in whose area they are situated.

15 Enquiries about this Circular should be addressed to:

Land Quality Team
Marine, Land and Liability Division
DETR
3/B4 Ashdown House
123 Victoria Street
London SW1E 6DE

Phone: (0171) 890 5287
Fax: (0171) 890 5279

Email: landquality_enquiries@DETR.GOV.UK

***[N,** Assistant Secretary*]

The Chief Executive
District Councils
Unitary Authorities
London Borough Councils
The Environment Agency
The Town Clerk, City of London

Contaminated Land

Contents of this Circular

ANNEX 1 - A Statement of Government Policy

Sustainable Development

1 In his foreword to A Better Quality of Life: A Strategy for Sustainable Development for the UK the Prime Minister, the Rt Hon Tony Blair MP, said:

> "The last hundred years have seen a massive increase in the wealth of this country and the well-being of its people. But focusing solely on economic growth risks ignoring the impact – both good and bad – on people and on the environment. Had we taken account of these links in our decision making, we might have reduced or avoided costs such as contaminated land or social exclusion."

PREVENTING NEW CONTAMINATION

2 Contaminated land is an archetypal example of our failure in the past to move towards sustainable development. We must learn from that failure. The first priority for the Government's policy on land contamination is therefore to prevent the creation of new contamination. We have, or are creating, a range of regimes aimed at achieving this. Of these, the most significant are:

(a) *Integrated Pollution Control (IPC)* – Part I of the Environmental Protection Act 1990 ("the 1990 Act") places a requirement on operators of prescribed industrial processes to operate within the terms of permits issued by the Environment Agency to control harmful environmental discharges;

(b) *Pollution Prevention and Control (PPC)* – A new regime will shortly be introduced to replace IPC, and to implement the European Union's Integrated Pollution Prevention and Control directive; that includes the specific requirement that permits for industrial plants and installations must include conditions to prevent the pollution of soil; and

(c) *Waste Management Licensing* – Part II of the 1990 Act places controls over the handling, treatment and disposal of wastes; in the past, much land contamination has been the result of unregulated, or badly-managed, waste disposal activities.

3 Although the prevention of new contamination is of critical importance, the focus of this Circular is on land which has been contaminated in the past.

OUR INHERITED LEGACY OF CONTAMINATED LAND

4 As well as acting to prevent new contamination, we have also to deal with a substantial legacy of land which is already contaminated, for example by past industrial, mining and waste disposal activities. It is not known, in detail, how much land is contaminated. This can be found out only through wide-ranging and detailed site investigation and risk assessment. The answer will be critically dependent on the definition used to establish what land counts as being "contaminated".

5 Various estimates have been made of the extent of the problem. In its report *Contaminated Land*, published in 1993, the Parliamentary Office of Science and Technology referred to expert estimates of between 50,000 and 100,000 potentially contaminated sites across the UK, with estimates of the extent of land ranging between 100,000 and 200,000 hectares. However, the report did note that international experience suggested that only a small proportion of potentially contaminated sites posed an immediate threat to human health and the environment. More recently, the Environment Agency has estimated that that there may be some 300,000 hectares of land in the UK affected to some extent by industrial or natural contamination.

6 The existence of contamination presents its own threats to sustainable development:

(a) it impedes social progress, depriving local people of a clean and healthy environment;

(b) it threatens wider damage to the environment and to wildlife;

(c) it inhibits the prudent use of our land and soil resources, particularly by obstructing the recycling of previously-developed land and increasing development pressures on greenfield areas; and

(d) the cost of remediation represents a high burden on individual companies, home- and other land-owners, and the economy as a whole.

7 In this context, the Government's objectives with respect to contaminated land are:

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

(b) to seek to bring damaged land back into beneficial use; and

(c) to seek to ensure that the cost burdens faced by individuals, companies and society as a whole are proportionate, manageable and economically sustainable.

8 These three objectives underlie the "suitable for use" approach to the remediation of contaminated land, which the Government considers is the most appropriate approach to achieving sustainable development in this field.

THE "SUITABLE FOR USE" APPROACH

9 The "suitable for use" approach focuses on the risks caused by land contamination. The approach recognises that the risks presented by any given level of contamination will vary greatly according to the use of the land and a wide range of other factors, such as the underlying geology of the site. Risks therefore need to be assessed on a site-by-site basis.

10 The "suitable for use" approach then consists of three elements:

(a) **ensuring that land is suitable for its current use** – in other words, identifying any land where contamination is causing unacceptable risks to human health and the environment, assessed on the basis of the current use and circumstances of the land, and returning such land to a condition where such risks no longer arise ("remediating" the land);

(b) **ensuring that land is made suitable for any new use, as official permission is given for that new use** – in other words, assessing the potential risks

from contamination, on the basis of the proposed future use and circumstances, before official permission is given for the development and, where necessary to avoid unacceptable risks to human health and the environment, remediating the land before the new use commences; and

(c) **limiting requirements for remediation to the work necessary to prevent unacceptable risks to human health or the environment in relation to the current use or officially-permitted future use of the land** - in other words, recognising that the risks from contaminated land can be satisfactorily assessed only in the context of specific uses of the land, and that any attempt to guess what might be needed at some time in the future for other uses is likely to result either in premature work (thereby risking distorting social, economic and environmental priorities) or in unnecessary work (thereby wasting resources).

11 Within this framework, it is important to recognise that the use of any particular area of land may include several different activities and that some of the potential risks arising from contamination, particularly impacts on water and the wider environment, may be independent of the use the land. In practical terms, the use of any land should be interpreted as being the range of uses to which the land is likely to be put, where those uses would not require any further official permission such as a planning approval.

12 Regulatory action may be needed to make sure that necessary remediation is carried out. However, limiting remediation costs to what is needed to avoid unacceptable risks will mean that we will be able to recycle more previously-developed land than would otherwise be the case, increasing our ability to make beneficial use of the land. This helps to increase the social, economic and environmental benefits from regeneration projects and to reduce unnecessary development pressures on greenfield sites.

13 The "suitable for use" approach provides the best means of reconciling our various environmental, social and economic needs in relation to contaminated land. Taken together with tough action to prevent new contamination, and wider initiatives to promote the reclamation of previously-developed land, it will also help to bring about progressive improvements in the condition of the land which we pass on to future generations.

14 Within the "suitable for use" approach, it is always open to the person responsible for a site, or liable to pay for remediation, to do more than can be enforced through regulatory action. For example, a site owner may plan to introduce at a future date some new use for the land which would require more stringent remediation, and may conclude that, in these circumstances, it is more economic to anticipate those remediation requirements. However, this is a judgement which only the owner of the land is in a position to make.

15 The one exception to the "suitable for use" approach to regulatory action applies where contamination has resulted from a specific breach of an environmental licence or permit. In such circumstances, the Government considers that it is generally appropriate that the polluter is required to remove the contamination completely. To do otherwise would be to undermine the regulatory regimes aimed at preventing new contamination.

Action to Deal with Contamination

VOLUNTARY REMEDIATION ACTION

16 The Government aims to maintain the quality of the land in this country and to improve it progressively where it has been degraded in the past. Redeveloping areas where

previous development has reached the end of its useful life not only contributes to social and economic regeneration of the local communities but is also an important driver in achieving this progressive environmental improvement.

17 The Government is determined to limit the unnecessary development of greenfield areas, and has in particular set a target for 60% of new housing to be built on previously-developed land. Various initiatives aimed at achieving the objective of increasing the recycling of land are outlined in *Planning for Communities of the Future*. Further proposals for action have been made by the Urban Task Force, chaired by Lord Rogers of Riverside, in its report *Towards an Urban Renaissance*. The Government will be responding to these recommendations in an Urban White Paper.

18 It is, of course, necessary to ensure that when previously-developed land is redeveloped any potential risks associated with contamination are properly identified and remediated. The planning and building control systems, described at paragraphs 44 to 48 below, provide the means of achieving this.

19 There are very few cases where land cannot be restored to some beneficial use. However, the actual or potential existence of contamination on a site can inhibit the willingness or ability of a developer to do so. The Government is acting in three specific ways to overcome the potential obstacles to the redevelopment of land affected by contamination:

(a) *by providing public subsidy* – substantial funding is made available through the Single Regeneration Budget, English Partnerships and the regional development agencies to support site redevelopment costs for projects aimed at particular social and economic regeneration objectives;

(b) *by promoting research and development* – the programmes of the science research councils, the Environment Agency, the DETR and the DTI aim to increase scientific understanding and the availability and take-up of improved methods of risk assessment and remediation; and

(c) *by providing an appropriate policy and legal framework* – the "suitable for use" approach ensures that remediation requirements are reasonable and tailored to the needs of individual sites; a significant objective underlying the new contaminated land regime is to improve the clarity and certainty of potential regulatory action on contamination, thereby assisting developers to make informed investment appraisals.

REGULATORY ACTION

20 The regeneration process is already dealing with much of our inherited legacy of contaminated land. But there will be circumstances where contamination is causing unacceptable risks on land which is either not suitable or not scheduled for redevelopment. For example, there may be contamination on sites now regarded as greenbelt or rural land, or contamination may be affecting the health of occupants of existing buildings on the land or prejudicing wildlife on the site or in its surroundings. We therefore need systems in place both to identify problem sites of this kind and, more significantly, to ensure that the problems are dealt with and the contamination remediated.

21 A range of specific clean-up powers exists to deal with cases where contamination is the result of offences against, or breaches of, pollution prevention regimes. The main examples of these are described in paragraphs 50 to 57 below.

22 Part IIA of the Environmental Protection Act 1990 creates a new framework for the identification and remediation of contaminated land in circumstances where there has not been any identifiable breach of a pollution prevention regime.

23 Although Part IIA itself is new, it largely replaces existing regulatory powers and duties. Borough and district councils have long-standing duties to identify particular environmental problems, including those resulting from land contamination, and to require their abatement. The origins of these powers is found in the mid-19th century legislation which created the concept of the statutory nuisance. They were codified in the Public Health Act 1936 and have most recently been set out in Part III of the Environmental Protection Act 1990, which modernised the statutory nuisance regime.

24 In addition, the Environment Agency has powers under Part VII of the Water Resources Act 1991 to take action to prevent or remedy the pollution of controlled waters, including circumstances where the pollution arises from contamination in the land.

The New Contaminated Land Regime

OBJECTIVES FOR THE NEW REGIME

25 The main objective underlying the introduction of the Part IIA Contaminated Land regime is to provide an improved system for the identification and remediation of land where contamination is causing unacceptable risks to human health or the wider environment, assessed in the context of the current use and circumstances of the land.

26 As stated in paragraph 23 above, the new regime broadly reflects the approaches already in place under the statutory nuisance regime and Part VII of the Water Resources Act 1991. The Government's primary objectives for introducing the new regime are:

(a) to improve the focus and transparency of the controls, ensuring authorities take a strategic approach to problems of land contamination;

(b) to enable all problems resulting from contamination to be handled as part of the same process; previously separate regulatory action was needed to protect human health and to protect the water environment;

(c) to increase the consistency of approach taken by different authorities; and

(d) to provide a more tailored regulatory mechanism, including liability rules, better able to reflect the complexity and range of circumstances found on individual sites.

27 In addition to providing a more secure basis for direct regulatory action, the Government considers that the improved clarity and consistency of the new regime, in comparison with its predecessors, is also likely to encourage voluntary remediation. This forms an important secondary objective for implementation of the Part IIA regime.

28 Companies who may be responsible for contamination, for example on land they currently own or on former production sites, will be able to assess the likely requirements of regulators acting under Part IIA. They will then be able to plan their own investment programmes to carry out remediation in advance of actual regulatory intervention.

29 Similarly, the Part IIA regime will assist in the recycling of previously-developed land. The new regime cannot be used directly to require the redevelopment of land, only its remediation. However, the Government considers that implementation of the regime will assist developers by reducing uncertainties about so-called "residual liabilities", in particular the perceived risk of further regulatory intervention. In particular it will:

(a) reinforce the "suitable for use" approach, enabling developers to design and implement appropriate and cost-effective remediation schemes as part of their redevelopment projects;

(b) clarify the circumstances in which future regulatory intervention might be necessary (for example, if the initial remediation scheme proved not to be effective in the long term); and

(c) set out the framework for statutory liabilities to pay for any further remediation, should that be necessary.

OUTLINE OF PART IIA AND ASSOCIATED DOCUMENTS

30 The primary legislation in Part IIA contains the structure and main provisions of the new regime. It consists of sections 78A to 78YC. An explanation of how the regime will operate is set out in the *Guide to the New Regime*, at Annex 2 to this Circular.

31 Within the structure of the Part IIA legislation, the [draft] statutory guidance set out in Annex 3 to this Circular provides the detailed framework for the following key elements of the new regime:

(a) the definition of contaminated land (Chapter A);

(b) the identification of contaminated land (Chapter B);

(c) the remediation of contaminated land (Chapter C);

(d) exclusion from, and apportionment of, liability for remediation (Chapter D); and

(e) the recovery of the costs of remediation and the relief from hardship (Chapter E).

32 Regulations made under Part IIA deal with:

(a) the descriptions of land which are required to be designated as "special sites";

(b) the contents of, and arrangements for serving, remediation notices;

(c) compensation to third parties for granting rights of entry etc. to land;

(d) grounds of appeal against a remediation notice, and procedures relating to any such appeal; and

(e) particulars to be contained in registers compiled by enforcing authorities, and the locations at which such registers must be available for public inspection.

33 Annex 4 to this Circular provides a detailed description of the Contaminated Land (England) Regulations 1999.

MAIN FEATURES OF THE NEW REGIME

34 The primary regulatory role under Part IIA rests with local authorities:

(a) in Greater London, this means the London borough councils, the City of London and the Temples; and

(b) elsewhere it means the borough or district councils or, where appropriate, the unitary authority.

35 This reflects their existing functions under the statutory nuisance regime, and will also complement their roles as planning authorities. In outline, the role of these authorities under Part IIA will be:

(a) to cause their areas to be inspected to identify contaminated land;

(b) to determine whether any particular site is contaminated land;

(c) to act as enforcing authority for all contaminated land which is not designated as a "special site" (the Environment Agency will be the enforcing authority for special sites).

36 The enforcing authorities will have four main tasks:

(a) to establish who should bear responsibility for the remediation of the land (the "appropriate person" or persons);

(b) to decide, after consultation with the appropriate person, the landowner and the Environment Agency, what remediation is required in any individual case and to ensure that such remediation takes place, either through agreement with the appropriate person, or by serving a remediation notice on the appropriate person if agreement is not possible or, in certain circumstances, through carrying out the work themselves;

(c) where a remediation notice is served, or the authority itself carries out the work, to determine who should bear what proportion of the liability for meeting the costs of the work; and

(d) to record certain prescribed information about their regulatory actions on a public register.

37 Contaminated land is land which appears to the local authority to be in such a condition, by reason of substances in, on or under the land, that significant harm is being caused, or there is a significant possibility of such harm being caused, or that pollution of controlled waters is being, or is likely to be, caused. This definition is to be applied in accordance with other definitions in Part IIA and statutory guidance set out in this Circular. These definitions and the guidance are based on the assessment of risks to human health and the environment assessment. The regime thus reflects the "suitable for use" approach.

38 Under the provisions concerning liabilities, responsibility for paying for remediation will, where feasible, follow the "polluter pays" principle. In the first instance, any persons who caused or knowingly permitted the contaminating substances to be in, on or under the land will be the appropriate person(s) to undertake the remediation and meet its costs. However, if it is not possible to find any such person, responsibility will pass to the current owner or occupier of the land. (This latter step does not apply where the problem caused by

the contamination is solely one of water pollution: this reflects the potential liabilities for water pollution as they existed prior to the introduction of Part IIA.) Responsibility will also be subject to limitations, for example where hardship might be caused; these limitations are set out in Part IIA and in the statutory guidance in this Circular.

39 The Environment Agency will have four principal roles with respect to contaminated land under Part IIA. It will:

(a) assist local authorities in identifying contaminated land, particularly in cases where water pollution is involved;

(b) provide site-specific guidance to local authorities on the remediation of contaminated land;

(c) act as the "enforcing authority" for any land designated as a "special site" (the descriptions of land which are required to be designated in this way are prescribed in the Regulations); and

(d) publish periodic reports on contaminated land.

40 In addition, the Agency has inherited the contaminated land research programme previously run by the then Department of the Environment. The Agency will continue to carry out technical research and, in conjunction with DETR, publish scientific and technical advice.

MEASURING PROGRESS

41 DETR will be developing performance indicators to assess overall progress in the task of identifying and remediating our inherited legacy of contaminated land. This will rely on information gathered by the Environment Agency as part of its role in preparing periodic reports on contaminated land.

42 The indicators will, potentially, include both:

(a) measures of the scale of regulatory activities carried out by local authorities and the Environment Agency under Part IIA;

(b) indicators of overall progress in the task of identifying and remediating contaminated land, whether this is the result of voluntary action or a response to regulatory action under Part IIA.

43 It is the Government's intention in due course to establish targets for overall progress. However, at this stage, it is not possible to set meaningful targets as too little is known about the true extent of contaminated land. This will change once local authorities have worked up their inspection strategies and started carrying out the detailed inspection of individual sites.

Interaction with Other Regimes

PLANNING AND DEVELOPMENT CONTROL

44 Land contamination, or the possibility of it, is a material consideration for the purposes of town and country planning. This means that a planning authority has to consider

the potential implications of contamination both when it is developing structure or local plans (or unitary development plans) and when it is considering individual applications for planning permission.

45 The planning authority should satisfy itself that the potential for contamination is properly assessed, and the development incorporates any necessary remediation. Where necessary, any planning permission should include appropriate site investigation and remediation conditions. Under the "suitable for use" approach, risks should be assessed, and remediation requirements set, on the basis of both the current use and circumstances of the land and its proposed new use. (This is in contrast to the approach under Part IIA, where only the current use and circumstances are considered.)

46 Guidance to planning authorities is set out in *Planning Policy Guidance: Planning and Pollution Control (PPG 23)*, published in 1994, and DOE Circular 11/95 *The Use of Conditions in Planning Permissions*. DETR is currently preparing further planning guidance on land contamination, which will amplify the guidance in PPG 23, explain the interface with the Part IIA regime from a planning perspective, and provide planning authorities with technical and practical advice on land contamination issues. In the meantime, the guidance contained in PPG23 remains valid, although planning authorities should note that references to the term "contaminated land" in that document should be interpreted in the general sense rather than according to the particular definition used for the purposes of the Part IIA regime.

47 In some cases, the carrying out of remediation activities may itself constitute "development" within the meaning given at section 55 of the Town and Country Planning Act 1990, and therefore require planning permission.

48 In addition to the planning system, the Building Regulations 1991 (made under the Building Act 1984) may require measures to be taken to protect the fabric of new buildings, and their future occupants, from the effects of contamination. *Approved Document Part C (Site Preparation and Resistance to Moisture)* gives guidance on these requirements.

49 In any case where new development is taking place, it will be the responsibility of the developer to carry out the necessary remediation. In most cases, the enforcement of any remediation requirements will be through planning conditions and building control, rather than through a remediation notice issued under Part IIA.

INTEGRATED POLLUTION CONTROL (IPC) AND POLLUTION PREVENTION AND CONTROL (PPC)

50 Section 27 of the Environmental Protection Act 1990 gives the Environment Agency the power to take action to remedy harm caused by a breach of IPC controls under section 23(1)(a) or (c) of the Act. This could apply to cases of land contamination arising from such causes.

51 In any case where an enforcing authority acting under Part IIA considers that the section 27 power is exercisable, it is precluded by section 78YB(1) from serving a remediation notice to remedy the same harm.

52 In some cases, remediation activities may themselves constitute processes which cannot be carried out without a permit issued under the IPC regime.

53 The Government is currently developing a new regime of Pollution Prevention and Control (PPC). This will replace the current IPC regime, and will transpose into national law the requirements of the EC Integrated Pollution Prevention and Control Directive (96/61/EC).

The regime will include a new system of enforcement notices, which will enable the Environment Agency to require the operator of permitted plants or installations to remedy the effects of any breaches of their permits. The PPC regime will have the same relationship to Part IIA as has the IPC regime.

WASTE MANAGEMENT LICENSING

54 There are three areas of potential interaction between the Part IIA regime and the waste management licensing system under Part II of the Environmental Protection Act 1990.

55 Firstly, there may be significant harm or pollution of controlled waters arising from land for which a site licence, issued under the Part II system, is in force. Where this is the case, under section 78YB(2), the Part IIA regime does not normally apply; that is, the land cannot formally be identified as "contaminated land" and no remediation notice can be served. If action is needed to deal with a pollution problem in such a case, this would normally be enforced through a "condition" attached to the site licence. However, Part IIA does apply if the harm or pollution on a licensed site is attributable to a cause other than a breach of the site licence, or the carrying on of an activity authorised by the licence in accordance with its terms and conditions.

56 Secondly, under section 78YB(3), an enforcing authority acting under Part IIA cannot serve a remediation notice in any case where the contamination results from an illegal deposit of controlled waste. In these circumstances, the Environment Agency and the waste disposal authority have powers under section 59 of the 1990 Act to remove the waste, and to deal with the consequences of its having been present.

57 Thirdly, remediation activities on contaminated land may themselves fall within the definitions of "waste disposal operations" or "waste recovery operations", and be subject to the licensing requirements under the Part II system. Guidance on the meaning of the relevant definitions and the operation of the licensing system is provided in DOE Circular 11/94.

STATUTORY NUISANCE

58 Until the implementation of the Part IIA contaminated land regime, the statutory nuisance system under Part III of the 1990 Act was the main regulatory mechanism for enforcing the remediation of contaminated land.

59 In order to avoid any duplication of controls, from the entry into force of the new contaminated land regime, land contamination issues are removed from the scope of the Statutory Nuisance system. (This is brought into effect by an amendment to the definition of a statutory nuisance in section 79 of the 1990 Act contained in paragraph 89 of Schedule 22 of the Environment Act 1995.) Any matter which would otherwise have been a statutory nuisance will no longer be treated as such, to the extent that it consists of, or is caused by, land "being in a contaminated state".

60 The definition of what constitutes a "contaminated state" for these purposes has deliberately been set on a broader basis than the definition of "contaminated land" for the purposes of the Part IIA regime. In particular, the "contaminated state" definition refers to circumstances where "harm is being caused or there is a possibility of harm being caused", whereas the "contaminated land" definition refers to "significant harm" and the "significant possibility" of it being caused. The effect of this distinction in definitions is to ensure that the statutory nuisance regime cannot be used to circumvent the statutory guidance under Part IIA on what constitutes "significant harm" and "significant possibility". The Government considers that the Part IIA statutory guidance sets out the right level of protection for human

health and the environment from land contamination. It would therefore be inappropriate to leave in place another system which could, in theory, be used to impose regulatory requirements on a different basis.

61 The one set of circumstances where the statutory nuisance regime will continue to apply for land contamination issues is in any case where an abatement notice under section 80(1), or an order of the court under section 82(2)(a), has already been issued and is still in force. This will ensure that any enforcement action taken under the statutory nuisance regime can continue, and will not be interrupted by the implementation of the Part IIA regime.

WATER RESOURCES ACT 1991

62 Sections 161 to 161D of the Water Resources Act 1991 give the Environment Agency powers to take action to prevent the pollution of controlled waters. The normal enforcement mechanism under these powers is a "works notice" served under section 161A, which specifies what actions have to be take and in what time periods. This is served on any person who has "caused or knowingly permitted" the potential pollutant to be in the place from which it is likely to enter controlled waters. Where it is not appropriate to serve such a notice, because of the need for urgent action or where no liable person can be found, the Agency has the power to carry out the works itself.

63 There is an obvious potential for overlap between these powers and the Part IIA regime in circumstances where substances in, on or under land are likely to enter controlled waters. The decision as to which regime is used in any case may have important implications, as there are differences between the two enforcement mechanisms.

64 The Environment Agency has published a policy statement, *Environment Agency Policy and Guidance on the Use of Anti-Pollution Works Notices*. This sets out how the Agency intends to use the works notice powers, particularly in cases where there is an overlap with the Part IIA regime. The statement has been agreed with the DETR. In summary, the policy is that:

(a) the local authority, acting under Part IIA, should consult the Environment Agency before determining that land is contaminated land in respect of pollution of controlled waters;

(b) in any case where a local authority has identified contaminated land which is potentially affecting controlled waters, the statutory guidance set out in this Circular requires that authority to consult the Environment Agency, and to take into account any comments the Agency makes with respect to remediation requirements;

(c) where the Agency identifies any case where actual or potential water pollution is arising from land affected by contamination, the Agency will notify the relevant local authority, thus enabling that authority formally to identify the land as "contaminated land" for the purposes of the Part IIA regime; and

(d) in any case where land has been identified as "contaminated land" under the Part IIA regime, the Part IIA enforcement mechanisms would normally be used, rather than the works notice system. This is because Part IIA imposes a duty to serve a remediation notice, whereas the Agency is given only a power to serve a works notice.

65 The works notice powers may be particularly useful in cases where there is historic pollution of groundwater, but where the Part IIA regime does not apply. This may occur, for

example, where the pollutants are entirely contained within the relevant body of groundwater or where the "source" site cannot be identified.

66 No remediation notice can require action to be carried out which would have the effect of impeding or preventing a discharge into controlled waters for which a "discharge consent" has been issued under Chapter II of Part III of the Water Resources Act 1991.

RADIOACTIVITY

67 Under section 78YC of the 1990 Act, the normal Part IIA regime does not apply with respect to harm, or water pollution, which is attributable to any radioactivity possessed by any substance.

68 However, this section does give powers to the Secretary of State to make regulations applying the Part IIA regime, with any necessary modifications, to problems of radioactive contamination. The DETR published a consultation paper in February 1998 outlining a possible approach to applying the Part IIA regime. More detailed proposals are currently being developed in the light of responses to that consultation.

OTHER REGIMES

69 Other regimes which may have implications for land contamination, or which may overlap with Part IIA, include the following:

(a) *Food Safety* – Part I of the Food and Environment Protection Act 1985 gives ministers at the Ministry of Agriculture, Fisheries and Food (MAFF) powers to prohibit specified agricultural activities in a designated area, in order to protect consumers from exposure to contaminated food. The Food Standards Bill, which will establish the new Food Standards Agency, will also remove MAFF ministers' functions under Part I of the 1985 Act. Enforcing authorities under Part IIA should liaise with the Food Standards Agency (once it is established, and prior to that with the appropriate MAFF Regional Service Centre) about any possible use of the powers in Part I of the 1985 Act. The Food Standards Agency will advise ministers (in practice, the Secretary of State for Health) on the use of these powers.

(b) *Health and Safety* – The Health and Safety at Work etc Act 1974, the Construction (Design and Management) Regulations 1994 (S.I. 1994/3140) and their associated controls are concerned with risks to the public or employees at business and other premises; risks of these kinds could arise as a result of land contamination. Liaison between Part IIA enforcing authorities and the Health and Safety Executive will help to ensure that unnecessary duplication of controls is avoided, and that the most appropriate regime is used to deal with any problems.

(c) *Landfill Tax* – The Finance Act 1996 introduced a tax on the disposal of wastes, including those arising from the remediation and reclamation of land. However, an exemption from this tax can be obtained where material is being removed from contaminated land in order to prevent harm, or to facilitate the development of the land for particular purposes. An exemption certificate has to be specifically applied for, through HM Customs and Excise, in each case where it might apply. No exemption certificate will be granted where the material is being removed in order to comply with the requirements of a remediation notice served under section 78E of the 1990 Act. This provides a fiscal incentive for those responsible for carrying out remediation under Part IIA to do so by agreement, rather than waiting for the service of a remediation notice.

ANNEX 2 - A Description of the New Regime for Contaminated Land

1 - Introduction

1.1 Part IIA of the Environmental Protection Act 1990 – which was inserted into that Act by section 57 of the Environment Act 1995 – provides a new regulatory regime for the identification and remediation of contaminated land. In addition to the requirements contained in the primary legislation, operation of the regime is subject to regulations and statutory guidance.

1.2 This annex to the circular describes, in general terms, the operation of the regime, setting out the procedural steps the enforcing authority takes, and some of the factors which may underlie its decisions at each stage. Where appropriate it refers to the primary legislation, regulations or statutory guidance. However, the material in this part of the Circular does not form a part of that statutory guidance, and it should not be taken to qualify or contradict any requirements in the guidance, or to provide any additional guidance. It represents the Department's views and interpretations of the legislation, regulations and guidance. Readers should seek their own legal advice where necessary.

DEFINITIONS

1.3 Throughout the text, various terms are used which have specific meanings under the primary legislation, or in the regulations or the statutory guidance. Where this is the case, the terms are printed in SMALL CAPITALS. The Glossary of Terms at Annex 6 to the circular either repeats these definitions or shows where they can be found.

1.4 Unless the contrary is shown, references in this document to "sections" are to sections of the Environmental Protection Act 1990 (as amended) and references to "regulations" are references to the Contaminated Land (England) Regulations 1999. References to the statutory guidance include the relevant Chapter in Annex 3 to this Circular and the specific paragraph (so that, for example, a reference to paragraph 13 of Chapter B is shown as *"paragraph B.13"*.) Such references are to the most relevant paragraph(s): those paragraph(s) must, of course, be read in the context of the relevant guidance as a whole.

2 - The Definition of Contaminated Land

The Definition in Part IIA

2.1 Section 78A(2) defines CONTAMINATED LAND for the purposes of Part IIA as:

> "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) POLLUTION OF CONTROLLED WATERS is being, or is likely to be, caused".

2.2 This definition reflects the intended role of the Part IIA regime, which is to enable the identification and remediation of land on which contamination is causing unacceptable risks to human health or the wider environment. It does not necessarily include all land where contamination is present, even though such contamination may be relevant in the context of other regimes. For example, contamination which might cause risks in the context of a new development of land could be a "material planning consideration" under the Town and Country Planning Act 1990.

2.3 The definition does not cover any HARM or POLLUTION OF CONTROLLED WATERS which is attributable to any radioactivity possessed by any substance (*section 78YC*). However, the Secretary of State has powers to make regulations applying some or all of the Part IIA regime – with modifications where appropriate – to cases of radioactive contamination (*section 78YC(a)*). Consultations began in February 1998 on the content of such regulations. Those regulations will deal with the procedure for sites where both radioactive and non-radioactive contamination is present. For the time being, any non-radioactive contamination on such sites may be addressed under the Part IIA regime as described here.

Significant Harm

2.4 The definition of CONTAMINATED LAND includes the notion of "SIGNIFICANT HARM" and the "SIGNIFICANT POSSIBILITY" of such HARM being caused. The LOCAL AUTHORITY is required to act in accordance with statutory guidance issued by the SECRETARY OF STATE in determining what is "significant" in either context (*section 78A(2) & (5)*). This statutory guidance is set out at Chapter A of Annex 3 to this circular.

2.5 The statutory guidance uses the concept of a "POLLUTANT LINKAGE" – that is, a linkage between a CONTAMINANT and a RECEPTOR, by means of a PATHWAY. The statutory guidance then explains:

(a) the types of RECEPTOR to which SIGNIFICANT HARM can be caused (HARM to any other type of RECEPTOR can never be regarded as SIGNIFICANT HARM);

(b) the degree or nature of HARM to each of these RECEPTORS which constitutes SIGNIFICANT HARM (*Chapter A, Table A*); and

(c) for each RECEPTOR, the degree of possibility of the SIGNIFICANT HARM being caused which will amount to a SIGNIFICANT POSSIBILITY (*Chapter A, Table B, & paragraphs A.27 to A.34*).

2.6 Before the LOCAL AUTHORITY can make the judgement that any land appears to be CONTAMINATED LAND on the basis that SIGNIFICANT HARM is being caused, or that there is a SIGNIFICANT POSSIBILITY of such harm being caused, the authority must therefore identify a SIGNIFICANT POLLUTANT LINKAGE. This means that each of the following has to be identified:

(a) a CONTAMINANT;

(b) a relevant RECEPTOR; and

(c) a PATHWAY by means of which either:

(i) that CONTAMINANT is causing SIGNIFICANT HARM to that RECEPTOR, or

(ii) there is a SIGNIFICANT POSSIBILITY of such harm being caused by that CONTAMINANT to that RECEPTOR (*paragraphs A.11 and A.19*).

Pollution of Controlled Waters

2.7 The LOCAL AUTHORITY is also required to act in accordance with statutory guidance issued by the SECRETARY OF STATE in determining whether POLLUTION OF CONTROLLED WATERS is being, or is likely to be, caused (*section 78A(5)*). This guidance is also set out at Chapter A of Annex 3 to this circular.

2.8 Before the LOCAL AUTHORITY can make the judgement that any land appears to be CONTAMINATED LAND on the basis that the POLLUTION OF CONTROLLED WATERS is being caused or is likely to be caused, the authority must identify a SIGNIFICANT POLLUTANT LINKAGE, where a body of CONTROLLED WATERS forms the RECEPTOR (*paragraphs A.11 and A.19*).

2.9 There is no power to issue guidance on what constitutes the POLLUTION OF CONTROLLED WATERS. This term is defined in section 78A(9), in terms which are close to those used in Part III of the Water Resources Act 1991. However, when considering cases where it is thought that very small quantities of a CONTAMINANT might satisfy that definition, it is necessary also to consider the guidance on what remediation it is reasonable to require (see paragraphs 6.30 to 6.32 below).

2.10 Such cases may well give rise to some problems. The Government has indicated its intention of reviewing the wording of the legislation on this aspect and of seeking amendments to the primary legislation.

3 - Identification of Contaminated Land

Inspection of a Local Authority's Area

3.1 Each LOCAL AUTHORITY has a duty to cause its area to be inspected from time to time for the purpose of identifying CONTAMINATED LAND (*section 78B(1)*). In doing so, it has to act in accordance with statutory guidance issued by the SECRETARY OF STATE. This statutory guidance is set out at Chapter B of Annex 3 to this circular.

STRATEGY FOR INSPECTION

3.2 The LOCAL AUTHORITY needs to take a strategic approach to the inspection of its area (*paragraph B.9*). It is to set out this approach as a written strategy, which it is to publish within 15 months of the issuing of the statutory guidance, that is by [June 2001] (*paragraph B.12*).

3.3 Taking a strategic approach enables the LOCAL AUTHORITY to identify, in a rational, ordered and efficient manner, the land which merits detailed individual inspection, identifying the most pressing and serious problems first and concentrating resources on the areas where CONTAMINATED LAND is most likely to be found.

3.4 The strategy is also to contain procedures for liaison with other regulatory bodies, which may have information about land contamination problems, and for responding to information and complaints from members of the public, businesses and voluntary organisations (*paragraphs B.15 and B.16*).

INSPECTING LAND

3.5 The LOCAL AUTHORITY may identify a particular area of land where it is possible that a POLLUTANT LINKAGE exists. The authority could do so as a result of:

(a) its own gathering of information as part of its strategy;

(b) receiving information from another regulatory body, such as the ENVIRONMENT AGENCY; or

(c) receiving information or a complaint from a member of the public, a business or a voluntary organisation.

3.6 Where this is the case, the LOCAL AUTHORITY needs to consider whether to carry out a detailed inspection to determine whether or not the land actually appears to be CONTAMINATED LAND. Normally, the LOCAL AUTHORITY will be interested only in land which is in its area. But if it considers SIGNIFICANT HARM or the POLLUTION OF CONTROLLED WATERS might be caused within its area as a result of contamination on land outside its area, it may also inspect that other land (*section 78X(2)*).

3.7 The LOCAL AUTHORITY may already have detailed information concerning the condition of the land. This may have been provided, for example, by the ENVIRONMENT AGENCY or by a person such as the owner of the land. Alternatively, such a person may offer to provide such information within a reasonable and specified time. It may therefore be helpful for the authority to consult the owner of the land and other persons, in order to find out whether information already exists, or could be made available to the authority.

3.8 Where information is already available, or will become available, the LOCAL AUTHORITY needs to consider whether the information provides, or would provide, a sufficient basis on which it can determine whether or not the land appears to be CONTAMINATED LAND. If the information meets this test, the authority does not need to carry out any further investigation of the land (*paragraph B.23*) and will proceed to make a determination on that basis (see paragraph 3.33 below).

3.9 Where the LOCAL AUTHORITY does not have sufficient information, it needs to consider whether to make an inspection of the land. For this purpose it needs to consider whether:

(a) there is a reasonable possibility that a POLLUTANT LINKAGE exists on the land (*paragraph B.22(a)*); and

(b) if the land were eventually determined to be CONTAMINATED LAND, whether it would fall to be designated a SPECIAL SITE (see paragraphs 3.12 to 3.16 below).

3.10 If the answer to the first of these questions is "yes", and the second is "no", the LOCAL AUTHORITY needs to authorise an inspection of the land. It has specific powers under section 108 of the Environment Act 1995 to authorise suitable persons to carry out any such investigation. This can involve entering premises, taking samples or carrying out related activities for the purpose of enabling the authority to determine whether any land is

CONTAMINATED LAND. In some circumstances, the authorised person can also ask other persons questions, which they are obliged to answer, and make copies of written or electronic records.

3.11 If there is to be an inspection of the land, the LOCAL AUTHORITY needs to consider whether it needs to authorise an intrusive investigation (for example, exploratory excavations) into the land. Under the statutory guidance, the authority should authorise an intrusive investigation only where it considers that it is likely (rather than only "reasonably possible") that both a CONTAMINANT and a RECEPTOR are present (*paragraph B.22(b)*).

POTENTIAL SPECIAL SITES

3.12 Part IIA creates a particular category of CONTAMINATED LAND called "SPECIAL SITES". For any SPECIAL SITE, the ENVIRONMENT AGENCY, rather than the LOCAL AUTHORITY, is the ENFORCING AUTHORITY for the purposes of the Part IIA regime.

3.13 The descriptions of the types of land which are required to be designated as SPECIAL SITES are set out in the Regulations (*regulations 2 & 3*; see also Annex 4 to this Circular). The procedure for the designation of a SPECIAL SITE is described at paragraphs 18.1 to 18.33 below, along with other procedural issues relating to SPECIAL SITES.

3.14 The actual designation of a SPECIAL SITE cannot take place until the land in question has been formally identified as CONTAMINATED LAND by the LOCAL AUTHORITY. However, the Government considers it appropriate for detailed investigation of any potential SPECIAL SITE to be carried out by the ENVIRONMENT AGENCY, acting on behalf of the LOCAL AUTHORITY.

3.15 To answer the second of the questions in paragraph 3.9 above, the LOCAL AUTHORITY needs to consider, for any land where the answer to the first question is "yes", whether either:

(a) the land or site is of a type such that it would inevitably be designated a SPECIAL SITE were it identified as CONTAMINATED LAND (for example, because the land has been used at some time for the manufacture or processing of explosives (*regulation 2(1)(c)(ii)*)); or

(b) the particular POLLUTANT LINKAGE which is being investigated is of a kind which would require the land to be designated a SPECIAL SITE were it found to be a SIGNIFICANT POLLUTANT LINKAGE (for example, where POLLUTION OF CONTROLLED WATERS might stop water for human consumption being regarded as wholesome (*regulation 3(a)*)).

3.16 Where either of these circumstances applies, the statutory guidance states that the LOCAL AUTHORITY should always seek to arrange with the ENVIRONMENT AGENCY for that Agency to carry out the detailed investigation of the land (*paragraphs B.28 and B.29*). Where necessary, the LOCAL AUTHORITY will authorise a person nominated by the agency to use the powers of entry conferred by section 108 of the Environment Act 1995 (*paragraph B.30*).

INSPECTION USING STATUTORY POWERS OF ENTRY

3.17 If the premises to be inspected are used for residential purposes, or if the inspection will necessitate taking heavy equipment onto the premises, the authorised person needs to give the occupier of the premises at least seven days notice of his proposed entry onto the premises. The authorised person can then enter the premises if he obtains either the consent

of the occupier or, if this is not forthcoming, a warrant issued by a magistrate (*section 108(6) and Schedule 18, Environment Act 1995*).

3.18 In other cases, consultation with the occupier prior to entry onto the premises may still be helpful, particularly so that any necessary health and safety precautions can be identified and then incorporated into the inspection. In some instances, specific consents or regulatory permissions may be needed for access to, or work on, the site.

3.19 In an EMERGENCY, these powers of entry can be exercised forthwith if this is necessary (*section 108(6)*). For these purposes, a case is an EMERGENCY if it appears to the authorised person-

> "(a) that there is an immediate risk of serious pollution of the environment or serious harm to human health, or
>
> "(b) that circumstances exist which are likely to endanger life or health
>
> "and that immediate entry to any premises is necessary to verify the existence of that risk or those circumstances or to ascertain the cause of that risk or those circumstances or to effect a remedy" (*section 108(15), Environment Act 1995*).

3.20 Compensation may be payable by the LOCAL AUTHORITY for any disturbance caused by an INSPECTION USING STATUTORY POWERS OF ENTRY(*paragraph 6 of Schedule 18 of the Environment Act 1995)*

OBJECTIVES FOR THE INSPECTION OF LAND

3.21 The primary objective in inspecting land is to enable the LOCAL AUTHORITY to obtain the information needed to decide whether or not the land appears to be CONTAMINATED LAND.

3.22 It is not always necessary for the LOCAL AUTHORITY to produce a complete characterisation of the nature and extent of CONTAMINANTS, PATHWAYS and RECEPTORS on the land, or of other matters relating to the condition of the land. The authority may be able to identify, in accordance with the statutory guidance set out at Chapters A and B, one or more SIGNIFICANT POLLUTANT LINKAGES, basing its decision on less than a complete characterisation. Once any land has been identified as CONTAMINATED LAND, fuller investigation and characterisation can, if necessary, form part of an ASSESSMENT ACTION required under a REMEDIATION NOTICE.

3.23 In some cases, the information obtained from an inspection may lead the LOCAL AUTHORITY to the conclusion that, whilst the land does not appear to be CONTAMINATED LAND on the basis of that information assessed on the balance of probabilities, it is still possible that the land is CONTAMINATED LAND. This might occur, for example, where the mean concentration of a CONTAMINANT in soil samples lies just below an appropriate guideline value for that CONTAMINANT. In cases of this kind, the LOCAL AUTHORITY will need to consider whether to carry out further inspections or pursue other lines of enquiry to enable it either to discount the possibility that the land is CONTAMINATED LAND, or to conclude that the land does appear to be CONTAMINATED LAND. In the absence of any such further inspection or enquiry, the local authority will need to proceed to make its determination on the basis that it cannot be satisfied, on the balance of probabilities, that the land falls within the statutory definition of CONTAMINATED LAND.

3.24 In other cases, an inspection may yield insufficient information to enable the LOCAL AUTHORITY to determine, in the manner described at paragraphs 3.26 to 3.35 below, whether or not the land appears to be CONTAMINATED LAND. In such cases, the LOCAL AUTHORITY will need to consider whether carrying out further inspections (for example, taking more samples) or pursing other lines of enquiry (for example, carrying out or commissioning more detailed scientific analysis of a substance or its properties) would be likely to provide the necessary information. If it is not possible to obtain the necessary information, the LOCAL AUTHORITY will need to proceed to make its determination on the basis that it cannot be satisfied, on the balance of probabilities, that the land falls within the statutory definition of CONTAMINATED LAND. The LOCAL AUTHORITY may, nevertheless, decide that the question should be reopened at some future date, or when further information becomes available.

3.25 A secondary objective in inspecting land is to enable the LOCAL AUTHORITY to identify any CONTAMINATED LAND which is required to be designated as a SPECIAL SITE.

Determining whether Land is Contaminated Land

3.26 Any determination by the LOCAL AUTHORITY that particular land appears to be CONTAMINATED LAND is made on one or more of the following bases, namely that:

(a) SIGNIFICANT HARM is being caused;

(b) there is a SIGNIFICANT POSSIBILITY of such harm being caused;

(c) POLLUTION OF CONTROLLED WATERS is being caused; or

(d) POLLUTION OF CONTROLLED WATERS is likely to be caused (*paragraph B.38*).

CONSISTENCY WITH OTHER REGULATORY BODIES

3.27 If the LOCAL AUTHORITY is considering whether the land might be CONTAMINATED LAND by virtue of an ECOLOGICAL SYSTEM EFFECT (*Chapter A, Table A*), the authority needs to consult English Nature (*paragraph B.42*).

3.28 Similarly, if the LOCAL AUTHORITY is considering whether land might be CONTAMINATED LAND by virtue of any POLLUTION OF CONTROLLED WATERS, the authority needs to consult the ENVIRONMENT AGENCY (*paragraph B.43*).

3.29 In either case, this is to ensure that the LOCAL AUTHORITY adopts an approach which is consistent with that adopted by the other regulatory bodies, and benefits from the experience and expertise available within that other body.

3.30 If the land is covered by a waste management site licence, the LOCAL AUTHORITY needs to consider whether all of the SIGNIFICANT HARM or POLLUTION OF CONTROLLED WATERS by reason of which the land might be CONTAMINATED LAND is the result of either:

(a) a breach of the conditions of the site licence; or

(b) activities authorised by, and carried on in accordance with the conditions of, the licence.

3.31 If all of the SIGNIFICANT HARM or POLLUTION OF CONTROLLED WATERS falls into either of these categories, the land cannot be identified as CONTAMINATED LAND for the purposes of Part IIA (*section 78YB(2)*). Any regulatory action on the land is the responsibility of the ENVIRONMENT AGENCY, acting as the waste regulation authority in the context of the waste management licensing regime in Part II of the Environmental Protection Act 1990.

3.32 Under other provisions in section 78YB, the land may be identified as CONTAMINATED LAND, but REMEDIATION may be enforced under other regimes rather than under Part IIA (see paragraphs 7.2 to 7.11 below).

MAKING THE DETERMINATION

3.33 The LOCAL AUTHORITY needs to carry out an appropriate, scientific and technical assessment of the circumstances of the land, using all of the relevant and available evidence. The authority then determines whether any of the land appears to it to meet the definition of CONTAMINATED LAND set out in section 78A(2). Where the authority has received information or advice given by other regulatory bodies referred to in paragraphs 3.27 to 3.31 above, it must have regard to that information or advice (*paragraphs B.42 and B.43*). Chapter B provides statutory guidance on the manner in which the LOCAL AUTHORITY makes this determination (*Chapter B, Part 4*). This includes guidance on the physical extent of the land which should be covered by any single determination (*paragraphs B.32 to B.36*).

3.34 There may be cases where the presence of one or more contaminants is discovered on land which is undergoing, or is about to undergo, development. Where this occurs, the LOCAL AUTHORITY will need to consider what action is appropriate under both Part IIA and town and country planning legislation (see Annex 1, paragraphs 44 to 49). Where the LOCAL AUTHORITY is not the local planning authority, the two authorities will need to consult.

3.35 The LOCAL AUTHORITY needs to prepare a written record of any determination that land is CONTAMINATED LAND, providing a summary of the basis on which the land has been identified as such land (*paragraph B.52*). This will include information on the specific SIGNIFICANT POLLUTANT LINKAGE, or linkages, found.

Information Arising from the Inspection of Land

3.36 As the LOCAL AUTHORITY inspects its area, it will generate a substantial body of information about the condition of different sites in its area.

3.37 Where land has been identified as being CONTAMINATED LAND, and consequent action taken, the LOCAL AUTHORITY has to include specified details about the condition of the land, and the REMEDIATION ACTIONS carried out on it, in its REGISTER (*section 78R*; see section 17 of this Annex and Annex 4, paragraphs 79 to 100). Having this information on the REGISTER makes it readily available to the public and to those with an interest in the land.

3.38 But the LOCAL AUTHORITY may also be asked, for example as part of a "local search" for a property purchase, to provide information about other areas of land which have not been identified as CONTAMINATED LAND. This might include, for example, information on whether the authority had inspected the land and, if so, details of any site investigation reports prepared.

3.39 The Environmental Information Regulations 1992 (SI 1992/3240 as amended) may apply to any information about land contamination. This means that, depending on the

circumstances and the particular information requested, the authority may be obliged to provide the information when requested to do so. However, this is subject to the requirements in the 1992 Regulations relating to commercial confidentiality, national defence and public security.

3.40 Even where land has not been identified as CONTAMINATED LAND, information collected under Part IIA may also be useful for the wider purpose of the LOCAL AUTHORITY and other regulatory bodies, including:

(a) planning and building control functions; and

(b) other relevant statutory pollution control regimes (for example, powers to require the removal of illegally-deposited controlled wastes).

4 - Identifying and Notifying Those Who May Need to Take Action

Notification of the Identification of Contaminated Land

IDENTIFICATION OF INTERESTED PERSONS

4.1 For any piece of land identified as being CONTAMINATED LAND, the LOCAL AUTHORITY needs to establish:

(a) who is the OWNER of the land (*defined in section 78A(9)*);

(b) who appears to be in occupation of all or part of the land; and

(c) who appears to be an APPROPRIATE PERSON to bear responsibility for any REMEDIATION ACTION which might be necessary (*defined in section 78F;* see paragraphs 9.3 to 9.21 below).

4.2 At this early stage, the LOCAL AUTHORITY may not be able to establish with certainty who falls into each of these categories, particularly the last of them. As it obtains further information, the authority needs to reconsider these questions. It needs to act, however, on the basis of the best information available to it at any particular time.

THE NOTIFICATION

4.3 The LOCAL AUTHORITY needs to notify, in writing, the persons set out in paragraph 4.1 above, as well as the ENVIRONMENT AGENCY, of the fact that the land has been identified as being CONTAMINATED LAND (*section 78B(3)*). The notice given to any of these persons will inform them of the capacity - for example, OWNER or APPROPRIATE PERSON - in which they have been sent it.

4.4 The LOCAL AUTHORITY (or, in the case of a SPECIAL SITE, the ENVIRONMENT AGENCY) may, at any subsequent time, identify some other person who appears to be an

APPROPRIATE PERSON, either as well as or instead of those previously identified. Where this happens, the relevant authority needs to notify that person that he appears to be an APPROPRIATE PERSON with respect to land which has been identified as CONTAMINATED LAND (*section 78B(4)*).

4.5 The issuing of a notice under either of these headings has the effect of starting the process of consultation on what REMEDIATION might be appropriate. The LOCAL AUTHORITY (or the ENVIRONMENT AGENCY) may therefore wish to consider whether to provide any additional information to the recipients of the notification, in order to facilitate this consultation. The following categories of information may be useful for these purposes:

(a) a copy of the written record of the determination made by the authority that the land appears to be CONTAMINATED LAND (*paragraph B.52*);

(b) information on the availability of site investigation reports, with copies of the full reports being available on request;

(c) an indication of the reason why particular persons appear to the authority to be APPROPRIATE PERSONS; and

(d) the names and addresses of other persons notified at the same time or previously, indicating the capacity in which they were notified (eg as OWNER or as APPROPRIATE PERSON).

4.6 The authority will also need to inform each APPROPRIATE PERSON about the tests for EXCLUSION from, and APPORTIONMENT of, liabilities set out in the statutory guidance in Chapter D (*paragraph D.33*). This will enable those persons to know what information they might wish to provide the authority, in order to make a case for their EXCLUSION from liability, or for a particular APPORTIONMENT of liability.

4.7 The notification to the ENVIRONMENT AGENCY enables the Agency to decide whether:

(a) it considers that the land should be designated a SPECIAL SITE, on the basis that it falls within one or more of the relevant descriptions (*regulations 2 and 3*; see also paragraphs 7 to 15 of Annex 4);

(b) it wishes to provide site-specific guidance to the LOCAL AUTHORITY, for example on what REMEDIATION might be required (see paragraphs 6.8 to 6.9 below); or

(c) it requires further information from the LOCAL AUTHORITY about the land, in order for the ENVIRONMENT AGENCY to prepare its national report (*section 78U*).

4.8 If the ENVIRONMENT AGENCY requires any further information from the LOCAL AUTHORITY, it should requests this in writing. The LOCAL AUTHORITY should provide such information as it has, or can "reasonably be expected to obtain" (*sections 78U(3) & 78V(3)*).

Identifying Possible Special Sites

4.9 Having identified any CONTAMINATED LAND, the LOCAL AUTHORITY needs to consider whether the land also meets any of the descriptions which would require it to be designated as a SPECIAL SITE. These descriptions are prescribed in the Contaminated Land (England) Regulations 1999 (*regulations 2 & 3*; see also paragraphs 7 to 15 of Annex 4). If the LOCAL AUTHORITY concludes that it should designate any land, it will need to notify the ENVIRONMENT AGENCY.

4.10 The authority needs to reconsider this question whenever it obtains further relevant information about the land, for example after the carrying out of any ASSESSMENT ACTION under the terms of a REMEDIATION NOTICE.

4.11 A description of the procedures for the designation of a SPECIAL SITE, and the implications of any such designation, are set out in paragraphs 18.1 to 18.33 below.

Role of the Enforcing Authority

4.12 After the LOCAL AUTHORITY has identified any SIGNIFICANT POLLUTANT LINKAGE, thus determined that the land is CONTAMINATED LAND and then carried out the necessary notifications, it is for the ENFORCING AUTHORITY (that is, the ENVIRONMENT AGENCY for any SPECIAL SITE and the LOCAL AUTHORITY for any other site) to take further action.

5 - Urgent Remediation Action

5.1 Where it appears to the ENFORCING AUTHORITY that there is an imminent danger of serious HARM or serious POLLUTION OF CONTROLLED WATERS being caused as a result of a SIGNIFICANT POLLUTANT LINKAGE that has been identified, that authority may need to ensure that urgent REMEDIATION is carried out.

5.2 The ENFORCING AUTHORITY needs to keep this question under review as it receives further information about the condition of the CONTAMINATED LAND. It may decide that urgent REMEDIATION is needed at any stage in the procedures set out below. It is likely that any REMEDIATION ACTION carried out on an urgent basis will be only a part of the total REMEDIATION SCHEME for the RELEVANT LAND OR WATERS, as not all of the REMEDIATION ACTIONS will need to be carried out urgently.

5.3 The terms “imminent” and “serious” are not defined in Part IIA. The ENFORCING AUTHORITY needs to judge each case on the normal meaning of the words and the facts of that case. However, the statutory guidance in Part 5 of Chapter C sets out a number of considerations relating to the assessment of the seriousness of any HARM or POLLUTION OF CONTROLLED WATERS which may be relevant.

5.4 Where the ENFORCING AUTHORITY is satisfied that there is a need for urgent REMEDIATION, two requirements which normally apply to the service of REMEDIATION NOTICES are disapplied (*sections 78G(4) & 78H(4)*). These are the requirements for:

(a) prior consultation (*section 78H(1)*; see paragraphs 6.10 to 6.17 below); and

(b) a three month interval between:

(i) the notification to the APPROPRIATE PERSON that the land has been identified as CONTAMINATED LAND or the land's designation as a SPECIAL SITE, and

(ii) the service of the remediation notice (*section 78H(3)*; see paragraphs 12.4 and 12.5 below).

5.5 However, other requirements in the primary legislation and in the statutory guidance continue to apply, in particular with respect to:

(a) the standard of REMEDIATION and what REMEDIATION ACTIONS may be required (*section 78E(4) and Chapter C*; see paragraphs 6.18 to 6.28 below); and

(b) the identification of the APPROPRIATE PERSON and any EXCLUSIONS from, or APPORTIONMENTS of, responsibility to bear the cost of REMEDIATION (*section 78F and Chapter D*; see paragraphs 9.3 to 9.50 below).

5.6 In general where there is a need for urgent REMEDIATION ACTION, the ENFORCING AUTHORITY will act by serving a REMEDIATION NOTICE on an urgent basis (that is, without necessarily consulting or waiting for the end of the three month period referred to in paragraph 5.4(b) above). However, if the ENFORCING AUTHORITY considers that serving a REMEDIATION NOTICE in this way would not result in the REMEDIATION happening soon enough, it may decide to carry out the REMEDIATION itself. The authority has the power to do this only where it considers that:

(a) there is an imminent danger of serious HARM or serious POLLUTION OF CONTROLLED WATERS, being caused; and

(b) it is necessary for the authority to carry out REMEDIATION itself to prevent that harm or pollution (*section 78N(3)(a)*).

5.7 These circumstances may apply, in particular, if the ENFORCING AUTHORITY cannot readily identify any APPROPRIATE PERSON on whom it could serve a REMEDIATION NOTICE. There may also be cases where the ENFORCING AUTHORITY considers that urgent REMEDIATION is needed and has already specified the necessary REMEDIATION ACTIONS in a REMEDIATION NOTICE, but the requirements of that notice have been suspended pending the decision in an appeal against the notice (see paragraphs 13.5 to 13.7 below).

5.8 If the ENFORCING AUTHORITY carries out any urgent REMEDIATION itself, it needs to prepare and publish a REMEDIATION STATEMENT describing the REMEDIATION ACTIONS it has carried out (*section 78H(7)*). It needs also to consider whether to seek to recover, from the appropriate person, the reasonable costs the authority has incurred in carrying out the REMEDIATION (*section 78P(1) and Chapter E*; see paragraphs 16.1 to 16.11 below).

6 - Identifying Appropriate Remediation Requirements

Introduction

6.1 Where any land has been identified as being CONTAMINATED LAND, the ENFORCING AUTHORITY has a duty to require appropriate REMEDIATION. The statutory guidance in

Chapter C of Annex 3 to this circular sets out the standard to which any land or waters should be remediated.

6.2 For the purposes of Part IIA, the term REMEDIATION has a wider meaning than it has under its common usage (*section 78A(7)*). It includes ASSESSMENT ACTION, REMEDIAL TREATMENT ACTION and MONITORING ACTION (*paragraphs C.7 and C.8*). Part 7 of the statutory guidance at Chapter C of Annex 3 identifies circumstances in which action falling within each of these three categories may be appropriate.

6.3 In relation to any particular piece of CONTAMINATED LAND, it may be necessary to carry out more than one thing by way of REMEDIATION. To describe the various things which may need to be done, the statutory guidance uses the following terms:

(a) a "REMEDIATION ACTION" is any individual thing which is being, or is to be done, by way of REMEDIATION;

(b) a "REMEDIATION PACKAGE" is all the REMEDIATION ACTIONS within a REMEDIATION SCHEME, which are referable to a particular SIGNIFICANT POLLUTANT LINKAGE; and

(c) a "REMEDIATION SCHEME" is the complete set or sequence of REMEDIATION ACTIONS (referable to one or more SIGNIFICANT POLLUTANT LINKAGES) to be carried out with respect to the RELEVANT LAND OR WATERS.

PHASED REMEDIATION

6.4 The overall process of REMEDIATION may well be phased, with different REMEDIATION ACTIONS being required at different times. For example, ASSESSMENT ACTION may be needed in order to establish what REMEDIAL TREATMENT ACTION would be effective. Once the results of that ASSESSMENT ACTION are known, the REMEDIAL TREATMENT ACTION itself might then be carried out, with MONITORING ACTIONS being needed to ensure that it has been effective. In another case, there might be a need for different REMEDIAL TREATMENT ACTIONS to be carried out in sequence.

6.5 Wherever the complete REMEDIATION SCHEME cannot be specified in a single REMEDIATION NOTICE or REMEDIATION STATEMENT, and needs to be phased, the process of consulting and determining what particular REMEDIATION ACTIONS are required need to be repeated for each such notice or statement.

AGREED REMEDIATION

6.6 It is the Government's intention that, wherever practicable, REMEDIATION should proceed by agreement rather than by formal action by the ENFORCING AUTHORITY. In this context, the authority and the person who will carry out the REMEDIATION may identify by mutual agreement the particular REMEDIATION ACTIONS which would achieve REMEDIATION to the necessary standard (see paragraphs 6.33 and 6.34 below). The REMEDIATION may be carried out without a REMEDIATION NOTICE being served, but with the agreed REMEDIATION ACTIONS being described in a published REMEDIATION STATEMENT (see paragraphs 8.1 to 8.27 below).

6.7 However, where appropriate REMEDIATION is not being carried out, or where agreement cannot be reached on the REMEDIATION ACTIONS required, the authority has a duty to serve a REMEDIATION NOTICE. Any such notice must specify particular REMEDIATION

ACTIONS to be carried out and the times within which they must be carried out (*section 78E(1)*).

Site-Specific Guidance from the Environment Agency

6.8 The ENVIRONMENT AGENCY has the power to provide site-specific guidance to the LOCAL AUTHORITY, where that LOCAL AUTHORITY is the ENFORCING AUTHORITY for any CONTAMINATED LAND (*section 78V(1)*). It may choose to do so, in particular, where either:

(a) it has particular technical expertise available, for example derived from its other pollution control functions; or

(b) the manner in which the REMEDIATION might be carried out could affect its responsibilities for protecting the water environment.

6.9 In any case where such guidance is given, the LOCAL AUTHORITY has to have regard to it when deciding what REMEDIATION is required (*section 78V(1)*).

Consultation

REMEDIATION REQUIREMENTS

6.10 Before the ENFORCING AUTHORITY serves any REMEDIATION NOTICE it will, in general, need to make reasonable endeavours to consult the following persons with an interest in the CONTAMINATED LAND, or in the REMEDIATION (*section 78H(1)*):

(a) the person on whom the notice is to be served (ie the APPROPRIATE PERSON);

(b) the OWNER of the land to which the notice would relate; and

(c) any other person who appears to the authority to be in occupation of the whole, or any part of, the land.

6.11 This means that any recipient of a REMEDIATION NOTICE is consulted before the notice is served, at a minimum about the details of what he is being required to do, and the time within which he must do it. However, consultation is not a requirement in cases of urgency (see paragraph 5.4 above).

6.12 In addition to the consultation directly required by section 78H(1), the ENFORCING AUTHORITY is likely to find a wider process of discussion and consultation useful. This could cover, for example:

(a) whether the land should, in fact, be identified as CONTAMINATED LAND; this question might be re-visited, for example, in cases where the land OWNER, or the APPROPRIATE PERSON, had additional sampling information;

(b) what would need to be achieved by the REMEDIATION, in terms of the reduction of the possibility of SIGNIFICANT HARM being caused, or of the likelihood of the POLLUTION OF CONTROLLED WATERS, and in terms of the remedying of any effects of that harm or pollution; and

(c) what particular REMEDIATION ACTIONS would achieve that REMEDIATION.

6.13 This wider process of discussion may also help:

(a) to identify opportunities for agreed REMEDIATION which can be carried out without the service of a REMEDIATION NOTICE; and

(b) where a REMEDIATION NOTICE is served, to resolve as many disagreements as possible before the service of the notice, thus limiting the scope of any appeal against the notice under section 78L.

GRANTING OF RIGHTS

6.14 The ENFORCING AUTHORITY also needs to consult on the rights which may need to be granted to the recipient of any REMEDIATION NOTICE to entitle him to carry out the REMEDIATION. For example, where the APPROPRIATE PERSON does not own the CONTAMINATED LAND, he may need the consent of the OWNER of the land to enter it. Under section 78G(2), any person whose consent is required has to grant, or join in granting, the necessary rights. He is then entitled to compensation (*section 78G & regulation 6*; see paragraphs 21 to 38 of Annex 4).

6.15 Except in cases of urgency (see paragraph 5.4 above), the ENFORCING AUTHORITY needs to consult:

(a) the owner or occupier of any of the RELEVANT LAND OR WATERS; and

(b) any other person who might have to grant, or join in granting, any rights to the recipient of a REMEDIATION NOTICE (*section 78G(3)*).

LIABILITIES

6.16 If there are two or more APPROPRIATE PERSONS, the ENFORCING AUTHORITY should make reasonable endeavours to consult each of those persons on any EXCLUSION from, or APPORTIONMENT of, liability (*paragraph D.36*). This allows anyone who might be affected to provide the information on which an EXCLUSION or APPORTIONMENT can be based. In addition to information provided by the APPROPRIATE PERSONS, the authority needs to seek its own information, where this is reasonable (*paragraph D.36*).

6.17 The ENFORCING AUTHORITY may also find it useful to discuss wider questions relating to liabilities with those whom it has identified as being APPROPRIATE PERSONS. For example, they may be able to identify other persons who ought to be identified as APPROPRIATE PERSONS, either in addition or instead.

Identifying an Appropriate Remediation Scheme

6.18 The ENFORCING AUTHORITY'S objective is to identify the appropriate REMEDIATION SCHEME, which will include the REMEDIAL TREATMENT ACTION or actions which, taken together, will ensure that the RELEVANT LAND OR WATERS are remediated to the necessary standard (*Chapter C, Part 3*). In some cases, the particular REMEDIATION ACTIONS to be carried out may be identified by mutual agreement between the authority and the persons who will carry them out. In other cases, that authority has to identify the particular actions itself.

6.19 Where the authority is identifying the actions itself, it is specifically required to ensure that they are "reasonable", having regard to the cost which is likely to be involved and the seriousness of the HARM or of the POLLUTION OF CONTROLLED WATERS in question (*section 78E(4)*). The authority needs to assess, in particular, the costs involved as against the benefits arising from the REMEDIATION (*paragraph C.30*; but see also paragraph 6.34 below).

6.20 It may be necessary for ASSESSMENT ACTIONS to be carried out before the appropriate REMEDIAL TREATMENT ACTION or actions can be identified (*paragraph C.65*). Where this is the case, the first step will be to identify the appropriate ASSESSMENT ACTION or actions. Once that ASSESSMENT ACTION has been carried out, it will be necessary to complete the identification of the remaining stages of the REMEDIATION SCHEME, identifying appropriate REMEDIAL TREATMENT ACTIONS in the light of the information obtained.

6.21 Throughout the process of identifying the appropriate REMEDIATION SCHEME, the ENFORCING AUTHORITY needs to keep under review whether there is a need for urgent REMEDIATION to be carried out (see section 5 of this Annex).

A SINGLE SIGNIFICANT POLLUTANT LINKAGE

6.22 Where only a single SIGNIFICANT POLLUTANT LINKAGE has been identified on the CONTAMINATED LAND, the ENFORCING AUTHORITY, in conjunction with those it is consulting, needs to consider what is needed, with respect to that linkage, to:

(a) prevent, or reduce the likelihood of, the occurrence of any SIGNIFICANT HARM or POLLUTION OF CONTROLLED WATERS; and

(b) remedy, or mitigate, the effect of any such harm or water pollution which has been, or might be, caused.

6.23 The ENFORCING AUTHORITY then needs to identify the REMEDIATION PACKAGE which would represent the BEST PRACTICABLE TECHNIQUES of REMEDIATION for that SIGNIFICANT POLLUTANT LINKAGE. Such techniques will include appropriate measures to provide quality assurance and to verify what has been done.

6.24 The assessment of what represents such BEST PRACTICABLE TECHNIQUES is made in terms of:

(a) the extent to which the REMEDIATION PACKAGE would achieve the objectives identified in paragraph 6.22 above (*Part 4 of Chapter C*);

(b) whether the package, and the individual REMEDIATION ACTIONS concerned, would be reasonable, having regard to their cost and to the seriousness of the HARM or of the POLLUTION OF CONTROLLED WATERS to which they relate (*Part 5 of Chapter C*); and

(c) whether the package represents the best combination of practicability, effectiveness and durability (*Part 6 of Chapter C*).

6.25 Any such REMEDIATION PACKAGE needs to include measures to achieve quality assurance and verification. Where appropriate, such measures may take the form of MONITORING ACTIONS (*paragraphs C.68 and C.69*).

MORE THAN ONE SIGNIFICANT POLLUTANT LINKAGE

6.26 If more than one SIGNIFICANT POLLUTANT LINKAGE has been identified, the REMEDIATION will have to deal with the SIGNIFICANT HARM or the POLLUTION OF CONTROLLED WATERS resulting from, or threatened by, each of those linkages. However, it may be neither practicable nor efficient simply to consider the REMEDIATION needed with respect to each linkage separately. There may, for example, be cost savings which can be achieved by carrying out particular REMEDIATION ACTIONS which deal with more than one SIGNIFICANT POLLUTANT LINKAGE. In other cases, if the separate REMEDIATION PACKAGES for each of the SIGNIFICANT POLLUTANT LINKAGES were carried out independently, the individual REMEDIATION ACTIONS might conflict or overlap.

6.27 The ENFORCING AUTHORITY therefore needs to try to identify a REMEDIATION SCHEME which deals with the RELEVANT LAND OR WATERS as a whole, avoids conflict or overlap between the REMEDIATION needed for the various SIGNIFICANT POLLUTANT LINKAGES, and does not involve unnecessary expense (*paragraph C.27*). This may result in a REMEDIATION ACTION which replaces, or subsumes, what would otherwise be several separate REMEDIATION ACTIONS in different REMEDIATION PACKAGES.

6.28 The first step in this process is for the ENFORCING AUTHORITY to assess the standard of REMEDIATION to be achieved by the REMEDIATION SCHEME with respect to each SIGNIFICANT POLLUTANT LINKAGE.

6.29 In doing this, the ENFORCING AUTHORITY needs to identify, for each SIGNIFICANT POLLUTANT LINKAGE, the extent to which the relevant SIGNIFICANT HARM or POLLUTION OF CONTROLLED WATERS should be reduced, and its effects mitigated. The standard for this reduction or mitigation is set by reference to what would be achieved by the BEST PRACTICABLE TECHNIQUES of REMEDIATION for that linkage, if it were the only linkage required to be remediated (*paragraphs C.18 and C.26*). In making this assessment, however, the authority works on the basis of REMEDIATION which could actually be carried out, given the wider circumstances of the land or waters, including the presence of other POLLUTANTS. In other words, in considering what might be achieved in relation to any particular SIGNIFICANT POLLUTANT LINKAGE, the ENFORCING AUTHORITY cannot ignore practical limitations on what might be done that are imposed by other problems on the same site.

VERY SLIGHT LEVELS OF WATER POLLUTION

6.30 As stated above (see paragraph 2.9 above), the definition of "POLLUTION OF CONTROLLED WATERS" is simply the "entry into CONTROLLED WATERS of any poisonous, noxious or polluting matter or any solid waste matter". Some commentators have suggested that the entry of very small amounts of matter into CONTROLLED WATERS might satisfy this definition, and thus lead to the identification of land as CONTAMINATED LAND. As has been said above, the Government is proposing to review the wording of the legislation on this aspect and to seek amendments to the primary legislation.

6.31 However, even if land is identified as CONTAMINATED LAND in this way – on the basis of the actual or likely entry of only a very small amount of a POLLUTANT into CONTROLLED WATERS – this should not lead to the imposition of major liabilities: there are other balances elsewhere in the regime to prevent this. In particular, any REMEDIATION that can be required must be "reasonable", having regard to the cost which is likely to be involved and the seriousness of the POLLUTION OF CONTROLLED WATERS involved (*section 78E(4) and Chapter C, Part 4*). If there is only a very low level of contamination on any land, which gives rise to only a low degree of seriousness of POLLUTION OF CONTROLLED WATERS, it will

be reasonable to incur only a correspondingly low level of expenditure in attempting to remediate that land.

6.32 Nevertheless, the simple fact of land being identified as CONTAMINATED LAND in this way may cause its own problems – for example, for landowners. It is therefore important that the circumstances of such cases are clearly entered on the REGISTER kept by the ENFORCING AUTHORITY. If REMEDIATION is not carried out because it would not be reasonable, a REMEDIATION DECLARATION needs to be published by the ENFORCING AUTHORITY (*section 78H(6)*) and entered on its REGISTER (*section 78R(1)(c)*). In this way, a public record is created explaining that no REMEDIATION is required under Part IIA, even though the land has been formally identified as CONTAMINATED LAND.

Assessing Remediation Schemes Proposed by Others

6.33 In general, the ENFORCING AUTHORITY needs to adopt a similar approach when it is assessing a REMEDIATION SCHEME proposed by the APPROPRIATE PERSON, the land OWNER or any other person to that which it adopts when itself identifying an appropriate REMEDIATION SCHEME (*paragraph C.3(b)*). In deciding whether it is satisfied that such a scheme would be appropriate and sufficient, it needs to consider whether that scheme would achieve a standard of REMEDIATION equivalent to that which would be achieved by the use of the BEST PRACTICABLE TECHNIQUES of REMEDIATION for each SIGNIFICANT POLLUTANT LINKAGE (*paragraph C.28*)

6.34 However, the ENFORCING AUTHORITY does not always need to consider whether the proposed scheme would, of itself, be "reasonable" in the sense required by section 78E(4) (ie. having regard to the cost likely to be involved and the seriousness of the particular harm or water pollution). This is because the person proposing the scheme may wish to carry out REMEDIATION on a wider basis than could be required under the terms of a REMEDIATION NOTICE. For example, the proposed scheme may include works to deal with matters which do not form SIGNIFICANT POLLUTANT LINKAGES, or may involve a more expensive approach to REMEDIATION.

6.35 Where an acceptable REMEDIATION SCHEMES is proposed by others, and that scheme is likely to proceed without the service of a REMEDIATION NOTICE, no such notice needs to be served. In such cases, the procedure set out section 8 of this Annex will apply.

7 - Limitations on Remediation Notices

7.1 In addition to circumstances where REMEDIATION takes place without the service of a REMEDIATION NOTICE (see section 8 of this Annex), there are a number of restrictions on the service or contents of a REMEDIATION NOTICE.

Interactions with Other Provisions in the 1990 Act

7.2 REMEDIATION cannot be required under Part IIA where the SIGNIFICANT HARM or the POLLUTION OF CONTROLLED WATERS in question results from an offence under the integrated pollution control regime or the waste management licensing regime, and powers are available under the relevant regime to deal with that HARM or POLLUTION OF CONTROLLED WATERS

7.3 Nevertheless, even in such cases, the ENFORCING AUTHORITY needs to consider whether additional REMEDIATION is required on the RELEVANT LAND OR WATERS under Part IIA, to deal with matters which cannot be dealt with under those other powers.

7.4 If no such additional REMEDIATION is necessary, the ENFORCING AUTHORITY takes no further action, under Part IIA, with respect to the CONTAMINATED LAND in question. However, it then needs to include information about the exercise of these powers on its REGISTER (*Schedule 3, Contaminated Land (England) Regulations 1999*; see also Annex 4, paragraph 91).

INTEGRATED POLLUTION CONTROL

7.5 If the SIGNIFICANT HARM or POLLUTION OF CONTROLLED WATERS in question results from the carrying out of a process covered by the Integrated Pollution Control (IPC) regime or the Local Air Pollution Control (LAPC) regime, the ENVIRONMENT AGENCY may have powers under section 27 of the Environmental Protection Act 1990 to remedy that HARM or POLLUTION OF CONTROLLED WATERS

7.6 Section 27 gives the Agency the power to carry out remedial steps where:

(a) the process has been carried out either without the necessary authorisation, or in contravention of an enforcement or prohibition notice;

(b) harm has been caused and it is possible to remedy that harm;

(c) the Secretary of State gives his written approval to the exercise of the powers; and

(d) the occupier of any affected land, other than the land on which the process is being carried out, gives his permission.

7.7 If a LOCAL AUTHORITY is the ENFORCING AUTHORITY and it considers that this might apply, it needs to consult the ENVIRONMENT AGENCY to find out whether the powers under section 27 are available to the Agency. In any case where the powers under section 27 may be exercised by the ENVIRONMENT AGENCY, a REMEDIATION NOTICE cannot include a REMEDIATION ACTION which would be carried out in order to achieve a purpose which could be achieved by the exercise of those powers (*section 78YB(1)*).

7.8 [The SECRETARY OF STATE will be making regulations under the Pollution Prevention and Control Act 1999 to transpose the requirements of the Integrated Pollution Prevention and Control Directive (96/61/EC) into UK law. The new Pollution Prevention and Control (PPC) regime will replace the current regimes under Part I of the 1990 Act (ie IPC and LAPC). The Government may therefore need to amend the provision in section 78YB(1) so that it refers to the clean-up provision in the new PPC regime, rather than to section 27.]

WASTE MANAGEMENT LICENSING

7.9 The ENVIRONMENT AGENCY (in its capacity as the "waste regulation authority"), and the waste collection authority for the area, have powers under section 59 of the Environmental Protection Act 1990 to deal with illegally-deposited controlled waste. These powers may permit the Agency or authority to remove, or require the removal of the waste, and to take other steps to eliminate or reduce the consequences of the deposit of the waste.

7.10 Section 59 applies where controlled waste has been deposited:

(a) without a waste management licence being in force authorising the deposit (except where regulations provide an exemption from licensing); or

(b) in a manner which is not in accordance with a waste management licence.

7.11 If a LOCAL AUTHORITY is the ENFORCING AUTHORITY and it considers that these circumstances might apply, it needs to consult the ENVIRONMENT AGENCY and to consider its position where it is the waste collection authority. If the powers under section 59 may be exercised, any REMEDIATION NOTICE cannot include a REMEDIATION ACTION which would be carried out in order to achieve a purpose which could be achieved by the exercise of those powers (*section 78YB(3)*).

Other Precluded Remediation Actions

ACTIONS WHICH WOULD BE UNREASONABLE

7.12 In identifying an appropriate REMEDIATION SCHEME, the ENFORCING AUTHORITY may have been precluded from specifying particular REMEDIATION ACTIONS on the grounds that they would not be reasonable, having regard to their likely cost and the seriousness of the HARM or the POLLUTION OF CONTROLLED WATERS to which they relate. In some cases, such restrictions may lead to a situation in which no REMEDIATION ACTION may be required (see, for one example, paragraph 6.31 above). Alternatively, the preclusion of a particular REMEDIATION ACTION or actions may lead to the adoption of an alternative REMEDIATION SCHEME.

7.13 Where particular REMEDIATION ACTIONS have been precluded because they would not be reasonable, the ENFORCING AUTHORITY needs to prepare and publish a REMEDIATION DECLARATION which records:

(a) the reasons why the authority would have specified the REMEDIATION ACTIONS in a REMEDIATION NOTICE; and

(b) the grounds on which it is satisfied that it is precluded from including them in any such notice – that is, why it considers that they are unreasonable (*section 78H(6)*).

7.14 The ENFORCING AUTHORITY also needs to enter details of the REMEDIATION DECLARATION on its REGISTER (*section 78R(1)(c)*; see paragraphs 17.1 to 17.19 below and Annex 4, paragraph 88).

ACTIONS WHICH WOULD BE CONTRARY TO THE STATUTORY GUIDANCE

7.15 In rare circumstances, there may also be a particular REMEDIATION ACTION which the ENFORCING AUTHORITY would include in a REMEDIATION NOTICE, but it cannot do so because that action is not consistent with the statutory guidance in Chapter C. In any such case, the authority needs to proceed in the same way as if that REMEDIATION ACTION had been precluded on the ground that it was unreasonable (*sections 78E(5) and 78H(6)*).

DISCHARGES INTO CONTROLLED WATERS

7.16 The ENFORCING AUTHORITY also needs to consider whether any REMEDIATION ACTION in the REMEDIATION SCHEME would have the effect of impeding or preventing any discharge into CONTROLLED WATERS for which a consent has been given under Part III of the Water Resources Act 1991.

7.17 If this is the case, the ENFORCING AUTHORITY is precluded from specifying the REMEDIATION ACTION in question in any REMEDIATION NOTICE (*section 78YB(4)*). However, it will be good practice for the ENFORCING AUTHORITY to consider in such circumstances whether there is a REMEDIATION ACTION which could address the problems posed by the SIGNIFICANT POLLUTANT LINKAGE without impeding or preventing the discharge.

7.18 However, if a REMEDIATION ACTION cannot be specified because of the restriction in section 78YB(4), the ENFORCING AUTHORITY needs to include information about the circumstances on its REGISTER (*Schedule 3, Contaminated Land (England) Regulations 1999* ; see also Annex 4, paragraph 92).

8 - Remediation Taking Place without the Service of a Remediation Notice

8.1 Having identified the appropriate REMEDIATION SCHEME for the RELEVANT LAND OR WATERS, the ENFORCING AUTHORITY needs to consider whether that REMEDIATION is being, or will be, carried out without any REMEDIATION NOTICE being served.

8.2 This might be the case, in particular, where:

(a) the APPROPRIATE PERSON, or some other person, already plans, or undertakes during the consultation process, to carry out particular REMEDIATION ACTIONS (see paragraphs 8.3 to 8.8 below); or

(b) REMEDIATION with an equivalent effect is taking, or will take, place as a result of enforcement action under other powers (see paragraphs 8.9 to 8.16 below).

VOLUNTEERED REMEDIATION

8.3 The ENFORCING AUTHORITY may be informed, before or during the course of consultation on REMEDIATION requirements, that the APPROPRIATE PERSON or some other person already intends, or now intends, to carry out particular REMEDIATION ACTIONS on a voluntary basis.

8.4 This may apply, in particular, where:

(a) the OWNER of the land has a programme for carrying out REMEDIATION on a number of different areas of land for which he is responsible which aims to tackle those cases in order of environmental priority;

(b) the land is already subject to development proposals;

(c) the APPROPRIATE PERSON brings forward proposals to develop the land in order to fund necessary REMEDIATION; or

(d) the APPROPRIATE PERSON wishes to avoid being served with a REMEDIATION NOTICE.

8.5 Where a development of the land is proposed, an ENFORCING AUTHORITY which is the local planning authority will need to consider what steps it needs to take under town and country planning legislation to ensure that appropriate REMEDIATION ACTIONS are included in the development proposals to ensure that contamination is properly dealt with. (Where the enforcing authority is not the local planning authority, the two authorities will need to consult.)

8.6 In all cases, the ENFORCING AUTHORITY needs to consider the standard of REMEDIATION which would be achieved by the proposed REMEDIATION ACTIONS. If it is satisfied that they would achieve an appropriate standard of REMEDIATION:

(a) it is precluded from serving any REMEDIATION NOTICE (*section 78H(5)(b)*); and

(b) the person who is carrying out, or will carry out, the REMEDIATION is required to prepare and publish a REMEDIATION STATEMENT (*sections 78H(7) & 78H(8)(a)*; see paragraphs 8.17 to 8.21 below).

8.7 Even if the ENFORCING AUTHORITY is not satisfied that an appropriate standard of REMEDIATION would be achieved by the REMEDIATION ACTIONS originally proposed, it may be able to persuade the person who made the proposals to bring forward a revised and satisfactory REMEDIATION SCHEME.

8.8 If this is not possible, the ENFORCING AUTHORITY's duty to serve a REMEDIATION NOTICE may apply (*section 78E(1)*; see paragraphs 12.1 to 12.9 below).

ENFORCEMENT ACTION UNDER OTHER POWERS

8.9 Enforcement action under other regulatory powers may already be underway, or could be taken, which would bring about the REMEDIATION of the RELEVANT LAND OR WATERS.

8.10 REMEDIATION under Part IIA cannot overlap with enforcement action under section 27 (Integrated Pollution Control and Local Air Pollution Control) or section 59 (waste management licensing); see paragraphs 7.2 to 7.11 above. However, there may be potential overlaps with the applicability of other regimes.

8.11 The ENFORCING AUTHORITY needs to consider whether enforcement could be taken under any other powers, and liaise with the relevant regulatory bodies to find out if it is already in progress or is planned.

8.12 If such enforcement action is in progress, or is planned, the ENFORCING AUTHORITY needs to consider the standard of REMEDIATION which would be achieved as a result of that enforcement action.

8.13 If the ENFORCING AUTHORITY is satisfied that the enforcement action would result in the achievement of an appropriate standard of REMEDIATION:

> (a) it is precluded from serving any REMEDIATION NOTICE (*section 78H(5)(b)*); and
>
> (b) the person who is carrying out, or will carry out, the action is required to prepare and publish a REMEDIATION STATEMENT (*sections 78H(7) & 78H(8)(a)*; see paragraphs 8.17 to 8.21 below).

8.14 If the authority considers that enforcement action could be taken under other powers, but it is not in progress, the authority should liaise with the relevant regulatory body, seeking to ensure that the most appropriate regulatory powers are used.

8.15 The authority's duty to serve a REMEDIATION NOTICE (*section 78E(1)*; see paragraphs 12.1 to 12.9 below) may apply where either:

> (a) enforcement action is not being taken under other powers, and none is intended; or
>
> (b) the enforcement action under those other powers would not achieve an appropriate standard of REMEDIATION for all of the SIGNIFICANT POLLUTANT LINKAGES identified.

8.16 There is a potential for overlap between Part IIA and the works notice powers of the ENVIRONMENT AGENCY (*section 161A of the Water Resources Act 1991 and the Anti-Pollution Works Regulations 1999*). Where an incidence of actual, or potential, water pollution does fall within the remit of both regimes, ENFORCING AUTHORITIES acting under Part IIA will be under a duty to serve a REMEDIATION NOTICE, whereas the ENVIRONMENT AGENCY is merely granted a power to act under section 161A of the 1991 Act. As set out in the Agency's policy statement, *Environment Agency Policy and Guidance on the Use of Anti-Pollution Works Notices*, which was agreed with DETR, this means that enforcement action will generally take place under Part IIA (see Annex 1, paragraphs 62 to 65).

REMEDIATION STATEMENTS

8.17 In any case where no REMEDIATION NOTICE may be served because appropriate REMEDIATION is taking place, or will take place without any such notice being served, the person responsible for the remediation is required to prepare and publish a REMEDIATION STATEMENT (*sections 78H(7) & 78H(8)(a)*).

8.18 Section 78H(7) requires the following information to be recorded in a REMEDIATION STATEMENT:

> "(a) the things which are being, have been, or are expected to be, done by way of REMEDIATION in the particular case;
>
> "(b) the name and address of the person who is doing, has done, or is expected to do, each of those things; and

"(c) the periods within which each of those things is being, or is expected to be done".

8.19 The ENFORCING AUTHORITY is required to enter details of the REMEDIATION STATEMENT onto its REGISTER (*section 78R(1)(c)*; see paragraphs 17.1 to 17.19 below and Annex 4, paragraph 88).

8.20 If the person who is required to prepare and publish the REMEDIATION STATEMENT fails to do so, the ENFORCING AUTHORITY has powers to do so itself. This applies after a reasonable time has elapsed since the date on which the authority could have served a REMEDIATION NOTICE, but for the fact that appropriate REMEDIATION was taking place, or was like to place, without the service of a notice (*section 78H(9)*).

8.21 In any case of this kind, the ENFORCING AUTHORITY needs to consider whether it should prepare and publish a REMEDIATION STATEMENT itself for inclusion on its REGISTER. If it does so, it is entitled to recover any reasonable costs it incurs from the person who should have prepared and published the statement (*section 78H(9)*).

REVIEWING CIRCUMSTANCES

8.22 The ENFORCING AUTHORITY needs to keep under review the REMEDIATION which is actually carried out on the RELEVANT LAND OR WATERS, as well as the question of whether any additional REMEDIATION is necessary. If, at any time, it ceases to be satisfied that appropriate REMEDIATION has been, is being, or will be, carried out it may need to serve a REMEDIATION NOTICE.

8.23 The authority may cease to be satisfied if, in particular:

(a) there has been, or is likely to be, a failure to carry out the REMEDIATION ACTIONS described in the REMEDIATION STATEMENT, or a failure to do so within the times specified; or

(b) further REMEDIATION ACTIONS now appear necessary in order to achieve the appropriate standard of REMEDIATION for the RELEVANT LAND OR WATERS.

8.24 If any of the REMEDIATION ACTIONS described in the REMEDIATION STATEMENT are not being carried out, the ENFORCING AUTHORITY needs to consider whether:

(a) the REMEDIATION ACTIONS in question still appear to be necessary in order to achieve an appropriate standard of REMEDIATION; and

(b) they are still "reasonable" for the purposes of section 78E(4).

8.25 If both of these apply, and the ENFORCING AUTHORITY is not precluded from serving a REMEDIATION NOTICE for any other reason, the authority will be under a duty to serve a REMEDIATION NOTICE, specifying the REMEDIATION ACTIONS in question. It may do this without any additional consultation, if the person on whom the notice would be served has already been consulted about those actions (*section 78H(10)*).

8.26 Even if the REMEDIATION ACTIONS described in the REMEDIATION STATEMENT are being carried out as planned, the ENFORCING AUTHORITY may consider that additional REMEDIATION is necessary. This may apply, in particular, where:

(a) the REMEDIATION was intended to be phased, and further REMEDIATION ACTIONS can now be identified as being necessary; or

(b) further SIGNIFICANT POLLUTANT LINKAGES are identified, or linkages which have already been identified are discovered to be more serious than previously thought.

8.27 Where it identifies further REMEDIATION as necessary, the ENFORCING AUTHORITY needs to consider how to ensure that the necessary REMEDIATION ACTIONS are carried out. This involves repeating the procedures set out above relating to consultation, and considering whether the additional REMEDIATION will be carried out without a REMEDIATION NOTICE being served. The authority cannot, for example, serve a REMEDIATION NOTICE specifying any additional REMEDIATION ACTIONS unless the person receiving the notice has been consulted on its contents (except in cases of urgency; see paragraphs 5.1 to 5.8 above).

9 - Determining Liability

9.1 If the ENFORCING AUTHORITY is not satisfied, at this stage, that appropriate REMEDIATION is being, or will be, carried out without a REMEDIATION NOTICE being served, it needs to consider who might be served with such a notice. This section of this Annex deals with the questions of who appears to be an APPROPRIATE PERSON and, if there is more than one such person, whether any of these should be EXCLUDED from liability and, where necessary, of how the liability for carrying out any REMEDIATION ACTION should be APPORTIONED between the APPROPRIATE PERSONS who remain. Further questions, covered in section 10 of this Annex, need to be considered before the ENFORCING AUTHORITY can decide whether a REMEDIATION NOTICE should be served on anyone.

9.2 Where the ENFORCING AUTHORITY is precluded from serving a REMEDIATION NOTICE by virtue of section 78H(5)(d), because it has the power to carry out the REMEDIATION itself, the authority needs to follow the same processes for determining liabilities, including any EXCLUSIONS and APPORTIONMENTS, in order to determine from whom it can recover its reasonable costs incurred in doing the work (see also paragraphs 16.1 to 16.11 below).

The Definition of the "Appropriate Person"

9.3 Part IIA defines two different categories of APPROPRIATE PERSON, and sets out the circumstances in which persons in these categories might be liable for REMEDIATION.

9.4 The first category is created by section 78F(2), which states that:

> "…any person, or any of the persons, who caused or knowingly permitted the substances, or any of the substances, by reason of which the CONTAMINATED LAND in question is such land to be in, on or under that land is an APPROPRIATE PERSON."

9.5 Such a person (referred to in the statutory guidance as a CLASS A PERSON) will be the APPROPRIATE PERSON only in respect of any REMEDIATION which is referable to the particular substances which he caused or knowingly permitted to be in, on or under the land (*section 78F(3)*). This means that the question of liability has to be considered separately for each SIGNIFICANT POLLUTANT LINKAGE identified on the land.

9.6 The second category arises in cases where it is not be possible to find a CLASS A PERSON, either for all of the SIGNIFICANT POLLUTANT LINKAGES identified on the land, or for a particular SIGNIFICANT POLLUTANT LINKAGE. These circumstances are addressed in section 78F(4) and (5), which provide that:

"(4) If no person has, after reasonable inquiry, been found who is by virtue of subsection (2) above an appropriate person to bear responsibility for the things which are to be done by way of REMEDIATION, the OWNER or occupier for the time being of the land in question is an APPROPRIATE PERSON.

"(5) If, in consequence of subsection (3) above, there are things which are to be done by way of REMEDIATION in relation to which no person has, after reasonable inquiry, been found who is an APPROPRIATE PERSON by virtue of subsection (2) above, the OWNER or occupier for the time being of the CONTAMINATED LAND in question is an APPROPRIATE PERSON in relation to those things."

9.7 A person who is an APPROPRIATE PERSON under sections 78F(4) or (5) is referred to in the statutory guidance as a CLASS B PERSON.

THE MEANING OF "CAUSED OR KNOWINGLY PERMITTED"

9.8 The test of "causing or knowingly permitting" has been used as a basis for establishing liability in environmental legislation for more than 100 years. In the context of Part IIA, what is "caused or knowingly permitted" is the presence of a POLLUTANT in, on or under the land.

9.9 In the Government's view, the test of "causing" will require that the person concerned was involved in some active operation, or series of operations, to which the presence of the pollutant is attributable. Such involvement may also take the form of a failure to act in certain circumstances.

9.10 The meaning of the term "knowingly permit" was considered during the debate on Lords' Consideration of Commons' Amendments to the then Environment Bill on 11 July 1995. The then Minister for the Environment, the Earl Ferrers, stated on behalf of the Government that:

"The test of "knowingly permitting" would require both knowledge that the substances in question were in, on or under the land and the possession of the power to prevent such a substance being there." (*House of Lords Hansard [11 July 1995], col 1497*)

9.11 Some commentators have questioned the extent to which this test might apply with respect to banks or other lenders, where their clients have themselves caused or knowingly permitted the presence of pollutants. With respect to that question, Earl Ferrers said:

"I am advised that there is no judicial decision which supports the contention that a lender, by virtue of the act of lending the money only, could be said to have "knowingly permitted" the substances to be in, on or under the land such that it is contaminated land. This would be the case if for no other reason than the lender, irrespective of any covenants it may have required from the polluter as to its environmental behaviour, would have no permissive rights over the land in question to prevent contamination occurring or continuing." (*House of Lords Hansard [11 July 1995], col 1497*)

9.12 It is also relevant to consider the stage at which a person who is informed of the presence of a pollutant might be considered to have knowingly permitted that presence, where he had not done so previously. In the Government's view, the test would be met only where the person had the ability to take steps to prevent or remove that presence and had a reasonable opportunity to do so.

9.13 Some commentators have, in particular, questioned the position of a person who, in his capacity as OWNER or occupier of land, is notified by the LOCAL AUTHORITY about the identification of that land as being CONTAMINATED LAND under section 78B(3). They have asked whether the resulting "knowledge" would trigger the "knowingly permit" test. In the Government's view, it would not. The legislation clearly distinguishes between those who cause or knowingly permit the presence of pollutants and those who are simply owners or occupiers of the land. In particular, this is evident in sections 78F, 78J and 78K which all relate to the different potential liabilities of OWNERS or occupiers as opposed to persons who have "caused or knowingly permitted" the presence of the POLLUTANTS.

9.14 Similarly, section 78H(1) requires consultation with OWNERS and occupiers for the specific purpose of determining "what shall be done by way of REMEDIATION" and not for the purpose of determining liability. In the Government's view, this implies that a person who merely owns or occupies the land in question cannot be held to have "knowingly permitted" as a consequence of that consultation alone.

9.15 It is ultimately for the courts to decide the meaning of "caused" and "knowingly permitted" as these terms apply to the Part IIA regime, and whether these tests are met in any particular case. However, indications of how the test should be construed can be obtained from case law under other legislation where the same or similar terms are used.

THE POTENTIAL LIABILITIES OF OWNERS AND OCCUPIERS OF LAND

9.16 Only where no CLASS A PERSON can be found who is responsible for any particular REMEDIATION ACTION will the OWNER or occupier be liable for REMEDIATION by virtue solely of that ownership or occupation. OWNERS and occupiers may, of course, be CLASS A PERSONS because of their own past actions or omissions.

9.17 It is ultimately for the courts to decide whether, in any case, it can be said that no CLASS A PERSON has been found. In the Government's view, "found" should take its normal meaning. In the Oxford English Dictionary it is defined as "discovered, met with, ascertained".

9.18 Some commentators have queried whether a person who has ceased to exist can be "found". In the Government's view, the normal meaning and relevant case law imply that something must be in existence in order to be found. In general, this means that a natural person would have to be alive and a legal person such as a company or trust must not have been dissolved. However, it may be possible in some circumstances for the authority to act against the estate of a deceased person or to apply to a court for an order to reconstitute or reinstate a company which has been dissolved.

9.19 Similarly, it is ultimately for the courts to determine what would constitute "reasonable inquiry" for the purposes of trying to find a CLASS A PERSON.

9.20 Section 78A(9) defines the term OWNER as follows:

> "in relation to any land in England and Wales, means a person (other than a mortgagee not in possession) who, whether in his own right or as trustee for any other person, is entitled to receive the rack rent of the land, or, where the land is not let at a rack rent, would be so entitled if it were so let".

9.21 The term "occupier" is not defined in Part IIA and it will therefore carry its ordinary meaning. In the Government's view, it would normally mean the person in occupation and in many cases that will be the tenant or licensee of the premises.

The Procedure for Determining Liabilities

9.22 Part 3 of the statutory guidance set out at Chapter D of Annex 3 provides a procedure for the ENFORCING AUTHORITY to follow to determine which of the APPROPRIATE PERSONS in any case should bear what liability for REMEDIATION. That procedure consists of the five distinct stages set out below.

9.23 Not all of these stages will be relevant to all cases. Most sites are likely to involve only one SIGNIFICANT POLLUTANT LINKAGE and thus have only one LIABILITY GROUP. In many cases, such a LIABILITY GROUP will consist of only one APPROPRIATE PERSON. However, more complicated situations will arise, requiring the application of all five stages. These steps may appear complex, but they are needed to fulfil the aims of the legislation in implementing the "polluter pays" principle while trying to avoid making APPROPRIATE PERSONS bear more than their fair share of the cost.

FIRST STAGE - IDENTIFYING POTENTIAL APPROPRIATE PERSONS AND LIABILITY GROUPS

9.24 The ENFORCING AUTHORITY will have already identified, on a preliminary basis, those persons who appear to it to be APPROPRIATE PERSONS in order to notify them of the identification of the CONTAMINATED LAND (see paragraph 4.1 above).

9.25 At this stage, the authority needs to reconsider this question, and identify all of the persons who appear to be APPROPRIATE PERSONS to bear responsibility for REMEDIATION. Depending on the information it has obtained, it may consider that:

(a) some or all of those who previously appeared to be APPROPRIATE PERSONS still appear to be such persons;

(b) some or all of those persons no longer appear to be APPROPRIATE PERSONS; or

(c) some other persons appear to be APPROPRIATE PERSONS, either in addition to those previously identified, or instead of them.

9.26 An example of circumstances in which the identity of those who appear to be APPROPRIATE PERSONS might change is if the authority had not previously found a person who had caused or knowingly permitted the POLLUTANT to be present (a CLASS A PERSON), but could now do so. At the time it identified the CONTAMINATED LAND, the authority would have identified the OWNER and the occupier of the land as being APPROPRIATE PERSONS. However, these persons would no longer appear to be APPROPRIATE PERSONS, unless they were also CLASS A PERSONS.

9.27 If, as a result of this process of reconsideration, the ENFORCING AUTHORITY identifies new persons who appear to be APPROPRIATE PERSONS, it needs to notify them of the fact that they have been identified as such (*section 78B(4),* see paragraphs 4.3 to 4.6 above).

9.28 The ENFORCING AUTHORITY will have identified one or more SIGNIFICANT POLLUTANTS on the land and the SIGNIFICANT POLLUTANT LINKAGES of which they form part.

A Single Significant Pollutant

9.29 Where there is a single SIGNIFICANT POLLUTANT, and a single SIGNIFICANT POLLUTANT LINKAGE, the ENFORCING AUTHORITY needs to make reasonable enquiries to find all those who have caused or knowingly permitted the SIGNIFICANT POLLUTANT in question to be in, on or under the land (*section 78F(2)*). Any such persons are then "CLASS A PERSONS" and together constitute a "CLASS A LIABILITY GROUP" for the SIGNIFICANT POLLUTANT LINKAGE

9.30 If no such CLASS A PERSONS can be found, the ENFORCING AUTHORITY needs to consider whether the SIGNIFICANT POLLUTANT LINKAGE of which it forms part relates solely to the POLLUTION OF CONTROLLED WATERS, rather than to any SIGNIFICANT HARM. If this is the case, there will be no LIABILITY GROUP for that SIGNIFICANT POLLUTANT LINKAGE (*section 78J(2)*), and it should be treated as an ORPHAN LINKAGE (see paragraph 11.3 below).

9.31 In any other case where no CLASS A PERSONS can be found for a SIGNIFICANT POLLUTANT, the ENFORCING AUTHORITY needs to identify all of the OWNERS or occupiers of the CONTAMINATED LAND in question. These persons are then "CLASS B PERSONS" and together constitute a "CLASS B LIABILITY GROUP" for the SIGNIFICANT POLLUTANT LINKAGE.

9.32 If the ENFORCING AUTHORITY cannot find any CLASS A PERSONS or any CLASS B PERSONS in respect of a SIGNIFICANT POLLUTANT LINKAGE, there will be no LIABILITY GROUP for that linkage and it should be treated as an ORPHAN LINKAGE (see paragraph 11.3 below).

Two or More Significant Pollutants

9.33 Where there are several SIGNIFICANT POLLUTANTS, and therefore two or more SIGNIFICANT POLLUTANT LINKAGES, the ENFORCING AUTHORITY should consider each linkage in turn, carrying out the steps set out in paragraphs 9.29 to 9.32 above, in order to identify the LIABILITY GROUP (if one exists) for each of the linkages.

In All Cases

9.34 Having 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 IIA. 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 (*section 78J(3)*);
>
> (b) a CLASS B PERSON is exempted from liability arising from the escape of a pollutant from one piece of land to other land (*section 78K*); or
>
> (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) (*section 78X(4)*).

9.35 If all of the members of a LIABILITY GROUP benefit from one or more of these exemptions, the ENFORCING AUTHORITY should treat the SIGNIFICANT POLLUTANT LINKAGE in question as an ORPHAN LINKAGE (see paragraphs paragraph 11.3 below).

9.36 Individual persons may be members of more than one LIABILITY GROUP. This might apply, for example, if they had caused or knowingly permitted the presence of more than one SIGNIFICANT POLLUTANT.

9.37 Where 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 the procedure for determining liabilities. However, the tests for EXCLUSION and APPORTIONMENT may produce different results for different SIGNIFICANT POLLUTANT LINKAGES, and so the ENFORCING AUTHORITY will need to exercise caution before trying to simplify the procedure in any case.

SECOND STAGE - CHARACTERISING REMEDIATION ACTIONS

9.38 Each REMEDIATION ACTION will be carried out to achieve a particular purpose with respect to one or more identified SIGNIFICANT POLLUTANT LINKAGES. Where there is only a single SIGNIFICANT POLLUTANT LINKAGE on the CONTAMINATED LAND in question, all the REMEDIATION ACTIONS will be referable to that linkage, and the ENFORCING AUTHORITY will not need to consider how the different REMEDIATION ACTIONS relate to different linkages. Therefore the authority will not need to carry out this stage and the third stage of the procedure where there is only a single SIGNIFICANT POLLUTANT LINKAGE.

9.39 However, where there are two or more SIGNIFICANT POLLUTANT LINKAGES on the CONTAMINATED LAND, the ENFORCING AUTHORITY needs to establish, for each REMEDIATION ACTION, whether it is:

(a) referable solely to the SIGNIFICANT POLLUTANT in a single SIGNIFICANT POLLUTANT LINKAGE (a SINGLE-LINKAGE ACTION); or

(b) referable to the SIGNIFICANT POLLUTANTS in more than one SIGNIFICANT POLLUTANT LINKAGE (a SHARED ACTION).

9.40 Where a REMEDIATION ACTION is a SHARED ACTION, there are two possible relationships between it and the SIGNIFICANT POLLUTANT LINKAGES to which it is referable. The ENFORCING AUTHORITY needs to establish whether the SHARED ACTION is:

(a) a COMMON ACTION - that is, an action which addresses together all of the SIGNIFICANT POLLUTANT 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 - that is, an action which addresses together all of the SIGNIFICANT POLLUTANT 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.

A COLLECTIVE ACTION replaces actions that would have been appropriate for the individual SIGNIFICANT POLLUTANT LINKAGES if they had been addressed separately, as it achieves the purposes which those other actions would have achieved.

THIRD STAGE - ATTRIBUTING RESPONSIBILITY TO LIABILITY GROUPS

9.41 This stage of the procedure does not apply in the simpler cases. Where there is only a single SIGNIFICANT POLLUTANT 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 itself, at its own cost (see paragraph 11.3 below).

9.42 Similarly, for any SINGLE-LINKAGE ACTION, the LIABILITY GROUP for the SIGNIFICANT POLLUTANT LINKAGE in question bears the full cost of carrying out that action.

9.43 However, for each SHARED ACTION the ENFORCING AUTHORITY needs to apply the statutory guidance set out in Part 9 of Chapter D, in order to attribute to each of the different LIABILITY GROUPS their share of responsibility for that action.

9.44 After that statutory guidance 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, since the full cost of the REMEDIATION ACTIONS required will have been borne by others. Where this is the case, the ENFORCING AUTHORITY does not need to carry out any of the rest of this procedure with respect to that LIABILITY GROUP.

FOURTH STAGE - EXCLUDING MEMBERS OF A LIABILITY GROUP

9.45 The ENFORCING AUTHORITY then needs to 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 authority applies the statutory guidance on EXCLUSION set out in Part 5 of Chapter D; and

(b) for each CLASS B LIABILITY GROUP with two or more members, the authority applies the statutory guidance on EXCLUSION set out in Part 7 of Chapter D.

FIFTH STAGE - APPORTIONING LIABILITY BETWEEN MEMBERS OF A LIABILITY GROUP

9.46 The ENFORCING AUTHORITY next needs to 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.

9.47 For any LIABILITY GROUP which has only a single remaining member, that person bears all of the costs falling to that LIABILITY GROUP. This means that he bears the cost of any SINGLE-LINKAGE ACTION referable to the SIGNIFICANT POLLUTANT LINKAGE, 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 of Chapter D.

9.48 For any LIABILITY GROUP which has two or more remaining members, the ENFORCING AUTHORITY applies the relevant statutory 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. The relevant APPORTIONMENT guidance is:

(a) for any CLASS A LIABILITY GROUP, the statutory guidance set out in Part 6 of Chapter D; and

(b) for any CLASS B LIABILITY GROUP, the statutory guidance set out in Part 8 of Chapter D.

AGREEMENTS ON LIABILITIES

9.49 The statutory guidance set out in Part 3 of Chapter D provides the procedure which the ENFORCING AUTHORITY should normally follow. However, two or more APPROPRIATE PERSONS may agree between themselves the basis on which they think costs should be borne, or apportioned between themselves, for any REMEDIATION for which they are responsible. If the ENFORCING AUTHORITY is notified in writing of such an agreement, the authority needs to allocate liabilities between the parties to the agreement so as to reflect the terms of the agreement, rather than necessarily reflecting the outcome which would otherwise result from the normal processes of EXCLUSION and APPORTIONMENT (*paragraph D.38*).

9.50 However, the ENFORCING AUTHORITY should not do this if the effect of following the agreement would be to increase the costs to be borne by the public purse. In these circumstances, it should disregard the agreement and follow the five stage process outlined above (*paragraph D.39*).

10 - Limits on Costs to be Borne by the Appropriate Person

10.1 When the ENFORCING AUTHORITY has APPORTIONED the costs of each REMEDIATION ACTION between the various APPROPRIATE PERSONS, and before proceeding to serve any REMEDIATION NOTICE on that basis, the authority must consider whether there are reasons why any of the APPROPRIATE PERSONS on whom that notice would be served should not be required to meet in full the share of the cost of carrying out the REMEDIATION ACTIONS which has been APPORTIONED to him. The importance of this question is that it may preclude the ENFORCING AUTHORITY from serving a REMEDIATION NOTICE in respect of those actions on ***all*** of the APPROPRIATE PERSONS (see paragraph 10.4 below).

10.2 To decide this question, the ENFORCING AUTHORITY needs to consider the hypothetical circumstances which would apply if the authority had carried out itself the REMEDIATION ACTION or actions for which each APPROPRIATE PERSON is liable. Specifically, the authority needs to consider whether, in these hypothetical circumstances, it would seek to recover from each APPROPRIATE PERSON all of the share of the costs which has been APPORTIONED to that person.

10.3 In making its decision, the authority must have regard to:

(a) any hardship which may be caused to the person in question (see paragraphs 10.8 to 10.10 below); and

(b) the statutory guidance in Chapter E of Annex 3 (*section 78P(2)*).

10.4 If the ENFORCING AUTHORITY decides that, in these hypothetical circumstances, it would seek to recover from each APPROPRIATE PERSON all of the share of its reasonable costs APPORTIONED to that person, the authority can proceed to serve the necessary REMEDIATION NOTICES on the basis of its apportionment.

10.5 However, if the ENFORCING AUTHORITY decides, with respect to any REMEDIATION ACTION, that it would seek to recover from any APPROPRIATE PERSON none, or only a part, of that person's apportioned share of the authority's reasonable costs:

> (a) it is precluded from serving a REMEDIATION NOTICE specifying that action on both on the APPROPRIATE PERSON in question and on anyone else who is an APPROPRIATE PERSON in respect of that action (*section 78H(5)(d)*); and
>
> (b) the authority has the power to carry out the REMEDIATION ACTION in question itself (*section 78N(3(e)*; see also paragraphs 11.7 to 11.11 below).

10.6 Where, in a case of this kind, the ENFORCING AUTHORITY does then decide to exercise its powers and carry out particular REMEDIATION ACTIONS, the authority will be entitled to recover its reasonable costs of doing so when it has completed the work. In deciding how much of those costs it will seek to recover, the authority will need to work on the basis of circumstances as they exist at that point. In practice, however, the decision that the authority has taken on the hypothetical basis described in paragraph 10.2 above will normally settle the questions of limits on the actual recovery of costs. Nevertheless, if there is evidence that the circumstances of the APPROPRIATE PERSON have changed in some relevant respect after the ENFORCING AUTHORITY has made its initial decision on this question, it will need to reconsider its decision as to how much of its reasonable costs it will seek to recover.

10.7 Further details about actual cost recovery are given in section 16 of this Annex.

The Meaning of the Term "Hardship"

10.8 The term "hardship" is not defined in Part IIA, and therefore carries its ordinary meaning. The Oxford English Dictionary defines it as meaning:

> "hardness of fate or circumstance, severe suffering or privation".

10.9 The term has been widely used in other legislation, and there is a substantial body of case law about its meaning under that other legislation. For example, it has been held appropriate to take account of injustice to the person claiming hardship, in addition to severe financial detriment. Although the case law may give a useful indication of the way in which the term has been interpreted by the courts, the meaning ascribed to the term in individual cases is specific to the particular facts of those cases and the legislation under which they were brought.

10.10 In deciding whether there would be hardship, and its extent, the matters considered in Chapter E may well be relevant.

11 - Remediation Action by the Authority

11.1 Before serving any REMEDIATION NOTICE, the ENFORCING AUTHORITY needs to consider whether it has the power to carry out any of the REMEDIATION ACTIONS itself. Where this applies, the authority is precluded from serving a REMEDIATION NOTICE requiring anyone else to carry out that REMEDIATION ACTION (*section 78H(5)*).

The Power to Carry Out Remediation

11.2 In general terms, the ENFORCING AUTHORITY has the power to carry out a REMEDIATION ACTION itself in cases where:

(a) the ENFORCING AUTHORITY considers it necessary to take urgent action itself (*section 78N(3)(a)*; see paragraphs 5.1 to 5.8 above);

(b) there is no APPROPRIATE PERSON to bear responsibility for the action (*section 78N(3)(f)*; see paragraph 11.3 below);

(c) the ENFORCING AUTHORITY is precluded from requiring one or more persons, who would otherwise be APPROPRIATE PERSONS, to carry out the action (*sections 78N(3)(d) & (e)*; see paragraph 11.4 below);

(d) the ENFORCING AUTHORITY has agreed with the APPROPRIATE PERSON that the authority should carry out the REMEDIATION ACTION (*section 78N(3)(b)*; see paragraphs 11.5 to 11.6 below); or

(e) the REMEDIATION ACTION has been specified in a REMEDIATION NOTICE, which has not been complied with (*section 78N(3)(c)*; see paragraph 15.15 below).

THERE IS NO APPROPRIATE PERSON

11.3 The ENFORCING AUTHORITY has the power to carry out a REMEDIATION ACTION if, after reasonable enquiry, it has been unable to find an APPROPRIATE PERSON for that action (*section 78N(3)(f)*).

THE APPROPRIATE PERSON CANNOT BE REQUIRED TO CARRY OUT A REMEDIATION ACTION

11.4 The ENFORCING AUTHORITY needs to consider whether it has the power to carry out a REMEDIATION ACTION on the basis that the APPROPRIATE PERSON cannot be required to carry it out. This applies where:

(a) the ENFORCING AUTHORITY considers that if it carried out the REMEDIATION ACTION itself, it would not seek to recover fully from that APPROPRIATE PERSON the proportion of the costs which that person would otherwise have to bear if the action were included in a REMEDIATION NOTICE (*sections 78N(3)(e) & 78P(2)*; see also paragraphs 10.1 to 10.10 above);

(b) the REMEDIATION ACTION is referable solely to one or more SIGNIFICANT POLLUTANT LINKAGES which relate to the POLLUTION OF CONTROLLED WATERS (and not to any SIGNIFICANT HARM), and either:

(i) the APPROPRIATE PERSON is a CLASS B PERSON (*section 78J(2)*), or

(ii) the APPROPRIATE PERSON is a CLASS A PERSON solely by virtue of his having permitted the discharge of water from a mine which was abandoned before the end of 1999 (*section 78J(3)*);

(c) the SIGNIFICANT POLLUTANT LINKAGE to which the REMEDIATION ACTION is referable is the result of the escape of the POLLUTANT from other land onto the CONTAMINATED LAND in question, and both:

(i) the APPROPRIATE PERSON is a CLASS B PERSON, and

(ii) the REMEDIATION ACTION is intended to deal with SIGNIFICANT HARM or the POLLUTION OF CONTROLLED WATERS on land other than the CONTAMINATED LAND in question, to which the POLLUTANT has escaped (*section 78K*); or

(d) requiring the APPROPRIATE PERSON to carry out the REMEDIATION ACTION would have the effect of making him personally liable to bear the costs, and:

(i) he is a "PERSON ACTING IN A RELEVANT CAPACITY" such as an insolvency practitioner (*section 78X(4)*), and

(ii) the REMEDIATION ACTION is not to any extent referable to any POLLUTANT which is present as a result of any act or omission which it was unreasonable for a person acting in that capacity to do or make (*section 78X(3)(a)*).

WRITTEN AGREEMENT

11.5 Even if none of the grounds set out in paragraph 11.4 above applies, the ENFORCING AUTHORITY may wish to consider whether it would, nonetheless, be appropriate for the authority to carry out a REMEDIATION ACTION itself on behalf of the APPROPRIATE PERSON. This might be appropriate, in particular, in the case of home-owners identified as APPROPRIATE PERSONS.

11.6 If the ENFORCING AUTHORITY considers that it wishes do this, it needs to seek the written agreement of the APPROPRIATE PERSON for:

(a) the ENFORCING AUTHORITY to carry out the REMEDIATION ACTION itself, on behalf of the APPROPRIATE PERSON; and

(b) the APPROPRIATE PERSON to reimburse the authority for any costs which he would otherwise have had to bear for the REMEDIATION (*section 78N(3)(b)*).

Action by the Authority

11.7 The ENFORCING AUTHORITY'S powers to carry out REMEDIATION under section 78N may be triggered with respect to all of the APPROPRIATE PERSONS for a particular

REMEDIATION ACTION, or only with respect to some of them. Whichever is the case, the authority is precluded from including the REMEDIATION ACTION in question in a REMEDIATION NOTICE served on anyone (*section 78H(5)*).

11.8 However, where the ENFORCING AUTHORITY carries out a REMEDIATION ACTION using its powers with respect to urgent action (*section 78N(3)(a)*) or limitations on costs (*section 78N(3)(e)*; see paragraphs 10.1 to 10.6 above), it is entitled to recover its reasonable costs from all of the APPROPRIATE PERSONS for that REMEDIATION ACTION (*section 78P(1)*). In deciding how much of those costs to recover from any particular APPROPRIATE PERSON, the authority must have regard to hardship which may be caused to that person and to the statutory guidance set out in Chapter E of Annex 3 (*section 78P(2)*).

11.9 For example, there may be two APPROPRIATE PERSONS (persons "1" and "2") for a particular REMEDIATION ACTION. The ENFORCING AUTHORITY may consider that the cost which "person 1" would have to bear would cause him hardship. On this basis, the authority has a power to carry out the REMEDIATION ACTION itself, and cannot include that action in a notice served on either of the APPROPRIATE PERSONS (see paragraph 10.5 above). Once the authority has carried out the action, it can recover from "person 2" the same proportion of its costs as a REMEDIATION NOTICE served on him would have specified, and from "person 1" as much of the remainder as would not cause hardship or be inconsistent with the statutory guidance in Chapter E.

11.10 Where the ENFORCING AUTHORITY is precluded from serving a REMEDIATION NOTICE because it has powers under section 78N to carry out the REMEDIATION itself, it will be under a duty to prepare and publish a REMEDIATION STATEMENT recording:

> "(a) the things which are being, have been, or are expected to be, done by way of REMEDIATION in the particular case;
>
> "(b) the name and address of the person who is doing, has done, or is expected to do, each of those things; and
>
> "(c) the periods within which each of those things is being, or is expected to be done" (*section 78H(7)*).

11.11 The ENFORCING AUTHORITY must then include details of the REMEDIATION STATEMENT on its REGISTER (*section 78R(1)(c) and regulation 16*; see paragraphs 17.1 to 17.19 below and Annex 4, paragraph 88).

12 - Serving a Remediation Notice

12.1 The basis for serving a REMEDIATION NOTICE is that the ENFORCING AUTHORITY considers that there are REMEDIATION ACTIONS, identified as part of the REMEDIATION SCHEME, which:

> (a) have not been, are not being, and will not be carried out without the service of a REMEDIATION NOTICE; and
>
> (b) in respect of which the authority has no power under section 78N to carry out itself and for which it is not, itself, the APPROPRIATE PERSON.

12.2 Before serving a REMEDIATION NOTICE, the ENFORCING AUTHORITY needs to decide whether it has made reasonable endeavours to consult the APPROPRIATE PERSON and the other

relevant persons (described in paragraph 6.10 to 6.17 above) on the nature of the REMEDIATION which is to be carried out (*section 78H(1)*).

12.3 When the authority is satisfied that it has consulted sufficiently, and subject to the timing requirements outlined in paragraphs 12.4 and 12.5 below, the authority will be under a duty to serve a REMEDIATION NOTICE on each APPROPRIATE PERSON requiring the relevant REMEDIATION ACTION to be carried out (*section 78E(1)*).

TIMING OF THE SERVICE OF A REMEDIATION NOTICE

12.4 THE ENFORCING AUTHORITY will have notified each APPROPRIATE PERSON that he appears to be such a person (*section 78B(3) & (4)*; see paragraphs 4.1 to 4.6 above). The date of this notification to any person determines the earliest date on which the ENFORCING AUTHORITY can serve a REMEDIATION NOTICE on that person. Except in a case of urgency (see paragraphs 5.1 to 5.8 above), at least three months must elapse between the date of the notification to the person concerned and the service of a REMEDIATION NOTICE on that person (*section 78H(3)(a)*).

12.5 However, later dates apply if the LOCAL AUTHORITY has given notice of a decision that the land is required to be designated a SPECIAL SITE, or if the ENVIRONMENT AGENCY has given an equivalent notice to the LOCAL AUTHORITY (see paragraphs 18.7 and 18.13 below). Once such a notice has been given, the ENFORCING AUTHORITY cannot serve a REMEDIATION NOTICE (except in cases of urgency) until three months have elapsed since:

(a) notice was given by the LOCAL AUTHORITY that the designation of the land as a SPECIAL SITE is to take effect; or

(b) notice was given by the SECRETARY OF STATE that the designation of the land as a SPECIAL SITE is, or is not, to take effect (*sections 78H(3)(b) & (c)*; see also section 18 of this Annex).

THE REMEDIATION NOTICE

12.6 The ENFORCING AUTHORITY must include in any REMEDIATION NOTICE particular information about the CONTAMINATED LAND, the REMEDIATION, the APPROPRIATE PERSON and rights of appeal against the notice. The requirements for the contents of a REMEDIATION NOTICE are formally set out in sections 78E(1) and (3), and regulation 4 of the Contaminated Land (England) Regulations 1999 (see Annex 4, paragraphs 16 to 20).

12.7 In any case where there are two or more APPROPRIATE PERSONS for any REMEDIATION ACTION, the ENFORCING AUTHORITY may serve a single REMEDIATION NOTICE on all of those persons.

12.8 As well as serving the REMEDIATION NOTICE on the APPROPRIATE PERSONS, the ENFORCING AUTHORITY must send a copy:

(a) to any person who they have consulted under section 78G(3) about the granting of rights over the land or waters to the APPROPRIATE PERSON;

(b) to any person who was consulted under section 78H(1); and

(c) if the ENFORCING AUTHORITY is the LOCAL AUTHORITY, to the ENVIRONMENT AGENCY, and if the ENFORCING AUTHORITY is the ENVIRONMENT AGENCY, to the LOCAL AUTHORITY (*regulation 5(1)*).

12.9 The ENFORCING AUTHORITY is under a duty to include prescribed details of the REMEDIATION NOTICE on its REGISTER (*section 78R(1)(a) and regulation 16*; see paragraphs 17.1 to 17.19 below and Annex 4, paragraph 85).

13 - Appeals Against a Remediation Notice

13.1 Any person who receives a REMEDIATION NOTICE has twenty-one days within which he can appeal against the notice (*section 78L(1)*). Any appeal is made:

(a) to a magistrates' court, if the notice was served by a LOCAL AUTHORITY; or

(b) to the SECRETARY OF STATE, if the notice was served by the ENVIRONMENT AGENCY.

13.2 The grounds for any such appeal are prescribed in regulation 7. Regulations 8-15 prescribe the procedures for any appeal. These regulations are described in Annex 4 to this circular.

13.3 If an appeal is made, the REMEDIATION NOTICE is suspended until final determination or abandonment of the appeal (*regulation 15*).

13.4 If any appeal is made against a REMEDIATION NOTICE, the ENFORCING AUTHORITY must enter prescribed particulars of the appeal, and the decision reached on the appeal, on its REGISTER (*section 78R(1)(b) and regulation 16*).

ACTION DURING A SUSPENSION OF A NOTICE

13.5 Where the requirement to carry out particular REMEDIATION ACTIONS is suspended during an appeal, the ENFORCING AUTHORITY needs to consider whether this makes it necessary for the authority itself to carry out urgent REMEDIATION (*section 78N(3)(a);* see paragraphs 5.1 to 5.8 above).

13.6 If the ENFORCING AUTHORITY does carry out urgent REMEDIATION itself in these circumstances, it does not need to prepare and publish a REMEDIATION STATEMENT, unless the REMEDIATION has not already been described in the original REMEDIATION NOTICE.

13.7 Having carried out any REMEDIATION ACTION, the ENFORCING AUTHORITY needs to consider whether to seek to recover its reasonable costs (*section 78P(1)*). Its ability to do so may, however, be affected by the decision in the appeal against the REMEDIATION NOTICE. For example, it would not be able to recover its costs from the recipient of a notice who successfully appealed on the grounds that he was not the APPROPRIATE PERSON.

14 - Variations in Remediation Requirements

14.1 It may become apparent, whilst REMEDIATION ACTIONS are being carried out, that the overall REMEDIATION SCHEME for the RELEVANT LAND OR WATERS is no longer appropriate. For example:

(a) further SIGNIFICANT POLLUTANT LINKAGES may be identified, requiring further REMEDIATION ACTIONS to be carried out;

(b) a REMEDIATION ACTION which is being carried out may be discovered to be:

(i) ineffective, given the circumstances of the RELEVANT LAND OR WATERS,

(ii) unsafe, in terms of pollution or health and safety risks, given the circumstances of the RELEVANT LAND OR WATERS, or

(iii) unnecessary, in the light of new information about the condition of the land; or

(c) a further REMEDIATION ACTION may be identified which would be reasonable and would achieve a purpose which could not previously be achieved by any reasonable REMEDIATION ACTION.

14.2 If other REMEDIATION ACTIONS are identified as being appropriate, this may require the preparation and publication of a new REMEDIATION STATEMENT or the serving of a new REMEDIATION NOTICE.

15 - Follow-up Action

15.1 The ENFORCING AUTHORITY needs to consider whether the REMEDIATION ACTIONS described in the REMEDIATION STATEMENT or specified in the REMEDIATION NOTICE have been carried out and, if so, whether they have been carried out adequately and satisfactorily. In many cases, the authority will do so on the basis of information generated by the quality assurance and verification procedures included within the REMEDIATION ACTIONS (*paragraphs C.25 and C.67*).

15.2 Whatever it decides, the ENFORCING AUTHORITY also needs to consider whether any further REMEDIATION is appropriate. This applies particularly in circumstances where the completed REMEDIATION ACTIONS form only a single phase of the overall process of REMEDIATION for the RELEVANT LAND OR WATERS. If it decides that further REMEDIATION is appropriate, the authority repeats the procedures set out above for consultation, identifying appropriate REMEDIATION ACTIONS and requiring that REMEDIATION to be carried out by service of a REMEDIATION NOTICE.

Remediation Action has been Carried Out

NOTIFICATIONS OF "CLAIMED REMEDIATION"

15.3 Any person who has carried out any REMEDIATION which was required by a REMEDIATION NOTICE or described in a REMEDIATION STATEMENT can notify the ENFORCING AUTHORITY, providing particular details of the REMEDIATION he claims to have carried out (*regulation 16(2)*). The OWNER or occupier of the CONTAMINATED LAND is also entitled to notify the authority.

15.4 If the ENFORCING AUTHORITY receives any notification of this kind, it will be under a duty to include on its REGISTER prescribed details of the REMEDIATION which it is claimed has been carried out (*sections 78R(1)(h) & (j) and regulation 16*; see paragraphs 17.1 to 17.19 below and Annex 4, paragraph 89).

15.5 Part IIA provides that the inclusion of an entry of this kind on the REGISTER is not to be taken as a representation by the authority maintaining the REGISTER that the entry is accurate with respect to what is claimed to have been done, or the manner in which it may have been done (*section 78R(3)*).

"SIGNING OFF"

15.6 Although Part IIA does not include any formal "signing off" procedure, the ENFORCING AUTHORITY may wish to consider writing to the APPROPRIATE PERSON, confirming the position with respect to any further enforcement action. In a case where a REMEDIATION NOTICE has been served and appears to have been complied with, this could confirm that the authority currently sees no grounds, on the basis of available information, for further enforcement action. In other cases – where a REMEDIATION NOTICE has not been served – the ENFORCING AUTHORITY might confirm that it does not consider that it needs to serve a REMEDIATION NOTICE, which it would need to do if appropriate REMEDIATION had not been carried out.

Remediation Has Not Been Carried Out

IF A REMEDIATION STATEMENT HAS NOT BEEN FOLLOWED

15.7 If a REMEDIATION ACTION described in a REMEDIATION STATEMENT is not carried out in the manner and within the time period described, the ENFORCING AUTHORITY needs to consider whether it is necessary for a REMEDIATION NOTICE to be served requiring that REMEDIATION ACTION to be carried out.

15.8 The ENFORCING AUTHORITY has a duty to serve such a REMEDIATION NOTICE if:

(a) it considers that appropriate REMEDIATION is not being carried out and it is not satisfied that it will be carried out without the service of a notice; and

(b) it is not precluded for any other reason from serving a notice on the APPROPRIATE PERSON (*section 78H(10)*).

15.9 In these circumstances, the ENFORCING AUTHORITY can serve the REMEDIATION NOTICE without making any further efforts to consult, provided that the REMEDIATION

ACTIONS specified in the notice have previously been the subject of consultation with the person in question (*section 78H(10)*).

IF A REMEDIATION NOTICE IS NOT COMPLIED WITH

15.10 If a REMEDIATION ACTION specified in a REMEDIATION NOTICE is not carried out within the time required, the ENFORCING AUTHORITY needs to consider whether to prosecute the APPROPRIATE PERSON who has failed to comply with the REMEDIATION NOTICE. It will normally be desirable for the authority to inform the APPROPRIATE PERSON that it is considering bringing such a prosecution before it actually does so. This may give that person an opportunity to avoid prosecution by carrying out the requirements of the REMEDIATION NOTICE.

15.11 Part IIA makes it an offence for any person to fail to comply with a REMEDIATION NOTICE "without reasonable excuse" (*section 78M(1)*). The question of whether a person had a "reasonable excuse" in any case is a matter of fact to be decided on the basis of the particular circumstances of that case.

15.12 One defence is specified in Part IIA. This applies where:

(a) the APPROPRIATE PERSON was required by the REMEDIATION NOTICE to bear only a proportion of the cost of the REMEDIATION ACTION which has not been carried out; and

(b) that person can show that the only reason why he did not comply with the REMEDIATION NOTICE was that one or more of the other APPROPRIATE PERSONS who should have borne other shares of the cost refused, or were not able, to do so (*section 78M(2)*).

15.13 In general, a person convicted of the offence of non-compliance with a REMEDIATION NOTICE is liable to a fine not exceeding level 5 on the standard scale; at the date of this circular, that is £5,000. Until either he complies with the REMEDIATION NOTICE, or the ENFORCING AUTHORITY uses its powers to act in default (see paragraph 15.15 below), he is also liable for additional daily fines up of up to one tenth of level 5; that is, at the date of this circular, £500 (*section 78M(3)*).

15.14 However, where the CONTAMINATED LAND to which the notice relates is INDUSTRIAL, TRADE OR BUSINESS PREMISES, the limit on the fine is higher: the fine may be up to £20,000, with daily fines of up to £2,000 (*section 78M(4)*). Part IIA provides a power to increase those limits by order: the Government's intention is to use that power where necessary to maintain the differential with level 5 on the standard scale.

15.15 In addition, the authority needs to consider whether to carry out the REMEDIATION ACTION itself (*section 78N(3)(c)*). It can decide to do so whether or not it decides to prosecute the APPROPRIATE PERSON. If it does carry out the REMEDIATION, it is entitled to recover its reasonable costs from the APPROPRIATE PERSON (*sections 78P(1)*).

16 - Recovering the Costs of Carrying Out Remediation

16.1 In general, where the ENFORCING AUTHORITY has carried out REMEDIATION itself, it is entitled to recover the reasonable costs it has incurred in doing so (*section 78P(1)*). The ENFORCING AUTHORITY has no power to recover any costs it incurred in inspecting the land to determine whether it was CONTAMINATED LAND.

16.2 In deciding whether to recover its costs and, if so, how much of its costs, the ENFORCING AUTHORITY must have regard to:

(a) any hardship which the recovery might cause to the APPROPRIATE PERSON (see paragraphs 10.8 to 10.10 above and

(b) the statutory guidance set out in Chapter E of Annex 3 (*section 78P(2)*; see also paragraphs 10.8 to 10.10 above).

16.3 However, the ENFORCING AUTHORITY has no power under section 78P to recover its costs where:

(a) the authority itself was the APPROPRIATE PERSON;

(b) the person who would otherwise have been an APPROPRIATE PERSON for a REMEDIATION ACTION could not have been required to carry out that action under the terms of a REMEDIATION NOTICE, because it related to the POLLUTION OF CONTROLLED WATERS or to the escape of the POLLUTANT from other land (*section 78N(3)(d)*); or

(c) the authority carried out the REMEDIATION with the written agreement of the APPROPRIATE PERSON (*section 78N(3)(b)*).

16.4 In the first two of these cases, the ENFORCING AUTHORITY has itself to bear the cost of carrying out the REMEDIATION (see paragraphs 16.12 to 16.14 below).

16.5 If the ENFORCING AUTHORITY carries out the REMEDIATION with the written agreement of the APPROPRIATE PERSON (*section 78N(3)(b)*), reimbursement by the APPROPRIATE PERSON will be under the terms of the written agreement.

16.6 If the ENFORCING AUTHORITY decides to recover all or a part of its costs, it needs to consider whether to do so immediately (which will involve an action in the county court or High Court, if payment is not made) or to postpone recovery and, where this is possible, safeguard its right to cost recovery by imposing a charge on the land in question. A CHARGING NOTICE may also be served to safeguard the authority's interests where immediate recovery is intended.

Charging Notices

16.7 If the ENFORCING AUTHORITY decides to safeguard its rights to cost recovery by imposing a charge on the land in question, it does so by serving a CHARGING NOTICE (*section 78P(3)*). The authority is entitled to serve a CHARGING NOTICE if the APPROPRIATE PERSON from whom it is recovering its costs is both:

(a) a CLASS A PERSON; and

(b) the OWNER of all or part of the CONTAMINATED LAND (*section 78P(3)*).

16.8 On the same day as the ENFORCING AUTHORITY serves any CHARGING NOTICE, it must send a copy of the notice to every other person who, to the knowledge of the authority, has an interest in the premises capable of being affected by the charge (*section 78P(6)*).

16.9 Any person served with a CHARGING NOTICE, or who receives a copy of it, can appeal against it to a county court (*section 78P(8)*). If any such appeal is made, the ENFORCING AUTHORITY must include prescribed particulars of that appeal on its REGISTER (*section 78R(1)(d)*; see paragraphs 17.1 to 17.19 below and Annex 4, paragraph 97). The CHARGING NOTICE itself will not appear on the REGISTER. The power to make regulations on the grounds of appeal against a CHARGING NOTICE and the related procedure has not been exercised. It is therefore for the county court to determine what grounds of appeal it will accept; the ordinary county court procedures for appeals will apply.

16.10 A CHARGING NOTICE can declare the cost to be payable with interest by instalments, within a specified period, until the whole amount is repaid (*section 78P(12)*).

16.11 If the ENFORCING AUTHORITY needs to enforce the charge, it has the same powers and remedies under the Law of Property Act 1925 as if the authority were a mortgagee by deed having powers of sale and lease, of accepting surrenders of leases and of appointing a receiver (*section 78P(11)*).

Central Government Support to Local Authorities

16.12 The Department of the Environment, Transport and the Regions runs a programme of Supplementary Credit Approvals (SCAs) for capital costs incurred by local authorities in dealing with land contamination where they:

(a) own the land;

(b) are responsible for its contamination; or

(c) have other statutory responsibilities for carrying out remediation, including the use of powers to carry out REMEDIATION under section 78N.

16.13 Support under this programme is not available for work needed solely to facilitate the development, redevelopment or sale of the land. Financial support for remediation in connection with the development or redevelopment of land may be available through the single regeneration budget or under the programmes of English Partnerships and the regional development agencies.

16.14 All local authorities which are entitled to receive SCAs are invited annually to bid for support from this programme for particular schemes. Schemes are assessed against environmental criteria and prioritised. Where a bid is successful, the authority is issued an SCA which permits it to raise money to finance the remediation. The revenue implications of servicing this borrowing are then taken into account in the Revenue Support Grant calculations for subsequent years.

16.15 DETR also provides financial support to the ENVIRONMENT AGENCY.

17 - Registers

17.1 Each ENFORCING AUTHORITY has a duty to maintain a REGISTER (*section 78R(1)*). The register will include details of REMEDIATION NOTICES which have been served and certain other documents in relation to each area of CONTAMINATED LAND for which the authority is responsible. The REGISTER will also include information about the condition of the land in question. For a LOCAL AUTHORITY, the REGISTER must be kept at its principal office. For the ENVIRONMENT AGENCY, the REGISTER must be kept at the area office for the area in which the land is situated.

17.2 The particular details to be included in each REGISTER are prescribed in regulation 16 and Schedule 3 of the Contaminated Land (England) Regulations 1999 (see Annex 4).

17.3 Before including any information on its REGISTER, the ENFORCING AUTHORITY needs to consider whether that information should be excluded on the basis that:

(a) its inclusion would be against the interests of national security (see paragraphs 17.8 to 17.9 below); or

(b) the information is commercially confidential (see paragraphs 17.10 to 17.19 below).

Copying Entries between Authorities

17.4 For most areas of CONTAMINATED LAND, the LOCAL AUTHORITY for that area will be the ENFORCING AUTHORITY. However, for particular areas of CONTAMINATED LAND this may not be the case. This applies if:

(a) the CONTAMINATED LAND has been designated a SPECIAL SITE, in which case the ENVIRONMENT AGENCY is the ENFORCING AUTHORITY; or

(b) the land has been identified as CONTAMINATED LAND by the LOCAL AUTHORITY for an adjoining or adjacent area, as a result of SIGNIFICANT HARM or the POLLUTION OF CONTROLLED WATERS which might be caused in that LOCAL AUTHORITY'S own area (*section 78X(2)*).

17.5 Where this is the case, the ENFORCING AUTHORITY needs to copy all entries it makes into its own REGISTER for the land in question, to the LOCAL AUTHORITY in whose area the land is actually situated (*section 78R(4) & (5)*).

17.6 The LOCAL AUTHORITY which receives these copied entries needs to include them on its own REGISTER (*section 78R(6)*). This means that the REGISTER maintained by any LOCAL AUTHORITY provides a comprehensive set of information about all of the CONTAMINATED LAND identified in its area, whichever authority is the ENFORCING AUTHORITY.

Public Access to Registers

17.7 Each ENFORCING AUTHORITY is under a duty to keep its REGISTER available for free inspection by the public at all reasonable times (*section 78R(8)(a)*). In addition, it will be under a duty to provide facilities for members of the public to obtain copies of REGISTER entries. It can make reasonable charges for this (*section 78R(8)(b)*).

Exclusion on the Grounds of National Security

17.8 The ENFORCING AUTHORITY must not include any information on its REGISTER if, in the opinion of the SECRETARY OF STATE, its inclusion would be against the interests of national security (*section 78S(1)*). The SECRETARY OF STATE can give directions to ENFORCING AUTHORITIES specifying information, or descriptions of information, which are to be excluded from any REGISTER or referred to the SECRETARY OF STATE for his determination (*section 78S(2)*). At the date of this circular, no such directions have been given.

17.9 Any person who considers that the inclusion of particular information on a REGISTER would be against the interests of national security can notify the SECRETARY OF STATE and the ENFORCING AUTHORITY of this. The SECRETARY OF STATE will then consider whether, in his opinion, the information should included or excluded. The ENFORCING AUTHORITY must not include on its REGISTER any information covered by this kind of notification unless and until the SECRETARY OF STATE determines that it can be included (*section 78S(4)*).

Exclusion on the Grounds of Commercial Confidentiality

17.10 The ENFORCING AUTHORITY must not, without the relevant person's permission, include any information on its REGISTER which:

(a) relates to the affairs of any individual or business; and

(b) is commercially confidential to that individual or the person carrying on that business (*section 78T(1)*).

17.11 For these purposes, commercial interests relating to the value of the CONTAMINATED LAND, or to its the ownership or occupation, are disregarded (*section 78T(11)*). This means that information cannot be excluded from the REGISTER solely on the basis that its inclusion might provide information to a prospective buyer of the land, thereby affecting the sale or the sale price.

17.12 In addition, the SECRETARY OF STATE can give directions to ENFORCING AUTHORITIES requiring the inclusion of specified information or descriptions of information, notwithstanding any commercial confidentiality, where he considers that the inclusion of that information would be in the public interest (*section 78T(7)*). No such directions have yet been given.

17.13 If the ENFORCING AUTHORITY considers that any information which it would normally include on its REGISTER could be commercially confidential, it must notify the person concerned in writing. The authority then needs to give that person a reasonable opportunity to make representations requesting the exclusion of the information and explaining why the information is commercially confidential (*section 78T(2)*).

17.14 The ENFORCING AUTHORITY then needs to determine, taking into account any representations received, whether the information is, or is not, commercially confidential.

17.15 If the ENFORCING AUTHORITY determines that the information is commercially confidential, that information is excluded from the REGISTER. However, the authority must include on its REGISTER a statement indicating the existence of excluded information of the relevant kind (*section 78R(7)*). This means, for example, that if details of a REMEDIATION

NOTICE are excluded, the statement records that the particulars of such a notice have been excluded.

17.16 If the ENFORCING AUTHORITY determines that the information is not commercially confidential, it notifies the person concerned. That person then has twenty-one days in which he can appeal to the SECRETARY OF STATE (*section 78T(3)*). While any appeal is pending, the information is not included on the REGISTER. If the SECRETARY OF STATE determines that the information is commercially confidential, then the information is excluded with a statement about the exclusion being entered on the REGISTER. If the SECRETARY OF STATE determines that the information is not commercially confidential, or if the appeal is withdrawn, the ENFORCING AUTHORITY includes it on its REGISTER seven days afterwards.

17.17 If no appeal is made within twenty-one days of the date on which the ENFORCING AUTHORITY notified the person concerned of its determination, the ENFORCING AUTHORITY enters the information on its REGISTER.

17.18 Where any information is excluded from a REGISTER on the grounds of commercial confidentiality, that exclusion will generally lapse after four years with the information being treated as no longer being commercially confidential (*section 78T(8)*). This means that where information has been excluded, the ENFORCING AUTHORITY will need to put arrangements in place to ensure that information is included on the REGISTER once the four year period has passed.

17.19 However, the person who furnished the information can apply to the ENFORCING AUTHORITY for information to remain excluded. The authority then determines whether the information is still commercially confidential, and acts accordingly. The same arrangements apply for any appeal against this determination as apply in the case of an original determination (*section 78T(9)*).

18 - Procedures Relating to Special Sites

Introduction

18.1 Regulations 2 and 3 of the Contaminated Land (England) Regulations 1999, together with Schedule 1 of those Regulations, prescribe various descriptions of CONTAMINATED LAND which are required to be designated as SPECIAL SITES. An explanation of these descriptions is set out in Annex 4 to this circular.

18.2 The actual designation of any individual site is made by the LOCAL AUTHORITY or, in any case where there is a dispute between the LOCAL AUTHORITY and the ENVIRONMENT AGENCY, by the SECRETARY OF STATE, on the basis that the land meets one or more of these descriptions.

18.3 The effect of any such designation is that the ENVIRONMENT AGENCY takes over from the LOCAL AUTHORITY as the ENFORCING AUTHORITY for that site. In carrying out its role as an ENFORCING AUTHORITY, the ENVIRONMENT AGENCY is subject to the same requirements under the primary and secondary legislation and statutory guidance as would be a LOCAL AUTHORITY.

18.4 From the point of view of the OWNER or occupier of the land, or an APPROPRIATE PERSON, the main procedural difference resulting from a designation will be that any appeal against a REMEDIATION NOTICE will be to the Secretary of State and not to the magistrates' court.

The Identification of Special Sites

IDENTIFICATION BY THE LOCAL AUTHORITY

18.5 Whenever the LOCAL AUTHORITY has identified any CONTAMINATED LAND, it will need to consider whether that land meets one or more of the descriptions prescribed in the Regulations, and should therefore be designated as a SPECIAL SITE (*section 78C(1)*). It will also need to keep this question under review as further information becomes available.

18.6 If the LOCAL AUTHORITY considers, at any time, that some particular CONTAMINATED LAND might be required to be designated as a SPECIAL SITE, it needs to request the advice of the ENVIRONMENT AGENCY (*section 78C(3)*). If the LOCAL AUTHORITY does not consider that the land might be required to be designated, it does not need to consult the ENVIRONMENT AGENCY.

18.7 The LOCAL AUTHORITY then needs to decide, having regard to any such advice received, whether or not the land is required to be designated (*section 78C(3)*). If it decides that it is, the authority must give notice in writing to:

(a) the ENVIRONMENT AGENCY;

(b) the OWNER of the land;

(c) any person who appears to be the occupier of all or part of the land; and

(d) each person who appears to be an APPROPRIATE PERSON (*sections 78C(1)(b) & 78C(2)*).

18.8 The ENVIRONMENT AGENCY then needs to consider whether it agrees with the LOCAL AUTHORITY'S decision that the land should be designated.

18.9 If it does not agree, it must notify the LOCAL AUTHORITY within twenty-one days of the LOCAL AUTHORITY'S notification, giving a statement of its reasons for disagreeing (*section 78D(1)(b)*). It also needs to copy the notification and statement to the SECRETARY OF STATE (*section 78D(2)*). The LOCAL AUTHORITY must then refer its decision to the SECRETARY OF STATE (*section 78D(1)*).

18.10 If the ENVIRONMENT AGENCY agrees with the LOCAL AUTHORITY'S decision, or if it fails to notify its disagreement within the twenty-one days allowed, the CONTAMINATED LAND in question will be designated as a SPECIAL SITE (see paragraphs 18.20 to 18.22 below).

IDENTIFICATION BY THE ENVIRONMENT AGENCY

18.11 The ENVIRONMENT AGENCY also needs to consider whether any CONTAMINATED LAND should be designated as a SPECIAL SITE. If at any time it considers that any such land should be designated, it needs to notify in writing the LOCAL AUTHORITY in whose area that land is situated (*section 78C(4)*).

18.12 The ENVIRONMENT AGENCY may take this view on the basis of information received from the LOCAL AUTHORITY or information it obtains itself, for example under its other pollution control functions. However, the basis on which it reaches such a decision must be whether or not it considers that the land meets one or more of the descriptions prescribed in the Regulations. The ENVIRONMENT AGENCY is not entitled to apply any different tests to those which the LOCAL AUTHORITY would apply.

18.13 The LOCAL AUTHORITY must then decide whether or not it agrees with the ENVIRONMENT AGENCY that the CONTAMINATED LAND should be designated a SPECIAL SITE. Once it has reached a decision, it must notify in writing the persons identified in paragraph 18.7 above of its decision (*section 78C(5)*).

18.14 If the LOCAL AUTHORITY agrees with the ENVIRONMENT AGENCY, the land is designated a SPECIAL SITE (see paragraphs 18.20 to 18.22 below).

18.15 If the LOCAL AUTHORITY disagrees with the ENVIRONMENT AGENCY, the Agency has an opportunity to reaffirm its view that the land should be designated. If it wishes to do this, it must notify the LOCAL AUTHORITY, in writing, within twenty-one days of receiving from the LOCAL AUTHORITY notification of its decision. The Agency must provide a statement of the reasons why it considers the land should be designated (*section 78D(1)(b)*) and send this information to the SECRETARY OF STATE (*section 78D(2)*). The LOCAL AUTHORITY must then refer its decision to the SECRETARY OF STATE (*section 78D(1)*).

REFERRAL OF DECISIONS TO THE SECRETARY OF STATE

18.16 If the LOCAL AUTHORITY receives any notification from the ENVIRONMENT AGENCY that the Agency disagrees with a decision it has made concerning the designation or non-designation of any CONTAMINATED LAND as a SPECIAL SITE, the LOCAL AUTHORITY must refer that decision to the SECRETARY OF STATE.

18.17 In doing so, the LOCAL AUTHORITY must send the SECRETARY OF STATE a statement setting out the reasons why it reached its decision (*section 78D(1)*). It must also notify in writing the persons identified in paragraph 18.7 above of the fact that it has referred its decision to the SECRETARY OF STATE (*section 78D(3)*).

18.18 The SECRETARY OF STATE then decides whether he considers that all, or part, of the CONTAMINATED LAND in question meets one or more of the descriptions prescribed in the Regulations as being required to be designated a SPECIAL SITE. If he decides that some land should be designated, then it is so designated (*section 78D(4)(a)*).

18.19 The SECRETARY OF STATE is under a duty to notify in writing the LOCAL AUTHORITY and the persons identified in paragraph 18.7 above of his decision (*section 78D(4)(b)*).

THE ACTUAL DESIGNATION AS A SPECIAL SITE

18.20 In any case where the LOCAL AUTHORITY'S decision that land should be designated a SPECIAL SITE has not been referred to the SECRETARY OF STATE, the notification it gives of that decision takes effect as the designation on the following basis:

(a) if the ENVIRONMENT AGENCY notifies the LOCAL AUTHORITY that it agrees with its decision, the designation takes effect on the day after that notification; or

(b) if no such notification is given, the designation takes effect on the day after a period of twenty-one days has elapsed since the LOCAL AUTHORITY notified the ENVIRONMENT AGENCY of its original decision (*section 78C(6)*).

18.21 Where a designation takes effect in this way, the LOCAL AUTHORITY must notify in writing the same categories of person as it notified of its original decision (*section 78C(6)*). It must also enter the relevant particulars on its REGISTER (*section 78R(1)(e)*; see paragraphs 17.1 to 17.19 above).

18.22 In any case where a decision has been referred to the SECRETARY OF STATE, and he decides that some CONTAMINATED LAND should be designated a SPECIAL SITE, the notice he gives of this decision to the LOCAL AUTHORITY and the persons identified in paragraph 18.7 above serves as the actual designation. The designation takes effect on the day after he gives the notification (*sections 78D(5) & (6)*). The LOCAL AUTHORITY and the ENVIRONMENT AGENCY must enter the relevant particulars of the SECRETARY OF STATE'S notification onto their respective REGISTERS (see paragraphs 17.1 to 17.19 above).

Remediation of Special Sites

18.23 In general, the procedures relating to the REMEDIATION of a SPECIAL SITE are the same as for any other CONTAMINATED LAND, with the exception that the ENVIRONMENT AGENCY is the ENFORCING AUTHORITY, rather than the LOCAL AUTHORITY. In particular, the ENVIRONMENT AGENCY is required to have regard to the statutory guidance on remediation (*Chapter C)* and the recovery of costs (*Chapter E*), and to act in accordance with the statutory guidance on EXCLUSIONS from, and APPORTIONMENT of, liability (*Chapter D*).

18.24 In some cases the designation of a SPECIAL SITE may be made after a REMEDIATION NOTICE has been served or after the LOCAL AUTHORITY has started carrying out REMEDIATION itself.

18.25 If a REMEDIATION NOTICE has already been served, the ENVIRONMENT AGENCY needs to decide whether or not to adopt the existing REMEDIATION NOTICE (*section 78Q(1)*). For example, it may consider that:

(a) the REMEDIATION ACTIONS specified in the existing notice are still appropriate;

(b) those REMEDIATION ACTIONS should not be carried out; or

(c) additional, or alternative, REMEDIATION ACTIONS should be carried out.

18.26 If the ENVIRONMENT AGENCY decides to adopt the REMEDIATION NOTICE, it must notify in writing the LOCAL AUTHORITY which originally served the notice, and the person or persons on whom the notice was served (*section 78Q(1)(a)*). The notice then has effect as if it had been given by the Agency (*section 78Q(1)(b)*). It is also good practice to send a copy of such a notification to anyone else to whom a copy of the original REMEDIATION NOTICE was sent (*regulation 5*).

18.27 The adoption of a REMEDIATION NOTICE by the ENVIRONMENT AGENCY means that the Agency has the power to enforce it, bringing a prosecution and carrying out the REMEDIATION itself if the notice is not complied with.

18.28 If the ENVIRONMENT AGENCY does not adopt a REMEDIATION NOTICE, that notice ceases to have effect, and the person on whom it was served is no longer obliged to comply

with its requirements. But the ENVIRONMENT AGENCY then needs to decide whether it is required to serve a further REMEDIATION NOTICE. In doing so, it must consult in the same manner as would a LOCAL AUTHORITY for any CONTAMINATED LAND which is not a SPECIAL SITE. Except where urgency is involved, the ENVIRONMENT AGENCY is prevented from serving any REMEDIATION NOTICE until three months have elapsed since the LOCAL AUTHORITY, or the Secretary of State, gave notification that the land was designated a SPECIAL SITE (*sections 78H(3)(b) & (c)*).

18.29 If the LOCAL AUTHORITY has begun to carry out any REMEDIATION itself before the land is designated a SPECIAL SITE, the LOCAL AUTHORITY needs to decide whether to continue carrying out that REMEDIATION (*section 78Q(2)(a)*). Whatever it decides, it is entitled to recover the reasonable costs it incurs, or has already incurred, in carrying out the REMEDIATION, even though it is no longer the ENFORCING AUTHORITY (*section 78Q(2)(b)*).

18.30 As an ENFORCING AUTHORITY, the ENVIRONMENT AGENCY is under a duty to maintain a REGISTER (*section 78R(1)*), with an entry for each SPECIAL SITE. Each time it enters any particulars onto its REGISTER, the ENVIRONMENT AGENCY must send a copy of those particulars to the LOCAL AUTHORITY in whose area the land is situated (*section 78R(4)*; see paragraphs 17.4 to 17.6 above). The LOCAL AUTHORITY then must enter those particulars onto its own REGISTER (*section 78R(6)*).

Termination of a Designation

18.31 The ENVIRONMENT AGENCY can inspect the SPECIAL SITE from time to time, in order to keep its condition under review (*section 78Q(3)*). In particular, the ENVIRONMENT AGENCY needs to consider whether the land still meets one or more of the descriptions of land prescribed in the Regulations.

18.32 If it decides that the land no longer meets one or more of those descriptions, it must also decide whether it wishes to terminate that land's designation as a SPECIAL SITE. It is not obliged to terminate the designation as soon as the land ceases to meet any of the descriptions of land prescribed in the Regulations (*section 78Q(4)*). It may choose, for example, to wait until REMEDIATION has been completed on the land.

18.33 If the ENVIRONMENT AGENCY decides to terminate any designation, it must notify in writing the SECRETARY OF STATE and the LOCAL AUTHORITY in whose area the land is situated. The termination takes effect from whatever date is specified by the ENVIRONMENT AGENCY (*section 78Q(4)*). Both the ENVIRONMENT AGENCY and the LOCAL AUTHORITY then need to enter particulars of this notification onto their respective REGISTERS (*section 78R(1)(g)*).

ANNEX 3 - [Draft] Statutory Guidance

Contents of this Annex

CHAPTER A - Statutory Guidance on the Definition of Contaminated Land

PART 1 – Scope of the Chapter

A.1 The statutory guidance in this Chapter is issued under section 78A(2), (5) and (6) of Part IIA of the Environmental Protection Act 1990 and provides guidance on applying the definition of contaminated land.

A.2 "Contaminated land" is defined at section 78A(2) as:

> "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) pollution of controlled waters is being, or is likely to be caused; ..."

A.3 Section 78A(5) further provides that:

> "the questions -
>
> "(a) what harm is to be regarded as "significant"
>
> "(b) whether the possibility of significant harm being caused is "significant"
>
> "(c) whether pollution of controlled waters is being, or is likely to be caused,
>
> "shall be determined in accordance with guidance issued .... by the Secretary of State".

A.4 In determining these questions the local authority is therefore required to act in accordance with the guidance contained in this Chapter.

A.5 As well as defining contaminated land, section 78A(2) further provides that:

> " ..... in determining whether any land appears to be such 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"

A.6 Guidance on the manner in which that determination is to be made is set out in Part 3 of the statutory guidance in Chapter B.

PART 2 – Definitions of Terms and General Material

A.7 Unless otherwise stated, any word, term or phrase given a specific meaning in Part IIA of the Environmental Protection Act 1990 has the same meaning for the purposes of the guidance in this Chapter.

A.8 Any reference to "Part IIA" means "Part IIA of the Environmental Protection Act 1990". Any reference to a "section" in primary legislation means a section of the Environmental Protection Act 1990, unless it is specifically stated otherwise.

Risk Assessment

A.9 The definition of contaminated land is based upon the principles of risk assessment. For the purposes of this guidance, "risk" is defined as the combination of:

(a) the probability, or frequency, of occurrence of a defined hazard (for example, exposure to a property of a substance with the potential to cause harm); and

(b) the magnitude (including the seriousness) of the consequences.

A.10 The guidance below follows established approaches to risk assessment, including the concept of contaminant-pathway-receptor. (In the technical literature, this is sometimes referred to as source-pathway-target.)

A.11 There are two steps in applying the definition of contaminated land. The first step is for the local authority to satisfy itself that a "contaminant", a "pathway" (or pathways), and a "receptor" have been identified with respect to that land. These three concepts are defined for the purposes of this Chapter in paragraphs A.12 to A.14 below.

A.12 A contaminant is a substance which is in, on or under the land and which has the potential to cause harm or to cause pollution of controlled waters.

A.13 A receptor is either:

(a) a living organism, a group of living organisms, an ecological system or a piece of property which

(i) is in a category listed in Table A (see below) as a type of receptor, and

(ii) is being, or could be, harmed, by a contaminant; or

(b) controlled waters which are being, or could be, polluted by a contaminant.

A.14 A pathway is one or more routes or means by, or through, which a receptor:

(a) is being exposed to, or affected by, a contaminant, or

(b) could be so exposed or affected.

A.15 It is possible for a pathway to be identified for this purpose on the basis of a reasonable assessment of the general scientific knowledge about the nature of a particular contaminant and of the circumstances of the land in question. Direct observation of the pathway is not necessary.

A.16 The identification of each of these three elements is linked to the identification of the others. A pathway can only be identified if it is capable of exposing an identified receptor to an identified contaminant. That particular contaminant should likewise be capable of harming or, in the case of controlled waters, be capable of polluting that particular receptor.

A.17 In this Chapter, a "pollutant linkage" means the relationship between a contaminant, a pathway and a receptor, and a "pollutant" means the contaminant in a pollutant linkage. Unless all three elements of a pollutant linkage are identified in respect of a piece of land, that land should not be identified as contaminated land. There may be more than one pollutant linkage on any given piece of land.

A.18 For the purposes of determining whether a pollutant linkage exists (and for describing any such linkage), the local authority may treat two or more substances as being a single substance, in any case where:

(a) the substances are compounds of the same element, or have similar molecular structures; and

(b) it is the presence of that element, or the particular type of molecular structures, that determines the effect that the substances may have on the receptor which forms part of the pollutant linkage.

A.19 The second step in applying the definition of contaminated land is for the local authority to satisfy itself that both:

(a) such a pollutant linkage exists in respect of a piece of land; and

(b) that pollutant linkage:

(i) is resulting in significant harm being caused to the receptor in the pollutant linkage,

(ii) presents a significant possibility of significant harm being caused to that receptor,

(iii) is resulting in the pollution of the controlled waters which constitute the receptor, or

(iv) is likely to result in such pollution.

A.20 In this Chapter, a "significant pollutant linkage" means a pollutant linkage which forms the basis for a determination that a piece of land is contaminated land. A "significant pollutant" is a pollutant in a "significant pollutant linkage".

A.21 The guidance in Part 3 below relates to questions about significant harm and the significant possibility of such harm being caused. The guidance in Part 4 below relates to the pollution of controlled waters.

PART 3 – Significant Harm and the Significant Possibility of Significant Harm

A.22 Section 78A(4) defines "harm" as meaning "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) provides that what harm is to be regarded as "significant" and whether the possibility of significant harm being caused is significant shall be determined in accordance with this guidance.

What Harm is to be Regarded as "Significant"

A.23 The local authority should regard as significant only harm which is both:

(a) to a receptor of a type listed in Table A, and

(b) within the description of harm specified for that type of receptor in that Table.

TABLE A – CATEGORIES OF SIGNIFICANT HARM

	Type of Receptor	**Description of harm to that type of receptor that is to be regarded as significant harm**
1	Human beings	Death, disease, serious injury, genetic mutation, birth defects or the impairment of reproductive functions. For these purposes, disease is to be taken to mean an unhealthy condition of the body or a part of it and can include, for example, cancer, liver dysfunction or extensive skin ailments. Mental dysfunction is included only insofar as it is attributable to the effects of a pollutant on the body of the person concerned. In this Chapter, this description of significant harm is referred to as a "human health effect".
2	Any ecological system, or living organism forming part of such a system, within a location which is: • an area notified as an area of special scientific interest under section 28 of the Wildlife and Countryside Act 1981; • any land declared a national nature reserve under section 35 of that Act; • any area designated as a marine nature reserve under section 36 of that Act; • an Area of Special Protection for Birds, established under section 3 of that Act; • any European Site within the meaning of regulation 10 of the Conservation (Natural Habitats etc) Regulations 1994 (ie Special Areas of Conservation and Special Protection Areas); • any habitat or site afforded policy protection under paragraph 13 of Planning Policy Guidance Note 9 (PPG9) on nature conservation (ie 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.	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. In determining what constitutes such harm, the local authority should have regard to the advice of English Nature and to the requirements of the Conservation (Natural Habitats etc) Regulations 1994. In this Chapter, this description of significant harm is referred to as an "ecological system effect".

	Type of Receptor	Description of harm to that type of receptor that is to be regarded as significant harm
3	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 pollutant 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".
4	Property in the form of buildings. For this purpose, "building" has the meaning given in section 336(1) of the Town and Country Planning Act 1990 (ie it includes "any structure or erection, and any part of a building… but does not include plant or machinery comprised in a building").	Structural failure, substantial damage or substantial interference with any right of occupation. For this purpose, 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. Additionally, in the case of a scheduled Ancient Monument, substantial damage should 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".

A.24 The local authority should not regard harm to receptors of any type other than those mentioned in Table A as being significant harm for the purposes of Part IIA. For example, harm to ecological systems outside the descriptions in the second entry in the table should be disregarded. Similarly, the authority should not regard any other description of harm to receptors of the types mentioned in Table A as being significant harm.

A.25 The 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.

A.26 For the purposes of this guidance, the "current use" means any use which is currently being made, or is likely to be made, of the land. This definition is subject to the following qualifications:

(a) the use must be consistent with any existing planning permission, or be otherwise lawful under town and country planning legislation;

(b) the current use should be taken to include any temporary use, permitted under that legislation, to which the land is, or is likely to be, put from time to time;

(c) the current use includes future uses or developments which do not require a new, or amended, grant of planning permission (but see also paragraph A.35 below);

(d) the current use should, nevertheless, be taken to include any likely informal recreational use of the land, whether authorised by the owners or occupiers or not, (for example, children playing on the land); and

(e) in the case of agricultural land, however, 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.

Whether the Possibility of Significant Harm Being Caused is Significant

A.27 As stated in paragraph A.9 above, the guidance on determining whether a particular possibility is significant is based on the principles of risk assessment, and in particular on considerations of the magnitude or consequences of the different types of significant harm caused. The term "possibility of significant harm being caused" should be taken as referring to a measure of the probability, or frequency, of the occurrence of circumstances which would lead to significant harm being caused.

A.28 The local authority should take into account the following factors in deciding whether the possibility of significant harm being caused is significant:

(a) the nature and degree of harm;

(b) the susceptibility of the receptors to which the harm might be caused; and

(c) the timescale within which the harm might occur.

A.29 In considering the timescale, the authority should take into account any evidence that the current use of the land (as defined in paragraphs A.25 and A.26 above) will cease in the foreseeable future.

A.30 The local authority should regard as a significant possibility any possibility of significant harm which meets the conditions set out in Table B for the description of significant harm under consideration.

TABLE B - SIGNIFICANT POSSIBILITY OF SIGNIFICANT HARM

	Descriptions Of Significant Harm (As Defined In Table A)	**Conditions For There Being A Significant Possibility Of Significant Harm**
1	Human health effects arising from • the intake of a contaminant, or • other direct bodily contact with a contaminant.	If the amount of the pollutant in the pollutant linkage in question: • which a human receptor in that linkage might take in, or • to which such a human might otherwise be exposed, as a result of the pathway in that linkage, would represent an unacceptable medical risk, assessed on the basis of relevant information on the toxicological properties of that pollutant. Such an assessment should take into account: • the likely total intake of, or exposure to, the substance or substances which form the pollutant, from all sources including that from the pollutant linkage in question; • the relative contribution of the pollutant linkage in question to the likely aggregate intake of, or exposure to, the relevant substance or substances; and • the duration of intake or exposure resulting from the pollutant linkage in question. Toxicological properties should be taken to include carcinogenic, mutagenic, teratogenic, pathogenic, endocrine-disrupting and other similar properties.
2	All other human health effects (particularly by way of explosion or fire).	If the probability, or frequency, of occurrence of significant harm of that description is unacceptable, assessed on the basis of relevant information concerning: • that type of pollutant linkage, or • that type of significant harm arising from other causes. Such an assessment should take into account the levels of risk which have been judged unacceptable in other similar contexts.
3	All ecological system effects.	If significant harm of that description is more likely than not to result from the pollutant linkage in question, taking into account relevant information for that type of pollutant linkage, particularly in relation to the ecotoxicological effects of the pollutant.
4	All animal and crop effects.	If significant harm of that description is more likely than not to result from the pollutant linkage in question, taking into account relevant information for that type of pollutant linkage, particularly in relation to the ecotoxicological effects of the pollutant.

	Descriptions Of Significant Harm (As Defined In Table A)	Conditions For There Being A Significant Possibility Of Significant Harm
5	All building effects	If significant harm of that description is more likely than not to result from the pollutant linkage in question during 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 pollutant linkage.

A.31 In Table B, 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 the determination of whether any land is contaminated land for the purposes of Part IIA, in that the use of the information is consistent with providing a level of protection of risk in line with the qualitative criteria set out in Tables A and B.

A.32 In making any assessment of what is unacceptable in relation to human health, the local authority should give particular weight to conclusions that significant harm which might be caused by the pollutant linkage which:

(a) would be irreversible or incapable of being treated;

(b) would affect a substantial number of people;

(c) would result from a single incident such as a fire or an explosion; or

(d) would be likely to result from a short-term (that is, less than 24-hour) exposure to the pollutant.

A.33 In addition, the local authority may also determine that there is a significant possibility of significant harm with respect to a non-human receptor in any case where the conditions in the third, fourth and fifth entries in Table B are not met, but where:

(a) the significant harm would result from a single incident such as a fire or explosion;

(b) the ecological system in a high proportion of a relevant habitat or site would be devastated; or

(c) the significant harm would be likely to result from a short-term (that is, less than 24-hour) exposure of the receptor to the pollutant.

A.34 The possibility of significant harm being caused as a result of any change of use of any land to one which is not a current use of that land (as defined in paragraph A.26 above) should not be regarded as a significant possibility for the purposes of this Chapter.

A.35 When considering the possibility of significant harm being caused in relation to any future use or development which falls within the description of a "current use" as a result of paragraph A.26(c) above, the local authority should assume that if the future use is introduced, or the development carried out, this will be done in accordance with any existing planning permission for that use or development. In particular, the local 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; and

(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.

PART 4 - The Pollution of Controlled Waters

A.36 Section 78A(9) defines the pollution of controlled waters as:

"the entry into controlled waters of any poisonous, noxious or polluting matter or any solid waste matter".

A.37 Before determining that pollution of controlled waters is being, or is likely to be, caused, the local authority should be satisfied that a substance is continuing to enter controlled waters or is likely to enter controlled waters. For this purpose, the local authority should regard something as being "likely" when they judge it more likely than not to occur.

A.38 Land should not be designated as contaminated land where:

(a) a substance is already present in controlled waters;

(b) entry into controlled waters of that substance from land has ceased; and

(c) it is not likely that further entry will take place.

A.39 Substances should be regarded as having entered controlled waters where:

(a) they are dissolved or suspended in those waters; or

(b) if they are immiscible with water, they have direct contact with those waters on or beneath the surface of the water.

A.40 The term "continuing to enter" should be taken to mean any entry additional to any which has already occurred.

CHAPTER B - Statutory Guidance on the Identification of Contaminated Land

PART 1 - Scope of the Chapter

B.1 The statutory guidance in this Chapter is issued under sections 78A(2) and 78B(2) of Part IIA of the Environmental Protection Act 1990, and provides guidance on the inspection of its area by a local authority and the manner in which an authority is to determine whether any land appears to it to be contaminated land.

B.2 Section 78B(1) provides that:

> "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.3 Section 78B(2) further provides that:

> "In performing [these] functions .... a local authority shall act in accordance with any guidance issued for the purpose by the Secretary of State."

B.4 Section 78A(2) also provides that:

> " '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) pollution of controlled waters is being, or is likely to be, caused;
>
> "and, in determining whether any land appears to be such 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."

B.5 The local authority is therefore required to act in accordance with the statutory guidance contained in this Chapter.

B.6 The questions of what harm is to be regarded as significant, whether the possibility of significant harm being caused is significant, and whether pollution of controlled waters is being or is likely to be caused are to be determined in accordance with guidance contained in Chapter A.

PART 2 - Definitions of Terms

B.7 Unless otherwise stated, any word, term or phrase given a specific meaning in Part IIA of the Environmental Protection Act 1990, or in the guidance at Chapter A, has the same meaning for the purposes of the guidance in this Chapter.

B.8 Any reference to "Part IIA" means "Part IIA of the Environmental Protection Act 1990". Any reference to a "section" in primary legislation means a section of the Environmental Protection Act 1990, unless it is specifically stated otherwise.

PART 3 - The Local Authority's Inspection Duty

Strategic Approach to Inspection

B.9 In carrying out its inspection duty under section 78B(1), the local authority should take a strategic approach to the identification of land which merits detailed individual inspection. This approach should:

(a) be rational, ordered and efficient;

(b) proportionate to the seriousness of any actual or potential risk;

(c) seek to ensure that the most pressing and serious problems are located first;

(d) ensure that resources are concentrated on investigating in areas where the authority is most likely to identify contaminated land; and

(e) ensure that the local authority efficiently identifies requirements for the detailed inspection of particular areas of land.

B.10 In developing this strategic approach the local authority should reflect local circumstances. In particular it should consider:

(a) any available evidence that significant harm or pollution of controlled waters is actually being caused;

(b) the extent to which any receptor (which is either of a type listed in Table A in Chapter A or is controlled waters) is likely to be found in any of the different parts of the authority's area;

(c) the extent to which any of those receptors is likely to be exposed to a contaminant (as defined in Chapter A), for example as a result of the use of the land or of the geological and hydrogeological features of the area;

(d) the extent to which information on land contamination is already available;

(e) the history, scale and nature of industrial or other activities which may have contaminated the land in different parts of its area;

(f) the nature and timing of past redevelopment in different parts of its area;

(g) the extent to which remedial action has already been taken by the authority or others to deal with land-contamination problems or is likely to be taken as part of an impending redevelopment; and

(h) the extent to which other regulatory authorities are likely to be considering the possibility of harm being caused to particular receptors or the likelihood of any pollution of controlled waters being caused in particular parts of the local authority's area.

B.11 In developing its strategic approach, the local authority should consult the Environment Agency and other appropriate public authorities, such as the county council (where one exists), statutory regeneration bodies, English Nature, English Heritage and the Ministry of Agriculture, Fisheries and Food.

B.12 The local authority should set out its approach as a written strategy, which it should formally adopt and publish. This strategy should be published within 15 months of the issue of this guidance. As soon as its strategy is published, the local authority should send a copy to the Environment Agency.

B.13 The local authority should keep its strategy under periodic review.

B.14 The local authority should not await the publication of its strategy before commencing more detailed work investigating particular areas of land, where this appears necessary.

Contents of the Strategy

B.15 Strategies are likely to vary both between local authorities and between different parts of an authority's area, reflecting the different problems associated with land contamination in different areas. The local authority should include in its strategy:

(a) a description of the particular characteristics of its area and how that influences its approach;

(b) the authority's particular aims, objectives and priorities;

(c) appropriate timescales for the inspection of different parts of its area; and

(d) arrangements and procedures for:

(i) considering land for which it may itself have responsibilities by virtue of its current or former ownership or occupation,

(ii) obtaining and evaluating information on actual harm, or pollution of controlled waters,

(iii) identifying receptors, and assessing the possibility or likelihood that they are being, or could be, exposed to or affected by a contaminant,

(iv) obtaining and evaluating existing information on the possible presence of contaminants and their effects,

(v) liaison with, and responding to information from, other statutory bodies, including, in particular, the Environment Agency, English Nature and the Ministry of Agriculture, Fisheries and Food (see paragraphs B.16 and B.17 below),

(vi) liaison with, and responding to information from, the owners or occupiers of land, and other relevant interested parties,

(vii) responding to information or complaints from members of the public, businesses and voluntary organisations,

(viii) planning and reviewing a programme for inspecting particular areas of land,

(ix) carrying out the detailed inspection of particular areas of land,

(x) reviewing and updating assumptions and information previously used to assess the need for detailed inspection of different areas, and managing new information, and

(xi) managing information obtained and held in the course of carrying out its inspection duties.

Information from Other Statutory Bodies

B.16 Other regulatory authorities may be able to provide information relevant to the identification of land as contaminated land, as a result of their various complementary functions. The local authority should seek to make specific arrangements with such other bodies to avoid unnecessary duplication in investigation.

B.17 For example, the Environment Agency has general responsibilities for the protection of the water environment. It monitors the quality of controlled waters and in doing so may discover land which would appropriately be identified as contaminated land by reason of pollution of controlled waters which is being, or is likely to be, caused.

Inspecting Particular Areas of Land

B.18 Applying the strategy will result in the identification of particular areas of land where it is possible that a pollutant linkage exists. Subject to the guidance in paragraphs B.22 to B.25 and B.27 to B.30 below, the local authority should carry out a detailed inspection of any such area to obtain sufficient information for the authority:

(a) to determine, in accordance with the guidance on the manner of determination in Part 4 below, whether that land appears to be contaminated land; and

(b) to decide whether any such land falls within the definition of a special site prescribed in regulations 2 and 3 of the Contaminated Land (England) Regulations 1999, and is therefore required to be designated as a special site.

B.19 To be sufficient for the first of these purposes the information should include, in particular, evidence of the actual presence of a pollutant.

B.20 Detailed inspection may include any or all of the following:

(a) the collation and assessment of documentary information, or other information from other bodies;

(b) a visit to the particular area for the purposes of visual inspection and, in some cases, limited sampling (for example of surface deposits); or

(c) intrusive investigation of the land (for example by exploratory excavations).

B.21 Section 108 of the Environment Act 1995 gives the local authority the power to authorise a person to exercise specific powers of entry. For the purposes of this Chapter, any detailed inspection of land carried out through use of this power by the local authority is referred to as an "inspection using statutory powers of entry".

B.22 Before the local authority carries out an inspection using statutory powers of entry, it should be satisfied, on the basis of any information already obtained:

(a) in all cases, that there is a reasonable possibility that a pollutant linkage (as defined in Chapter A) exists on the land; this implies that not only must the authority be satisfied that there is a reasonable possibility of the presence of a contaminant, a receptor and a pathway, but also that these would together create a pollutant linkage; and

(b) in cases involving an intrusive investigation, that it is further likely that both the contaminant and receptor are actually present.

B.23 The local authority should not carry out any inspection using statutory powers of entry which takes the form of intrusive investigation if:

(a) it has already been provided with detailed information on the condition of the land, whether by the Environment Agency or some other person such as the owner of the land, which provides an appropriate basis upon which the local authority can determine whether the land is contaminated land in accordance with the requirements of the guidance in this Chapter; or

(b) a person offers to provide such information within a reasonable and specified time, and then provides such information within that time.

B.24 The local authority should carry out any intrusive investigation in accordance with appropriate technical procedures for such investigations. It should also ensure that it takes all reasonable precautions to avoid harm or water pollution which might be caused as a result of its investigation.

B.25 If at any stage, the local authority considers, on the basis of information obtained from a detailed inspection, that there is no longer a reasonable possibility that a particular pollutant linkage exists on the land, the authority should not carry out any further detailed inspection for that pollutant linkage.

Land which may be a Special Site

B.26 If land has been determined to be contaminated land and it also falls within one or more of the "special sites" descriptions prescribed in the Contaminated Land (England) Regulations 1999, it is required to be designated as a special site. The Environment Agency then becomes the enforcing authority for that land. It is therefore helpful for the Environment Agency to have a formal role at the inspection stage for any such land.

B.27 Before authorising or carrying out on any land an inspection using statutory powers of entry, the local authority should consider whether, if that land were found to be contaminated land, it would meet any of the descriptions of land prescribed in the Regulations as requiring to be designated a special site.

B.28 If the local authority already has information that this would be the case, the authority should always seek to make arrangements with the Environment Agency for that Agency to carry out the inspection of the land on behalf of the local authority. This might occur, for example, where the prescribed description of land in the Regulations relates to its current or former use, such as land on which a process designated for central control under the Integrated Pollution Control regime has been carried out, or land which is occupied by the Ministry of Defence.

B.29 If the local authority considers that there is a reasonable possibility that a particular pollutant linkage is present, and the presence of a linkage of that kind would require the designation of the land as a special site (were that linkage found to be a significant pollutant linkage), the authority should seek to make arrangements with the Environment Agency for the Agency to carry out the inspection of the land. An example of this kind of pollutant linkage would be the pollution of waters in the circumstances described in regulation 3(b) of the Contaminated Land (England) Regulations 1999.

B.30 Where the Environment Agency is to carry out an inspection on behalf of the local authority, 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. Before the local authority gives such an authorisation, the Environment Agency should satisfy the local authority that the conditions for the use of the statutory powers of entry set out in paragraphs B.22 to B.25 above are met

PART 4 - Determining whether Land Appears to be Contaminated Land

B.31 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), although in discharging it the local authority can choose to rely on information or advice provided by another body such as the Environment Agency. This applies even where the Agency has carried out the inspection of land on behalf of the local authority (see paragraphs B.26 to B.30 above).

Physical Extent of Land

B.32 A determination that land is contaminated land is necessarily made in respect of a specific area of land. In deciding what that area should be, the primary consideration is the extent of the land which is contaminated land. However, there may be situations in which the local authority may consider that separate designations of parts of a larger area of contaminated land may simplify the administration of the consequential actions. In such circumstances, the local authority should do so, taking into account:

(a) the location of significant pollutants in, on or under the land;

(b) the nature of the remediation which might be required; and

(c) the likely identity of those who may be the appropriate persons to bear responsibility for the remediation (where this is reasonably clear at this stage).

B.33 If necessary, the local authority should initially review a wider area, the history of which suggests that contamination problems are likely. It can subsequently refine this down to the precise areas which meet the statutory tests for identification as contaminated land, and use these as the basis for its determination.

B.34 In practice, the land to be covered by a single determination is likely to be the smallest area which is covered by a single remediation action which cannot sensibly be broken down into smaller actions. Subject to this, the land is likely to be the smaller of:

(a) the plots which are separately recorded in the Land Register or are in separate ownership or occupation; and

(b) the area of land in which the presence of significant pollutants has been established.

B.35 The determination should identify the area of contaminated land clearly, including reference to a map or plan at an appropriate scale.

B.36 The local authority should also be prepared to review the decision on the physical extent of the land to be identified in the light of further information.

Making the Determination

B.37 In determining whether any land appears to the local authority to be contaminated land, the authority is required to act in accordance with the guidance on the definition of contaminated land set out in Chapter A. Guidance on the manner in which the local authority should determine whether land appears to it to be contaminated land, by reason of substances in, on or under the land, is set out in paragraphs B.39 to B.51 below.

B.38 There are four possible grounds for the determination, (corresponding to the parts of the definition of contaminated land in section 78A(2)) namely that:

(a) significant harm is being caused (see paragraph B.44 below);

(b) there is a significant possibility of significant harm being caused (see paragraphs B.45 to B.49 below);

(c) pollution of controlled waters is being caused (see paragraph B.50 below); or

(d) pollution of controlled waters is likely to be caused (see paragraph B.51 below).

B.39 In making any determination, the local authority should take all relevant and available evidence into account and carry out an appropriate scientific and technical assessment of that evidence.

B.40 The local authority should identify a particular pollutant linkage or linkages (as defined in Chapter A) as the basis for the determination. All three elements of any pollutant linkage (pollutant, pathway and receptor) should be identified. A linkage which forms a basis for the determination that land is contaminated land is then a "significant pollutant linkage"; and any pollutant which forms part of it is a "significant pollutant".

B.41 The local authority should consider whether:

(a) there is evidence that additive or synergistic effects between potential pollutants, whether between the same substance on different areas of land or between different substances, may result in a significant pollutant linkage;

(b) a combination of several different potential pathways linking one or more potential pollutants to a particular receptor, or to a particular class of receptors, may result in a significant pollutant linkage; and

(c) there is more than one significant pollutant linkage on any land; if there are, each should be considered separately, since different people may be responsible for the remediation.

CONSISTENCY WITH OTHER STATUTORY BODIES

B.42 In making a determination which relates to an "ecological system effect" as defined in Table A of Chapter A, the local authority should adopt an approach consistent with that

adopted by English Nature. To this end, the local authority should consult that authority and have regard to its comments in making its determination.

B.43 In making a determination which relates to pollution of controlled waters the local authority should adopt an approach consistent with that adopted by the Environment Agency in applying relevant statutory provisions. To this end, where the local authority is considering whether pollution of controlled waters is being or is likely to be caused, it should consult the Environment Agency and have regard to its comments before determining whether pollution of controlled waters is being or is likely to be caused.

DETERMINING THAT "SIGNIFICANT HARM IS BEING CAUSED"

B.44 The local authority should determine that land is contaminated land on the basis that significant harm is being caused where:

(a) it has carried out an appropriate scientific and technical assessment of all the relevant and available evidence; and

(b) on the basis of that assessment, it is satisfied on the balance of probabilities that significant harm is being caused.

DETERMINING THAT "THERE IS A SIGNIFICANT POSSIBILITY OF SIGNIFICANT HARM BEING CAUSED"

B.45 The local authority should determine that land is contaminated land on the basis that there is a significant possibility of significant harm being caused (as defined in Chapter A), where:

(a) it has carried out a scientific and technical assessment of the risks arising from the pollutant linkage, according to relevant, appropriate, authoritative and scientifically based guidance on such risk assessments;

(b) that assessment shows that there is a significant possibility of significant harm being caused; and

(c) there are no suitable and sufficient risk management arrangements in place to prevent such harm.

B.46 In following any such guidance on risk assessment, the local authority should be satisfied that it is relevant to the circumstances of the pollutant linkage and land in question, and that any appropriate allowances have been made for particular circumstances.

B.47 To simplify such an assessment of risks, the local authority may use authoritative and scientifically based guideline values for concentrations of the potential pollutants in, on or under the land in pollutant linkages of the type concerned. If it does so, the local authority should be satisfied that:

(a) an adequate scientific and technical assessment of the information on the potential pollutant, using the appropriate, authoritative and scientifically based guideline values, shows that there is a significant possibility of significant harm; and

(b) there are no suitable and sufficient risk management arrangements in place to prevent such harm.

B.48 In using any guideline values, the local authority should be satisfied that:

(a) the guideline values are relevant to the judgement of whether the effects of the pollutant linkage in question constitute a significant possibility of significant harm;

(b) the assumptions underlying the derivation of any numerical values in the guideline values (for example, assumptions regarding soil conditions, the behaviour of potential pollutants, the existence of pathways, the land-use patterns, and the availability of receptors) are relevant to the circumstances of the pollutant linkage in question;

(c) any other conditions relevant to the use of the guideline values have been observed (for example, the number of samples taken or the methods of preparation and analysis of those samples); and

(d) appropriate adjustments have been made to allow for the differences between the circumstances of the land in question and any assumptions or other factors relating to the guideline values.

B.49 The local authority should be prepared to reconsider any determination based on such use of guideline values if it is demonstrated to the authority's satisfaction that under some other more appropriate method of assessing the risks the local authority would not have determined that the land appeared to be contaminated land.

DETERMINING THAT "POLLUTION OF CONTROLLED WATERS IS BEING CAUSED"

B.50 The local authority should determine that land is contaminated land on the basis that pollution of controlled waters is being caused where:

(a) it has carried out an appropriate scientific and technical assessment of all the relevant and available evidence, having regard to any advice provided by the Environment Agency; and

(b) on the basis of that assessment, it is satisfied on the balance of probabilities that both of the following circumstances apply:

(i) a potential pollutant is present in, on or under the land in question, which constitutes poisonous, noxious or polluting matter, or which is solid waste matter, and

(ii) that potential pollutant is entering controlled waters by the pathway identified in the pollutant linkage.

DETERMINING THAT "POLLUTION OF CONTROLLED WATERS IS LIKELY TO BE CAUSED"

B.51 The local authority should determine that land is contaminated land on the basis that pollution of controlled waters is likely to be caused where:

(a) it has carried out an appropriate scientific and technical assessment of all the relevant and available evidence, having regard to any advice provided by the Environment Agency; and

(b) on the basis of that assessment it is satisfied that, on the balance of probabilities, all of the following circumstances apply:

(i) a potential pollutant is present in, on or under the land in question, which constitutes poisonous, noxious or polluting matter, or which is solid waste matter,

(ii) the potential pollutant in question is in such a condition that it is capable of entering controlled waters,

(iii) taking into account the geology and other circumstances of the land in question, there is a pathway (as defined in Chapter A) by which the potential pollutant can enter identified controlled waters,

(iv) that potential pollutant is more likely than not to enter these controlled waters and will remain in a form when it enters the controlled waters that is poisonous, noxious or polluting, or solid waste matter, and

(v) there are no suitable and sufficient risk management arrangements relevant to the pollution linkage in place to prevent such pollution.

Record of the Determination that Land is Contaminated Land

B.52 The local authority should prepare a written record of any determination that particular land is contaminated land. The record should include (by means of a reference to other documents if necessary):

(a) a description of the particular significant pollutant linkage, identifying all three components of pollutant, pathway and receptor;

(b) a summary of the evidence upon which the determination is based;

(c) a summary of the relevant assessment of this evidence; and

(d) a summary of the way in which the authority considers that the requirements of the guidance in this Part and in Chapter A of the guidance have been satisfied.

CHAPTER C - Statutory Guidance on the Remediation of Contaminated Land

PART 1 - Scope of the Chapter

C.1 The statutory guidance in this Chapter is issued under section 78E(5) of Part IIA of the Environmental Protection Act 1990, and provides guidance on the remediation which may be required for any contaminated land.

C.2 Section 78E provides:

> "(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 IIA of the Environmental Protection Act 1990] 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.
>
> "(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".

C.3 The enforcing authority is therefore required to have regard to this guidance when it is:

(a) determining what remediation action it should specify in a remediation notice as being required to be carried out (section 78E(1));

(b) satisfying itself that appropriate remediation is being, or will be, carried out without the service of a notice (section 78H(5)(b)); or

(c) deciding what remediation action it should carry out itself (section 78N).

C.4 The guidance in this Chapter does not attempt to set out detailed technical procedures or working methods. For information on these matters, the enforcing authority may wish to consult relevant technical documents prepared under the contaminated land research programmes of DETR and the Environment Agency, and by other professional and technical organisations.

PART 2 - Definitions of Terms

C.5 Unless otherwise stated, any word, term or phrase given a specific meaning in Part IIA of the Environmental Protection Act 1990, or in the statutory guidance in Chapters A or B, has the same meaning for the purposes of the guidance in this Chapter.

C.6 "Remediation" is defined in section 78A(7) as meaning:

"(a) the doing of anything for the purpose of assessing the condition of-

"(i) the contaminated land in question;

"(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 or waters for the purpose-

"(i) of preventing or minimising, or remedying or mitigating the effects of, any significant harm, or any 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."

C.7 The definition of remediation given in section 78A extends more widely than the common usage of the term, which more normally relates only to the actions defined as "remedial treatment actions" below.

C.8 For the purposes of the guidance in this Chapter, the following definitions apply:

(a) a "remediation action" is any individual thing which is being, or is to be, done by way of remediation;

(b) a "remediation package" is the full set or sequence of remediation actions, within a remediation scheme, which are referable to a particular significant pollutant linkage;

(c) a "remediation scheme" is the complete set or sequence of remediation actions (referable to one or more significant pollutant linkages) to be carried out with respect to the relevant land or waters;

(d) "relevant land or waters" means the contaminated land in question, any controlled waters affected by that land and any land adjoining or adjacent to the contaminated land on which remediation might be required as a consequence of the contaminated land being such land;

(e) an "assessment action" means a remediation action falling within the definition of remediation in section 78A(7)(a) (see paragraph C.6 above);

(f) a "remedial treatment action" means a remediation action falling within the definition in section 78A(7)(b) (see paragraph C.6 above); and

(g) a "monitoring action" means a remediation action falling within the definition in section 78A(7)(c) (see paragraph C.6 above).

C.9 Any reference to "Part IIA" means "Part IIA of the Environmental Protection Act 1990". Any reference to a "section" in primary legislation means a section of the Environmental Protection Act 1990, unless it is specifically stated otherwise.

PART 3 – Securing Remediation

C.10 When the enforcing authority is serving a remediation notice, it will need to specify in that notice any remediation action which is needed in order to achieve remediation of the relevant land or waters to the standard described in Part 4 of this Chapter and which is reasonable for the purposes of section 78E(4) (see Part 5 of this Chapter). Part 6 of this Chapter provides further guidance relevant to the determining the necessary standard of remediation. Part 7 provides guidance on the circumstances in which different types of remediation action may, or may not, be required.

C.11 The enforcing authority should be satisfied that appropriate remediation is being, or will be, carried out without the service of a remediation notice if that remediation would remediate the relevant land or waters to an equivalent, or better, standard than would be achieved by the remediation action or actions that the authority could, at that time, otherwise specify in a remediation notice.

Phased Remediation

C.12 The overall process of remediation on any land or waters may require a phased approach, with different remediation actions being carried out in sequence. For example, the local authority may have obtained sufficient information about the relevant land or waters to enable it to identify the land as falling within the definition of contaminated land, but that information may not be sufficient information for the enforcing authority to be able to specify any particular remedial treatment action as being appropriate. Further assessment actions may be needed in any case of this kind as part of the remediation scheme. In other cases, successive phases of remedial treatment actions may be needed.

C.13 The phasing of remediation is likely to follow a progression from assessment actions, through remedial treatment actions and onto monitoring actions. However, this will not always be the case, and the phasing may omit some stages or revisit others. For example, in some circumstances it may be possible for a remedial treatment action to be carried out without any previous assessment action (because sufficient information is already available). But, conversely, in some instances additional assessment action may be found to be necessary only in the light of information derived during the course of a first phase of a required assessment action or the carrying out of required remedial treatment actions.

C.14 Where it is necessary for the remediation scheme as a whole to be phased, a single remediation notice may not be able to include all of the remediation actions which could eventually be needed. In these circumstances, the enforcing authority should specify in the notice the remediation action or actions which, on the basis of the information available at that time, it considers to be appropriate, taking into account in particular the guidance in Part 7 of this Chapter. In due course, the authority may need to serve further remediation notices which include remediation actions for further phases of the scheme.

C.15 However, before serving any further remediation notice, the enforcing authority must be satisfied that the contaminated land which was originally identified still appears to it to meet the definition in section 78A(2). If, for example, the information obtained as a result of an assessment action reveals that there is not, in fact, a significant possibility of significant harm being caused, nor is there a likelihood of any pollution of controlled waters being caused, then no further assessment, remedial treatment or monitoring action can be required under section 78E(1).

PART 4 - The Standard to which Land or Waters should be Remediated

C.16 The statutory guidance in this Part is issued under section 78E(5)(b) and provides guidance on the standard to which land or waters should be remediated.

The Standard of Remediation

C.17 The Government's intention is that any remediation required under this regime should result in land being "suitable for use". The aim of any remediation should be to ensure that the circumstances of the land are such that, in its current use (as defined in paragraph A.26 of Chapter A) it is no longer contaminated land (as defined in section 78A(2)), and that the effects of any significant harm or pollution of controlled waters which has occurred are

remedied. However, it is always open to the appropriate person to carry out remediation on a broader basis than this, if he considers it in his interests to do so, for example if he wishes to prepare the land for redevelopment.

C.18 The standard to which the relevant land or waters as a whole should be remediated should be established by considering separately each significant pollutant linkage identified on the land in question. For each such linkage, the standard of remediation should be that which would be achieved by the use of a remediation package which forms the best practicable techniques of remediation for:

(a) ensuring that the linkage is no longer a significant pollutant linkage, by doing any one or more of the following:

(i) removing or treating the pollutant;

(ii) breaking or removing the pathway; or

(iii) protecting or removing the receptor; and

(b) remedying the effect of any significant harm or pollution of controlled waters which is resulting, or has already resulted from, the significant pollutant linkage.

C.19 In deciding what represents the best practicable technique for any particular remediation, the enforcing authority should look for the method of achieving the desired results which, in the light of the nature and volume of the significant pollutant concerned and the timescale within which remediation is required:

(a) is reasonable, taking account of the guidance in Part 5; and

(b) represents the best combination of the following qualities:

(i) practicability, both in general and in the particular circumstances of the relevant land or waters;

(ii) effectiveness in achieving the aims set out in paragraph C.18 above; and

(iii) durability in maintaining that effectiveness over the timescale within which the significant harm or pollution of controlled waters may occur.

C.20 Further guidance on how the factors set out in sub-paragraph b) above should be considered is set out in Part 6. The determination of what, in any particular case, represents the best practicable technique of remediation may require a balance to be struck between these factors.

C.21 When considering what would be the best practicable techniques for remediation in any particular case, the enforcing authority should work on the basis of authoritative scientific and technical advice. The authority should consider what comparable techniques have recently been carried out successfully on other land, and also any technological advances and changes in scientific knowledge and understanding.

C.22 Where there is established good practice for the remediation of a particular type of significant pollutant linkage, the authority should assume that this represents the best practicable technique for remediation for a linkage of that type, provided that:

(a) it is satisfied that the use of that means of remediation is appropriate, given the circumstances of the relevant land or waters; and

(b) the remediation actions involved would be reasonable having regard to the cost which is likely to be involved and the seriousness of the harm or pollution of controlled waters in question.

C.23 In some instances, the best practicable techniques of remediation with respect to any significant pollutant linkage may not fully achieve the aim in subparagraph C.18(a), that is to say that if the remediation were to be carried out the pollutant linkage in question would remain a significant pollutant linkage. Where this applies, the standard of remediation with respect to that significant pollutant linkage should be that which, by the use of the best practicable techniques:

(a) comes as close as practicable to achieving the aim in subparagraph C.18(a);

(b) achieves the aim in subparagraph C.18(b); and

(c) puts arrangements in place to remedy the effect of any significant harm or pollution of controlled waters which may be caused in the future as a consequence of the continued existence of the pollutant linkage.

C.24 In addition, the best practicable techniques for remediation with respect to a significant pollutant linkage may, in some circumstances, not fully remedy the effect of past or future significant harm or pollution of controlled waters. Where this is the case the standard of remediation should be that which, by the use of the best practicable techniques, mitigates as far as practicable the significant harm or pollution of controlled waters which has been caused as a consequence of the existence of that linkage, or may be caused in the future as a consequence of its continued existence.

C.25 For any remediation action, package or scheme to represent the best practicable techniques, it should be implemented in accordance with best practice, including any precautions necessary to prevent damage to the environment and any other appropriate quality assurance procedures.

MULTIPLE POLLUTANT LINKAGES

C.26 Where more than one significant pollutant linkage has been identified on the land, it may be possible to achieve the necessary overall standard of remediation for the relevant land or waters as a whole by considering what remediation actions would form part of the appropriate remediation package for each linkage (ie, representing the best practicable techniques of remediation for that linkage) if it were the only such linkage, and then carrying out all of these remediation actions.

C.27 However, the enforcing authority should also consider whether there is an alternative remediation scheme which would, by dealing with the linkages together, be cheaper or otherwise more practicable to implement. If such a scheme can be identified which achieves an equivalent standard of remediation with respect to all of the significant pollutant linkages to which it is referable, the authority should prefer that alternative scheme.

VOLUNTEERED REMEDIATION

C.28 In some cases, the person carrying out remediation may wish to adopt an alternative remediation scheme to that which could be required in a remediation notice. This might

occur, in particular, if the person concerned wished also to prepare the land for redevelopment. The enforcing authority should consider such a remediation scheme as appropriate remediation provided the scheme would achieve at least the same standard of remediation with respect to each of the significant pollutant linkages identified on the land as would be achieved by the remediation scheme which the authority would otherwise specify in a remediation notice.

PART 5 - The Reasonableness of Remediation

C.29 The statutory guidance in this Part is issued under section 78E(5)(c) and provides guidance on the determination by the enforcing authority of what remediation is, or is not, to be regarded as reasonable having regard to the cost which is likely to be involved and the seriousness of the harm or of the pollution of controlled waters to which it relates.

C.30 The enforcing authority should regard a remediation action as being reasonable for the purpose of section 78E(4) if an assessment of the costs likely to be involved and of the resulting benefits shows that those benefits justify incurring those costs. Such an assessment should include the preparation of an estimate of the costs likely to be involved and of a statement of the benefits likely to result. This latter statement need not necessarily attempt to ascribe a financial value to these benefits.

C.31 For these purposes, the enforcing authority should regard the benefits resulting from a remediation action as being the contribution that the action makes, either on its own or in conjunction with other remediation actions, to:

(a) reducing the seriousness of any harm or pollution of controlled waters which might otherwise be caused; or

(b) mitigating the seriousness of any effects of any significant harm or pollution of controlled waters.

C.32 In assessing the reasonableness of any remediation, the enforcing authority should make due allowance for the fact that the timing of expenditure and the realisation of benefits is relevant to the balance of costs and benefits. In particular, the assessment should recognise that:

(a) expenditure which is delayed to a future date will have a lesser impact on the person defraying it than would an equivalent cash sum to be spent immediately;

(b) there may be a gain from achieving benefits earlier but this may also involve extra expenditure; the authority should consider whether the gain justifies the extra costs. This applies, in particular, where natural processes, managed or otherwise, would over time bring about remediation; and

(c) there may be evidence that the same benefits will be achievable in the foreseeable future at a significantly lower cost, for example, through the development of new techniques or as part of a wider scheme of development or redevelopment.

C.33 The identity or financial standing of any person who may be required to pay for any remediation action are not relevant factors in the determination of whether the costs of that action are, or are not, reasonable for the purposes of section 78E(4). (These factors may however be relevant in deciding whether or not the enforcing authority can impose the cost of remediation on that person, either through the service of a remediation notice or through the recovery of costs incurred by the authority; see section 78P and the guidance in Chapter E.)

The Cost of Remediation

C.34 When considering the costs likely to be involved in carrying out any remediation action, the enforcing authority should take into account:

(a) all the initial costs (including tax payable) of carrying out the remediation action, including feasibility studies, design, specification and management, as well as works and operations, and making good afterwards;

(b) any on-going costs of managing and maintaining the remediation action; and

(c) any relevant disruption costs.

C.35 For these purposes, relevant disruption costs mean depreciation in the value of land or other interest, or other loss or damage, which is likely to result from the carrying out of the remediation action in question. The enforcing authority should assess these costs on the following basis:

(a) where the depreciation, loss or damage would be suffered by a person required to grant rights of entry etc. under section 78G(2), the relevant disruption costs should be taken to be the enforcing authority's estimate of the value of any compensation payable to that person under section 78G(5); or

(b) in any other case (for example, where the appropriate person owns the land), the relevant disruption costs should be taken to be the enforcing authority's estimate of the value of any compensation which would have been payable under section 78G(5) if the person suffering the depreciation, loss or damage had been required to grant rights of entry etc. to another person, and would therefore have been entitled to compensation.

C.36 Each of the types of cost set out in paragraph C.34 above should be included even where they would not result in payments to others by the person carrying out the remediation. For example, a company may choose to use its own staff or equipment to carry out the remediation, or the person carrying out the remediation may already own the land in question and would therefore not be entitled to receive compensation under section 78G(5). The evaluation of the cost involved in remediation should not be affected by the identity of the person carrying it out, or internal resources available to that person.

C.37 The enforcing authority should furthermore regard it as a necessary condition of an action being reasonable that:

(a) where two or more significant pollutant linkages have been identified on the land in question, and the remediation action forms part of a wider remediation scheme which is dealing with two or more of those linkages, there is no alternative scheme which would achieve the same purposes for a lower overall cost; and

(b) subject to subparagraph a) above, where the remediation action forms part of a remediation package dealing with any particular significant pollutant linkage, there is no alternative package which would achieve the same standard of remediation at a lower overall cost.

C.38 In addition, for any remediation action to be reasonable there should be no alternative remediation action which would achieve the same purpose, as part of any wider remediation package or scheme, to the same standard for a lower cost (bearing in mind that the purpose of any remediation action may relate to more than one significant pollutant linkage).

The Seriousness of Harm or of Pollution of Controlled Waters

C.39 When evaluating the seriousness of any significant harm, for the purposes of assessing the reasonableness of any remediation, the enforcing authority should consider:

(a) whether the significant harm is already being caused;

(b) the degree of the possibility of the significant harm being caused;

(c) the nature of the significant harm with respect, in particular, to:

(i) the nature and importance of the receptor,

(ii) the extent and type of any effects on that receptor of the significant harm,

(iii) the number of receptors which might be affected, and

(iv) whether the effects would be irreversible; and

(d) the context in which the effects might occur, in particular:

(i) whether the receptor has already been damaged by other means and, if so, whether further effects resulting from the harm would materially affect its condition, and

(ii) the relative risk associated with the harm in the context of wider environmental risks.

C.40 Where the significant harm is an "ecological system effect" as defined in Chapter A, the enforcing authority should take into account any advice received from English Nature.

C.41 In evaluating for this purpose the seriousness of any pollution of controlled waters, the enforcing authority should consider:

(a) whether the pollution of controlled waters is already being caused;

(b) the likelihood of the pollution of controlled waters being caused;

(c) the nature of the pollution of controlled waters involved with respect, in particular, to:

(i) the nature and importance of the controlled waters which might be affected,

(ii) the extent of the effects of the actual or likely pollution on those controlled waters, and

(iii) whether such effects would be irreversible; and

(d) the context in which the effects might occur, in particular:

(i) whether the waters have already been polluted by other means and, if so, whether further effects resulting from the water pollution would materially affect their condition, and

(ii) the relative risk associated with the water pollution in the context of wider environmental risks.

C.42 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 seriousness of any pollution of controlled waters.

C.43 In some instances, it may be possible to express the benefits of addressing the harm or pollution of controlled waters in direct financial terms. For example, removing a risk of explosion which renders a building unsafe for occupation could be considered to create a benefit equivalent to the cost of acquiring a replacement building. Various Government departments have produced technical advice, which the enforcing authority may find useful, on the consideration of non-market impacts of environmental matters.

PART 6 - The Practicability, Effectiveness and Durability of Remediation

C.44 The statutory guidance in this Part is issued under section 78E(5)(b) and is relevant to the guidance given in Part 4 on the standard to which land and waters should be remediated.

General Considerations

C.45 In some instances, there may be little firm information on which to assess particular remediation actions, packages or schemes. For example, a particular technology or technique may not have been subject previously to field-scale pilot testing in circumstances comparable to those to be found on the contaminated land in question. Where this is the case, the enforcing authority should consider the effectiveness and durability which it appears likely that any such action would achieve, and the practicability of its use, on the basis of information which it does have at that time (for example information derived from laboratory or other “treatability” testing).

C.46 If the person who will be carrying out the remediation proposes the use of an innovative approach to remediation, the enforcing authority should be prepared to agree to that approach being used (subject to that person obtaining any other necessary permits or authorisations), notwithstanding the fact that there is little available information on the basis of which the authority can assess its likely effectiveness. If the approach to remediation proves to be ineffective, further remediation actions may be required, for which the person proposing the innovative approach will be liable.

C.47 However, the enforcing authority should not, under the terms of a remediation notice, require any innovative remediation action to be carried out for the purposes of establishing its effectiveness in general, unless either the person carrying out the remediation agrees or there is clear evidence that it is likely that the action would be effective on the relevant land or waters and it would meet all other requirements of the statutory guidance in this Chapter.

The Practicability of Remediation

C.48 The enforcing authority should consider any remediation as being practicable to the extent that it can be carried out in the circumstances of the relevant land or waters. This applies both to the remediation scheme as a whole and the individual remediation actions of which it is comprised.

C.49 In assessing the practicability of any remediation, the enforcing authority should consider, in particular, the following factors:

(a) technical constraints, for example whether

(i) any technologies or other physical resources required (for example power or materials) are commercially available, or could reasonably be made available, on the necessary scale, and

(ii) the separate remediation actions required could be carried out given the other remediation actions to be carried out, and without preventing those other actions from being carried out;

(b) site constraints, for example whether

(i) the location of and access to the relevant land or waters, and the presence of buildings or other structures in, on or under the land, would permit the relevant remediation actions to be carried out in practice, and

(ii) the remediation could be carried out, given the physical or other condition of the relevant land or waters, for example the presence of substances, whether these are part of other pollutant linkages or are not pollutants;

(c) time constraints, for example whether it would be possible to carry out the remediation within the necessary time period given the time needed by the person carrying out the remediation to

(i) obtain any necessary regulatory permits and constraints, and

(ii) design and implement the various remediation actions; and

(d) regulatory constraints, for example whether

(i) the remediation can be carried out within the requirements of statutory controls relating to health and safety (including engineering safety) and pollution control,

(ii) any necessary regulatory permits or consents would reasonably be expected to be forthcoming,

(iii) any conditions attached to such permits or consents would affect the practicability or cost of the remediation, and

(iv) adverse environmental impacts may arise from carrying out the remediation (see paragraphs C.51 to C.57 below).

C.50 The responsibility for obtaining any regulatory permits or consents necessary for the remediation to be carried out rests with the person who will actually be carrying out the remediation, and not with the enforcing authority. However, the authority may in some circumstances have particular duties to contribute to health and safety in the remediation work, under the Construction (Design and Management) Regulations 1994 (S.I. 1994/3140).

ADVERSE ENVIRONMENTAL IMPACTS

C.51 Although the objective of any remediation is to improve the environment, the process of carrying out remediation may, in some circumstances, create adverse environmental impacts. The possibility of such impacts may affect the determination of what remediation package represents the best practicable techniques for remediation.

C.52 Specific pollution control permits or authorisations may be needed for some kinds of remediation processes, for example:

(a) authorisations under Part I of the Environmental Protection Act 1990 (Integrated Pollution Control and Local Authority Air Pollution Control);

(b) site or mobile plant licences under Part II of the Environmental Protection Act 1990 (waste management licensing); or

(c) discharge consents under Part III of the Water Resources Act 1991.

C.53 Permits or authorisations of these kinds may include conditions controlling the manner in which the remediation is to be carried out, intended to prevent or minimise adverse environmental impacts. Where this is the case, the enforcing authority should assume that these conditions provide a suitable level of protection for the environment.

C.54 Where this is not the case, the enforcing authority should consider whether the particular remediation package can be carried out without damaging the environment, and in particular:

(a) without risk to water, air, soil and plants and animals;

(b) without causing a nuisance through noise or odours; and

(c) without adversely affecting the countryside or places of special interest.

C.55 If the enforcing authority considers that there is some risk that the remediation might damage the environment, it should consider whether:

(a) the risk is sufficiently great to mean that the balance of advantage, in terms of improving and protecting the environment, would lie with adopting an alternative approach to remediation, even though such an alternative may not fully achieve the objectives for remediation set out at paragraph C.18 above; or

(b) the risk can be sufficiently reduced by including, as part of the description of what is to be done by way of remediation, particular precautions designed to prevent the occurrence of such damage to the environment (for example, precautions analogous to the conditions attached to a waste management licence).

C.56 In addition, the enforcing authority should consider whether it is likely that the process of remediation might lead to a direct or indirect discharge into groundwater of a substance in either List I or List II of the Schedule to the Groundwater Regulations 1998 (S.I. 1998/1006). (For these purposes, the terms direct discharge, indirect discharge and groundwater have the meanings given to them in the 1998 Regulations.)

C.57 If the enforcing authority considers that such a discharge is likely, it should (where that authority is not the Environment Agency) consult the Environment Agency, and have regard to its advice on whether an alternative remediation package should be adopted or precaution required as to the way that remediation is carried out.

The Effectiveness of Remediation

C.58 The enforcing authority should consider any remediation as being effective to the extent to which the remediation scheme as a whole, and its component remediation packages, would achieve the aims set out in paragraph C.18 above in relation to each of the significant pollutant linkages identified on the relevant land or waters. The enforcing authority should consider also the extent to which each remediation action, or group of actions required for the same particular purpose, would achieve the purpose for which it was required.

C.59 Within this context, the enforcing authority should consider also the time which would pass before the remediation would become effective. In particular, the authority should establish whether the remediation would become effective sufficiently soon to match the particular degree of urgency resulting from the nature of the significant pollutant linkage in question. However, the authority may also need to balance the speed in reaching a given level of effectiveness against higher degrees of effectiveness which may be achievable, but after a longer period of time, by the use of other remediation methods.

C.60 If any remedial treatment action representing the best practicable techniques will not fully achieve the standard set out in paragraph C.18 above, the enforcing authority should consider whether additional monitoring actions should be required.

The Durability of Remediation

C.61 The enforcing authority should consider a remediation scheme as being sufficiently durable to the extent that the scheme as a whole would continue to be effective with respect to the aims in paragraph C.18 above during the time over which the significant pollutant linkage would otherwise continue to exist or recur. Where other action (such as redevelopment) is likely to resolve or control the problem within that time, a shorter period may be appropriate.

The durability of an individual remediation action is a measure of the extent to which it will continue to be effective in meeting the purpose for which it is to be required taking into account normal maintenance and repair.

C.62 Where 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 continue to be effective for as long as can reasonably and practicably be achieved. In these circumstances, additional monitoring actions may be required.

C.63 Where 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 as well as any monitoring actions necessary to keep the effectiveness of the remediation under review.

PART 7 - What is to be Done by Way of Remediation

C.64 The statutory guidance in this Part is issued under section 78E(5)(a) and provides guidance on the determination by the enforcing authority of what is to be done by way of remediation – in particular, on the circumstances in which any action within the three categories of remediation action (that is, assessment, remedial treatment and monitoring actions) should be required.

Assessment Action

C.65 The enforcing authority should require an assessment action to be carried out where this is necessary for the purpose of obtaining information on the condition of the relevant land or waters which is needed:

(a) to characterise in detail a significant pollutant linkage (or more than one such linkage) identified on the relevant land or waters for the purpose of enabling the authority to establish what would need to be achieved by any remedial treatment action;

(b) to enable the establishment of the technical specifications or design of any particular remedial treatment action which the authority reasonably considers it might subsequently require to be carried out; or

(c) where, after remedial treatment actions have been carried out, the land will still be in such a condition that it would still fall to be identified as contaminated land, to evaluate the condition of the relevant land or waters, or the incidence of any significant harm or pollution of controlled waters, for the purpose of supporting future decisions on whether further remediation might then be required (this applies where the remediation action concerned would not otherwise constitute a monitoring action).

C.66 The enforcing authority should not require any assessment action to be carried out unless that action is needed to achieve one or more of the purposes set out in paragraph C.65

above, and it represents a reasonable means of doing so. In particular, no assessment action should be required for the purposes of determining whether or not the land in question is contaminated land. For the purposes of this guidance, assessment actions relate solely to land which has already been formally identified as contaminated land, or to other land or waters which might be affected by it. The statutory guidance in Chapters A and B sets out the requirements for the inspection of land and the manner in which a local authority should determine that land appears to it to be contaminated land.

Remedial Treatment Action

C.67 The enforcing authority should require a remedial treatment action to be carried out where it is necessary to achieve the standard of remediation described in Part 4, but for no other purpose. Any such remedial treatment action should include appropriate verification measures. When considering what remedial treatment action may be necessary, the enforcing authority should consider also what complementary assessment or monitoring actions might be needed to evaluate the manner in which the remedial treatment action is implemented or its effectiveness or durability once implemented.

Monitoring Action

C.68 The enforcing authority should require a monitoring action to be carried out where it is for the purpose of providing information on any changes which might occur in the condition of a pollutant, pathway or receptor, where:

(a) the pollutant, pathway or receptor in question was identified previously as part of a significant pollutant linkage; and

(b) the authority will need to consider whether any further remedial treatment action will be required as a consequence of any change that may occur.

C.69 Monitoring action should not be required to achieve any other purpose, such as general monitoring to enable the enforcing authority to identify any new significant pollutant linkages which might become present in the future. This latter activity forms part of the local authority's duty, under section 78B(1), to cause its area to be inspected from time to time for the purpose of identifying any contaminated land.

What Remediation should not be Required

C.70 The enforcing authority should not require any remediation to be carried out for the purpose of achieving any aims other than those set out in paragraphs C.18 to C.24 above, or purposes other than those identified in this Part of this Chapter. In particular, it should not require any remediation to be carried out for the purposes of:

(a) dealing with matters which do not in themselves form part of a significant pollutant linkage, such as substances present in quantities or concentrations at which there is neither a significant possibility of significant harm being caused nor a likelihood of any pollution of controlled waters being caused; or

(b) making the land suitable for any uses other than its current use, as defined in paragraphs A.25 and A.26 in Chapter A.

C.71 It is, however, always open to the owner of the land, or any other person who might be liable for remediation, to carry out on a voluntary basis remediation to meet these wider objectives.

CHAPTER D - Statutory Guidance on Exclusion from, and Apportionment of, Liability for Remediation

PART 1 - Scope of the Chapter

D.1 The statutory guidance in this Chapter is issued under sections 78F(6) and 78F(7) of the Environmental Protection Act 1990. It provides guidance on 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.

D.2 Section 78F provides that:

> "(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.
>
> "(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".

D.3 The enforcing authority is therefore required to act in accordance with the guidance in this Chapter. Introductory summaries are included to various parts and sections of the guidance: these do not necessarily give the full detail of the guidance; the section concerned should be consulted.

PART 2 – Definitions of Terms

D.4 Unless otherwise stated, any word, term or phrase given a specific meaning in Part IIA of the Environmental Protection Act 1990, or in the statutory guidance in Chapters A or B, has the same meaning for the purpose of the guidance in this Chapter.

D.5 In addition, for the purposes of this Chapter, the following definitions apply:

> (a) a person who is an appropriate person by virtue of section 78F(2) (that is, because he has caused or knowingly permitted a pollutant to be in, on or under the land) is described as a "Class A person";
>
> (b) a person who is an appropriate person by virtue of section 78F(4) or (5) (that is, because he is the owner or occupier of the land in circumstances where no Class A person can be found with respect to a particular remediation action) is described as a "Class B person";
>
> (c) collectively, the persons who are appropriate persons with respect to any particular significant pollutant linkage are described as the "liability group" for that linkage; a liability group consisting of one or more Class A persons is described as a "Class A liability group", and a liability group consisting of one or more Class B persons is described as a "Class B liability group";
>
> (d) any determination by the enforcing authority under section 78F(6) (that is, a person is to be treated as not being an appropriate person) is described as an "exclusion";
>
> (e) any determination by the enforcing authority under section 78F(7) (dividing the costs of carrying out any remediation action between two or more appropriate persons) is described as an "apportionment"; the process of apportionment between liability groups is described as "attribution";

(f) a "remediation action" is any individual thing which is being, or is to be, done by way of remediation;

(g) a "remediation package" is all the remediation actions, within a remediation scheme, which are referable to a particular significant pollutant linkage; and

(h) a "remediation scheme" is the complete set or sequence of remediation actions (referable to one or more significant pollutant linkages) to be carried out with respect to the relevant land or waters.

D.6 Any reference to "Part IIA" means "Part IIA of the Environmental Protection Act 1990". Any reference to a "section" in primary legislation means a section of the Environmental Protection Act 1990, unless it is specifically stated otherwise.

PART 3 – The Procedure for Determining Liabilities

D.7 For most sites, 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 pollutant, or the owner of the site. The history of other sites 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 IIA. 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.

D.8 The statutory guidance in this Part sets out the procedure which the enforcing authority should follow for determining which appropriate persons should bear what responsibility for each remediation action. It refers forward to the other Parts of this Chapter, and describes how they should be applied. Not all stages will be relevant to all cases, particularly where there is only a single significant pollutant linkage, or where a liability group has only one member.

First Stage - Identifying Potential Appropriate Persons and Liability Groups

D.9 As 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 pollutant linkage (pollutant, pathway and receptor), resulting from the presence of at least one significant pollutant.

WHERE THERE IS A SINGLE SIGNIFICANT POLLUTANT LINKAGE

D.10 The enforcing authority should identify all of the persons who would be appropriate persons to pay for any remediation action which is referable to the pollutant which forms part of the significant pollutant linkage. These persons constitute the "liability group" for that

significant pollutant linkage. (In this guidance the term "liability group" is used even where there is only a single appropriate person who is a "member" of the liability group.)

D.11 To achieve this, the enforcing authority should make reasonable enquiries to find all those who have caused or knowingly permitted the pollutant in question to be in, on or under the land. Any such persons constitute a "Class A liability group" for the significant pollutant linkage.

D.12 If no such Class A persons can be found for any significant pollutant, the enforcing authority should consider whether the significant pollutant linkage of which it forms part relates solely to the pollution of controlled waters, rather than to any significant harm. If this is the case, there will be no liability group for that significant pollutant linkage, and it should be treated as an "orphan linkage" (see paragraph D.103 below).

D.13 In any other case where no Class A persons can be found for a significant pollutant, 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 pollutant linkage.

D.14 If the enforcing authority cannot find any Class A persons or any Class B persons in respect of a significant pollutant linkage, there will be no liability group for that linkage and it should be treated as an orphan linkage (see paragraph D.103 below).

WHERE THERE ARE TWO OR MORE SIGNIFICANT POLLUTANT LINKAGES

D.15 The enforcing authority should consider each significant pollutant linkage in turn, carrying out the steps set out in paragraphs D.10 to D.14 above, in order to identify the liability group (if one exists) for each of the linkages.

IN ALL CASES

D.16 Having 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 IIA. 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));

(b) a Class B person is exempted from liability arising from the escape of a pollutant from one piece of land to other land (see section 78K); or

(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).

D.17 If all of the members of any liability group benefit from one or more of these exemptions, the enforcing authority should treat the significant pollutant linkage in question as an orphan linkage (see paragraph D.103 below).

D.18 Persons may be members of more than one liability group. This might apply, for example, if they caused or knowingly permitted the presence of more than one significant pollutant.

D.19 Where 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 pollutant linkages, and so the enforcing authority should exercise caution before trying to simplify the procedure in any case.

Second Stage - Characterising Remediation Actions

D.20 Each remediation action will be carried out to achieve a particular purpose with respect to one or more defined significant pollutant linkages. Where there is a single significant pollutant 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 stage and the third stage of the procedure therefore do not need to be carried out in where there is only a single significant pollutant linkage.

D.21 However, where there are two or more significant pollutant linkages on the land in question, the enforcing authority should establish whether each remediation action is:

(a) referable solely to the significant pollutant in a single significant pollutant linkage (a "single-linkage action"); or

(b) referable to the significant pollutant in more than one significant pollutant linkage (a "shared action").

D.22 Where a remediation action is a shared action, there are two possible relationships between it and the significant pollutant linkages to which it is referable. The enforcing authority should establish whether the shared action is:

(a) a "common action" – that is, an action which addresses together all of the significant pollutant 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; or

(b) a "collective action" – that is, an action which addresses together all of the significant pollutant 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.

D.23 A collective action replaces actions that would have been appropriate for the individual significant pollutant linkages if they had been addressed separately, as it achieves the purposes which those other actions would have achieved.

Third Stage - Attributing Responsibility between Liability Groups

D.24 This stage of the procedure does not apply in the simpler cases. Where there is only a single significant pollutant 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.)

D.25 Similarly, for any single-linkage action, the liability group for the significant pollutant linkage in question bears the full cost of carrying out that action

D.26 However, the enforcing authority should apply the guidance in Part 9 with respect to each shared action, in order to attribute to each of the different liability groups their share of responsibility for that action.

D.27 After the guidance in Part 9 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.

Fourth Stage - Excluding Members of a Liability Group

D.28 The 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 Part 5; and

(b) for each Class B liability group with two or more members, the enforcing authority should apply the guidance on exclusion in Part 7.

Fifth Stage - Apportioning Liability between Members of a Liability Group

D.29 The 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.

D.30 For any liability group which has only a single remaining member, that person bears all of the costs falling to that liability group, that is both the cost of any single-linkage action referable to the significant pollutant 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.

D.31 For 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 pollutant 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 Part 6; and

(b) for any Class B liability group, the guidance set out in Part 8.

PART 4 – General Considerations Relating to the Exclusion, Apportionment and Attribution Procedures

D.32 This Part sets out general guidance about the application of the exclusion, apportionment and attribution procedures set out in the rest of this Chapter. It is accordingly issued under both section 78F(6) and section 78F(7).

D.33 The 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.

D.34 The enforcing authority should apply the tests for exclusion (in Parts 5 and 7) 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 pollutant 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

D.35 The 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 D.76 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

D.36 The 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.

D.37 The statutory guidance in this Chapter 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. The enforcing authority's judgements should be made on the basis of 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

D.38 In any case where:

(a) two or more persons are 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, and confirmation in writing that all parties to the agreement are content for the agreement to be applied, are provided to the enforcing authority;

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.

D.39 However, 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.

PART 5 – Exclusion of Members of a Class A Liability Group

D.40 The guidance in this Part is issued under section 78F(6) and sets out the tests for determining whether to exclude from liability a person who would otherwise be a Class A person (that is, a person who has been identified as responsible for remediation costs by reason of his having "caused or knowingly permitted" the presence of a significant pollutant). The tests are intended to establish whether, in relation to other members of the liability group, it is fair that he should bear any part of that responsibility.

D.41 The exclusion tests in this Part are subject to the following overriding guidance:

(a) the exclusions that the enforcing authority should make are solely in respect of the significant pollutant linkage giving rise to the liability of the liability group in question; an exclusion in respect of one significant pollutant 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.

D.42 The 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.

D.43 The 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 he is to bear in respect of his 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

D.44 Before applying any of the exclusion tests, the enforcing authority should establish whether two or more of the members of the liability group are, or were at the "relevant date", "related companies".

D.45 Where this is the case, for the purposes of applying the exclusion tests and making any exclusions, the enforcing authority should treat the related companies as if they were a single person.

D.46 For these purposes, the terms "relevant date" and "related companies" have the following meanings:

(a) 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

(b) "related companies" are those which are members of a group of companies consisting of a "holding company" and its "subsidiaries", where these terms have the same meaning as in section 736 of the Companies Act 1985.

The Exclusion Tests for Class A Persons

TEST 1 – "EXCLUDED ACTIVITIES"

D.47 The purpose of this test is to exclude those who have been identified as having caused or knowingly permitted the land to be contaminated land solely by reason 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 IIA. It does not imply that the carrying out of such activities necessarily amounts to "causing or knowingly permitting".

D.48 In applying this test with respect to any appropriate person, the enforcing authority should consider whether the person in question is a member of a liability group solely by reason of one or more of the following activities (not including any associated activity outside these descriptions):

(a) providing financial assistance to another person, 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 leasing arrangements and instalment credit,

(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 for the purposes of section 736 of the Companies Act 1985, or

(vi) providing a person with any other financial benefit (including the remission in whole or in part of any financial liability or obligation);

(b) withholding financial assistance of any of the forms identified in sub-paragraph (a) above;

(c) 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 pollutant to be in, on or under the land in question; (for the purposes of this sub-paragraph, underwriting an insurance policy is to be taken to include imposing any conditions on the insured, for example relating to the manner in which he carries out the insured activity);

(d) carrying out any action for the purpose of deciding whether or not to underwrite any such insurance policy; (for the purposes of this sub-paragraph, such action does not include carrying out any intrusive investigation in respect of the land in question for the purpose of the underwriting where the carrying out of that investigation is itself a cause of the existence, nature or continuance of the significant pollutant linkage in question);

(e) consigning, as waste, to another person the substance which is now a significant pollutant, under a contract under which that other person knowingly took over responsibility for its proper disposal or other management on a site not under the control of the person seeking to be excluded from liability;

(f) 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 pollutant linkage in question (whether or not the tenant can now be found);

(g) 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 pollutant 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;

(h) 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 pollutant in question; this test does not apply in the case of statutory undertakers granting permission for their contractors to carry out works;

(i) providing legal, financial, engineering, scientific or technical advice to (or design, contract management or works management services for) another person (the "client"):

(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 pollutant,

(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) carrying out any intrusive investigation in respect of the land in question in the course of preparing advice, or providing services, in the circumstances set out in the preceding sub-paragraph, except where the investigation is itself a cause of the existence, nature or continuance of the significant pollutant linkage in question; or

(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 and paragraph D.49 below, 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) the circumstances in paragraph D.49 below apply.

D.49 The circumstances referred to in paragraph D.48(k)(iii) are:

(a) the employer is a body corporate;

(b) 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

(c) 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.

D.50 If any of the circumstances in paragraph D.48 above apply, the enforcing authority should exclude the person in question.

TEST 2 – "PAYMENTS MADE FOR REMEDIATION"

D.51 The 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.

D.52 In 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 D.53 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 pollutant linkage in question; and

(d) the remediation in question was not carried out or was not carried out effectively.

D.53 Payments 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.

D.54 For the purposes of this test, payments include consideration of any form.

D.55 However, 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.

D.56 If all of the circumstances set out in paragraph D.52 above apply, the enforcing authority should exclude the person who made the payment in respect of the remediation action in question. (See paragraph D.43 above for guidance on how this exclusion should be made.)

TEST 3 – "SOLD WITH INFORMATION"

D.57 The purpose of this test is to exclude from liability those who, although they have caused or knowingly permitted the presence of a significant pollutant 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.

D.58 In 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 pollutant identified in the significant pollutant 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.

D.59 In 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 the sale of the land is a part of a group of transactions or a wider agreement (such as the sale of a company or business), a sale of land arms' length should be taken to include any case 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 D.58(c) above; and

(e) for the purposes of paragraph D.58(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.

D.60 If all of the circumstances in paragraph D.58 above apply, the enforcing authority should exclude the seller. (See paragraph D.43 above for guidance on how this exclusion should be made.)

D.61 This test does not imply that the receipt by the buyer of the information referred to in paragraph D.58(c) above necessarily means that the buyer has "caused or knowingly permitted" the presence of the significant pollutant in, on or under the land.

TEST 4 – "CHANGES TO SUBSTANCES"

D.62 The 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 pollutant linkage because of its interaction with another substance which was later introduced to the land by another person.

D.63 In applying this test, the enforcing authority should consider whether all the following circumstances exist:

(a) the substance forming part of the significant pollutant linkage in question is present, or has become a significant pollutant, only as the result of a chemical reaction, biological process or other change (the "intervening change") involving:

(i) both a substance (the "earlier substance") which would not have formed part of the significant pollutant 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 caused or knowingly permitted the presence in, on or under the land of the earlier substance, but he 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; and

(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.

D.64 If all of the circumstances in paragraph D.63 aboveD.63 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"

D.65 The 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.

D.66 In applying this test, the enforcing authority should consider whether all the following circumstances exist:

(a) a significant pollutant 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 pollutant linkage of which that pollutant forms part:

(i) caused or knowingly permitted the pollutant to be present in, on or under that other land (that is, he 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 pollutant to escape from that other land and its escape would not have happened but for their actions or omissions.

D.67 If all of the circumstances in paragraph D.66 above apply, the enforcing authority should exclude any person meeting the description in paragraph D.66(b) above.

TEST 6 – "INTRODUCTION OF PATHWAYS OR RECEPTORS"

D.68 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 Chapter A) in the significant pollutant linkage.

D.69 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 pollutant in a significant pollutant 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 pollutant linkage in question;

(c) if those later actions had not been carried out or made, the significant pollutant linkage would either not have existed, or would not have been a significant pollutant linkage, because of the absence of a pathway or of a receptor; and

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

D.70 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; and

(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 pollutant 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 pollutant in the significant pollutant linkage in question.

D.71 This 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.

D.72 If all of the circumstances in paragraph D.69 above apply, the enforcing authority should exclude any person meeting the description at paragraph D.69(d) above.

PART 6 – Apportionment Between Members of any Single Class A Liability Group

D.73 The 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 pollutant linkage as a result of the application of the exclusion tests in Part 5.

D.74 The 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 pollutant 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

D.75 In 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 pollutant linkage in question. (For these purposes, "risk" has the same meaning as that given in Chapter A.) In applying this principle, the enforcing authority should follow, where appropriate, the specific approaches set out in paragraphs D.77 to D.86 below.

D.76 If appropriate information is not available to enable the enforcing authority to make such an assessment of relative responsibility (and, following the guidance at paragraph D.36 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 pollutant linkage, subject to the specific guidance in paragraph D.85 below.

Specific Approaches

PARTIAL APPLICABILITY OF AN EXCLUSION TEST

D.77 If, for any member of the liability group, the circumstances set out in any of the exclusion tests in Part 5 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.

THE ENTRY OF A SUBSTANCE VS. ITS CONTINUED PRESENCE

D.78 In assessing the relative responsibility of a person who has caused or knowingly permitted the entry of a significant pollutant into, onto or under land (the "first person") and another person who has knowingly permitted the continued presence of that same pollutant 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 pollutant 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, he should bear the same responsibility as the first person;

(b) if the second person did not have the means and opportunity, his 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, his 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 POLLUTANT

D.79 Where the enforcing authority is determining the relative responsibilities of members of the liability group who have caused or knowingly permit the entry of the significant pollutant into, onto or under the land, it should follow the approach set out in paragraphs D.80 to D.83 below.

D.80 If 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.

D.81 If the circumstances in paragraph D.80 above do not apply, but the quantity of the significant pollutant present is a major influence on the cost of remediation, the enforcing authority should regard the relative amounts of that pollutant which are referable to the different persons as an appropriate basis for apportioning responsibility.

D.82 If it is deciding the relative quantities of pollutant 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.

D.83 In cases where the circumstances in neither paragraph D.80 nor D.81 above apply, the enforcing authority should consider the nature of the activities carried out by the appropriate persons concerned from which the significant pollutant 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 POLLUTANT

D.84 Where 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 pollutant 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 pollutant in question or to reduce the seriousness of the implications of that presence; or

(d) a combination of the foregoing factors.

COMPANIES AND OFFICERS

D.85 If, following the application of the exclusion tests (and in particular the specific guidance at paragraphs D.48(k)(iii) and D.49 above) 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 D.75 above (ie 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 D.76 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.

D.86 For the purposes of paragraph D.85 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.

PART 7 – Exclusion of Members of a Class B Liability Group

D.87 The guidance in this Part 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.

D.88 The test applies where two or more persons have been identified as Class B persons for a significant pollutant linkage.

D.89 In 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.

D.90 However, 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.

PART 8 – Apportionment between the Members of a Single Class B Liability Group

D.91 The 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 pollutant linkage as a result of the application of the exclusion test in Part 7.

D.92 Where 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

pollutant 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.

D.93 Where those circumstances do not apply, the enforcing authority should apportion liability for the remediation actions necessary for the significant pollutant linkage in question amongst all of the members of the liability group.

D.94 Where 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 his 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 his 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.

D.95 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.

D.96 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.

D.97 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 D.36 above, such information cannot reasonably be obtained), the enforcing authority should apportion liability in equal shares among all the members of the liability group.

PART 9 – Attribution of Responsibility between Liability Groups

D.98 The statutory guidance in this Part is issued under section 78F(7) and applies where one remediation action is referable to two or more significant pollutant linkages (that is, 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

D.99 The enforcing authority should attribute responsibility for the costs of any common action among the liability groups for the significant pollutant 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);

(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); and

(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 Parts 7 and 8 of this Chapter as between all of the members of that combined group.

D.100 The enforcing authority should attribute responsibility for the cost of any collective action among the liability groups for the significant pollutant 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 pollutant 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

D.101 If any appropriate person demonstrates to the satisfaction of the enforcing authority that the result of an attribution made on the basis set out in paragraphs D.99 and D.100 above would have the effect of the liability group of which he is 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.

D.102 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

D.103 As explained above at paragraphs D.12, D.14 and D.17 above, an orphan linkage may arise either where no Class A or Class B persons can be found, or where those who would otherwise be liable are exempted by one of the relevant statutory provisions. Where there is a remediation action which is referable to an orphan linkage, the enforcing authority should adopt the following approach:

(a) for any single-linkage action, the enforcing authority should itself bear the cost of carrying out that action;

(b) for any shared action which is also referable to a single significant pollutant 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;

(c) for any shared action which is also referable to two or more significant pollutant 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;

(d) for any common action which is also referable to a significant pollutant linkage for which there is a Class B liability group (and not to any other significant pollutant 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 the Class B liability group; and

(e) for any collective action which is also referable to a significant pollutant linkage for which there is a Class B liability group (and not to any other significant pollutant linkage for which there is a Class A liability group), 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.

CHAPTER E - Statutory Guidance on the Recovery of the Costs of Remediation

PART 1 – Scope of the Chapter

E.1 The statutory guidance in this Chapter is issued under section 78P(2) of the Environmental Protection Act 1990. 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.

E.2 Section 78P provides that:

> "(1) Where, by virtue of section 78N(3)(a), (c), (e) or (f) … the enforcing authority does any particular thing by way of remediation, it shall be entitled, subject to sections 78J(7) and 78K(6) … to recover the reasonable cost incurred in doing it from the appropriate person or, if there are two or more appropriate persons in relation to the thing in question, from those persons in proportions determined pursuant to section 78F(7) …
>
> "(2) In deciding whether to recover the cost, and, if so, how much of the cost, which it is entitled to recover under subsection (1) above, the enforcing authority shall have regard –

"(a) to any hardship which the recovery may cause to the person from whom the cost is recoverable; and

"(b) to any guidance issued by the Secretary of State for the purposes of this subsection."

E.3 The guidance in this Chapter is also crucial in deciding when the enforcing authority is prevented from serving a remediation notice. Under section 78H(5), the enforcing 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.

E.4 Section 78H(5) provides that:

"(5) The enforcing authority shall not serve a remediation notice on a person if and so long as …

"(d) the authority is satisfied that the powers conferred on it by section 78N below to do what is appropriate by way of remediation are exercisable..."

E.5 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;...."

E.6 The enforcing authority is required to have regard to the statutory guidance in this Chapter.

PART 2 – Definition of Terms

E.7 Unless otherwise stated, any word, term or phrase given a specific meaning in Part IIA of the Environmental Protection Act 1990, or in the statutory guidance in Chapters A, B, C, or D has the same meaning for the purpose of the guidance in this Chapter.

E.8 In addition, for the purposes of the statutory guidance in this Chapter, the term "cost recovery decision" is used to describe any decision by the enforcing authority, for the purposes either of section 78P or of sections 78H and 78N, whether:

(a) to recover from the appropriate person all of the reasonable costs incurred by the authority in carrying out remediation; or

(b) not to recover those costs or to recover only part of those costs (described below as "waiving or reducing its costs recover").

E.9 Any reference to "Part IIA" means "Part IIA of the Environmental Protection Act 1990". Any reference to a "section" in primary legislation means a section of the Environmental Protection Act 1990, unless it is specifically stated otherwise.

PART 3 – Cost Recovery Decisions

Cost Recovery Decisions in General

E.10 The statutory guidance in this Part 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, including the history and ownership of land, and liability for its remediation, the statutory guidance in this Chapter sets out principles and approaches, rather than detailed rules. The enforcing authority will need to have regard to the circumstances of each individual case.

E.11 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; and

(b) the "polluter pays" principle, by virtue of which the costs of remediating pollution are to be borne by the polluter; the authority should therefore consider the degree and nature of responsibility of the appropriate person for the creation, or continued existence, of the circumstances which lead to the land in question being identified as contaminated land

E.12 In general, this will mean that the enforcing authority should seek to recover in full its reasonable costs. However, the authority should waive or reduce the recovery of costs to the extent that the authority considers this appropriate and reasonable, either:

(a) to avoid any hardship which the recovery may cause to the appropriate person; or

(b) to reflect one or more of the specific considerations set out in the statutory guidance in Parts 4, 5 and 6 below.

E.13 When deciding how much of its costs it should recover in any case, the enforcing authority should consider whether it could recover more of its costs by deferring recovery and securing them by a charge on the land in question under section 78P. 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

E.14 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 his request.

E.15 In making any cost recovery decision, the authority should always consider any relevant information provided by the appropriate person. The authority should also seek to obtain such information as is reasonable, having regard to:

(a) how the information might be obtained;

(b) the cost, for all the parties involved, of obtaining the information; and

(c) the potential significance of the information for any decision.

E.16 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

E.17 In order to promote transparency, fairness and consistency, an enforcing authority which is a local authority may wish to prepare, adopt and make available as appropriate a policy statement about the general approach it intends to follow in making cost recovery decisions. This would outline circumstances in which it would waive or reduce cost recovery (and thereby, by inference, not serve a remediation notice because it has the powers to carry out the remediation itself), having had regard to hardship and the statutory guidance in this Chapter.

E.18 Where the Environment Agency, is making a cost recovery decision with respect to a special site falling within the area of a local authority which has adopted such a policy statement, the Agency should take account of that statement.

PART 4 – Considerations Applying both to Class A & Class B Persons

E.19 The statutory guidance in this Part sets 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 of a Class B person (as defined in Chapter D). They apply in addition to the general issue of the “hardship” which the cost recovery may cause to the appropriate person.

Commercial Enterprises

E.20 Subject to the specific guidance elsewhere in this Chapter, 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

E.21 In the case of a small or medium-sized enterprise which is the appropriate person, or which is run by the appropriate person, the enforcing authority should consider whether recovery of the full cost attributable to that person would mean that the enterprise is likely to become insolvent and thus cease to exist. Where the cost to the local economy of such a closure might be greater than the costs of remediation which the authority would have to bear themselves, the authority should consider waiving or reducing its costs recovery to the extent needed to avoid making the enterprise insolvent. However, the authority should not waive or reduce its costs recovery where it is clear that an enterprise has deliberately arranged matters so as to avoid responsibility for the costs of remediation.

E.22 For these purposes, a "small or medium-sized enterprise" is as defined in the European Commission's Community Guidelines on State Aid for Small and Medium-Sized Enterprises, published in the Official Journal of the European Communities (the reference number for the present version of the guidelines is OJ C213 1996 item 4). This can be summarised as an independent enterprise with fewer than 250 employees, and either an annual turnover not exceeding 40 million, or an annual balance sheet total not exceeding 27 million.

E.23 Where the enforcing authority is a local authority, it may wish to take account in any such cost recovery decisions of any policies it may have for assisting enterprise or promoting economic development (for example, for granting financial or other assistance under section 33 of the Local Government and Housing Act 1989, including any strategy which it has published under section 35 of that Act concerning the use of such powers).

E.24 Where the Environment Agency is the enforcing authority, it should seek to be consistent with the local authority in whose area the contaminated land in question is situated. The Environment Agency should therefore consult the local authority, and should take that authority's views into consideration in making its own cost recovery decision.

Trusts

E.25 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 its costs recovery to the extent that the costs of remediation to be recovered from the trustees would otherwise exceed the amount that can be made available from the trust to cover those costs.

E.26 However, as exceptions to the approach set out in the preceding paragraph, the authority should not waive or reduce its costs recovery:

(a) where it is clear that the trust was formed for the purpose of avoiding paying the costs of remediation; or

(b) to the extent that trustees have personally benefited, or will personally benefit, from the trust.

Charities

E.27 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 jeopardise that charity's ability to continue to provide a benefit or amenity which is in the public interest. Where this is the case, the authority should consider waiving or reducing its costs recovery to the extent needed to avoid such a consequence. This approach applies equally to charitable trusts and to charitable companies.

Social Housing Landlords

E.28 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 financial difficulties for the appropriate person, such that the provision or upkeep of the social housing would be jeopardised.

E.29 The extent of the waiver or reduction should be sufficient to avoid any such financial difficulties.

PART 5 – Specific Considerations Applying to Class A Persons

E.30 The statutory guidance in this Part 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, as defined in Chapter D (that is, a person who has caused or knowingly permitted the significant pollutant to be in, on or under the contaminated land).

E.31 In applying the approach in this Part, the enforcing authority should be less willing to waive or reduce its costs recovery where it was in the course of carrying on a business that the Class A person caused or knowingly permitted the presence of the significant pollutants, than where he was not carrying on a business. This is because in the former case he is likely to have earned profits from the activity which created or permitted the presence of those pollutants.

Where Other Potentially Appropriate Persons have not been Found

E.32 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 pollutant in question, but who cannot now be found for the purposes of treating him as an appropriate person. For example, this might apply where a company has been dissolved.

E.33 The authority should consider waiving or reducing its costs recovery from a Class A person if that person demonstrates to the satisfaction of the enforcing authority that:

(a) another identified person, who cannot now be found, also caused or knowingly permitted the significant pollutant to be in, on or under the land; and

(b) if that other person could be found, the Class A person seeking the waiver or reduction of the authority's costs recovery would either:

(i) be excluded from liability by virtue of one or more of the exclusion tests set out in Part 5 of Chapter D, or

(ii) the proportion of the cost of remediation which the appropriate person has to bear would have been significantly less, by virtue of the guidance on apportionment set out in Part 6 of Chapter D.

E.34 Where an appropriate person is making a case for the authority's costs recovery to be waived or reduced by virtue of paragraph E.33 above, the enforcing authority should expect that person to provide evidence that a particular person, who cannot now be found, caused or knowingly permitted the significant pollutant to be in, on or under the land. The enforcing authority should not regard it as sufficient for the appropriate person concerned merely to state that such a person must have existed.

PART 6 – Specific Considerations Applying to Class B Persons

E.35 The statutory guidance in this Part sets out specific considerations relating to cost recovery decisions where the appropriate person is a Class B person, as defined in Chapter D (that is, a person who is liable by virtue or their ownership or occupation of the contaminated land, but who has not caused or knowingly permitted the significant pollutant to be in, on or under the land).

Costs in Relation to Land Values

E.36 In some cases, the costs of remediation may exceed the value of the land in its current use (as defined in Chapter A) after the required remediation has been carried out.

E.37 The enforcing authority should consider waiving or reducing its costs recovery from a Class B person if that person demonstrates to the satisfaction of the authority that the costs of remediation are likely to exceed the value of the land. In this context, the "value" should be taken to be the value that the remediated land would have on the open market disregarding any possible blight arising from the contamination

E.38 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. The enforcing authority should, however, take into account:

(a) the price paid by the appropriate person for the land; if the appropriate person paid a reduced price for the land to reflect its condition, the authority should be less willing to waive or reduce its costs recovery;

(b) any increase, as a result of the remediation, in the value of any other land in the same ownership or occupation; and

(c) any support from public funds which the appropriate person has received towards the costs of acquiring or developing the land.

Precautions Taken before Acquiring a Freehold or a Leasehold Interest

E.39 In some cases, the appropriate person may have been reckless as to the possibility that land he has acquired may be contaminated, or he may have decided to take a risk that the land was not contaminated. On the other hand, he may have taken precautions to ensure that he did not acquire land which is contaminated.

E.40 The authority should consider reducing its costs recovery where a Class B person who is the owner of the land demonstrates to the satisfaction of the authority that:

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

(b) when he acquired the land, or accepted the grant of assignment of the leasehold, he was nonetheless unaware of the presence of the significant pollutant now identified and could not reasonably have been expected to have been aware of their presence; and

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

E.41 The enforcing authority should bear in mind that the safeguards which might reasonably be expected to be taken will be different in different types of transaction (for example, acquisition of recreational land as compared with commercial land transactions) and as between buyers of different types (for example, private individuals as compared with major commercial undertakings).

Owner-occupiers of Dwellings

E.42 Where a Class B person owns and occupies a dwelling on the contaminated land in question, the enforcing authority should consider waiving or reducing its costs recovery where that person satisfies the authority that, at the time he person purchased the dwelling, he did not know, and could not reasonably have been expected to have known, that the land was adversely affected by presence of a pollutant.

E.43 Any such waiver or reduction should be to the extent needed to ensure that the Class B person in question bears no more of the cost of remediation than it appears reasonable to impose, having regard to his income, capital and outgoings. Where the appropriate person has inherited the dwelling or received it as a gift, the approach in paragraph E.42 above should be applied with respect to the time at which he received the property.

E.44 Where the contaminated land in question extends beyond the dwelling and its curtilage, and is owned or occupied by the same appropriate person, the approach in paragraph E.42 above should be applied only to the dwelling and its curtilage.

THE HOUSING RENEWAL GRANT ANALOGY

E.45 In judging the extent of a waiver or reduction in costs recovery from an owner-occupier of a dwelling, an enforcing authority which is a local authority may wish to apply an approach analogous to that used for applications for housing renovation grant (HRG). These grants are assessed on a means-tested basis, as presently set out in the Housing Renewal Grants Regulations 1996 (SI 1996/2890, as amended). The HRG test determines how much a person should contribute towards the cost of necessary renovation work for which they are responsible, taking into account income, capital and outgoings, including allowances for those with particular special needs.

E.46 The HRG approach can be applied as if the appropriate person were applying for HRG and the authority had decided that the case was appropriate for grant assessment. Using this analogy, the authority would conclude that costs recovery should be waived or reduced to the extent that the appropriate person contributes no more than if the work were house renovations for which HRG was being sought.

E.47 Where the Environment Agency is the enforcing authority, it should seek to be consistent with the local authority in whose area the contaminated land in question is situated. The Environment Agency should therefore consult the local authority, and should take that authority's views into consideration in making its own cost recovery decision.

ANNEX 4 - Guide to the Contaminated Land (England) Regulations 1999

Contents of this Annex

Introduction

1 This annex provides additional material to help with the understanding of the Contaminated Land (England) Regulations 1999 (SI 1999/[n]), which are referred to in it as "the Regulations".

2 Cross-references to the other parts of this circular help to show how the Regulations relate to the rest of the new contaminated-land regime.

3 The Regulations should always be consulted for the precise legal requirements and meanings. What follows is merely an informal guide.

4 The Regulations set out detailed provisions on parts of the regime which Part IIA of the Environmental Protection Act 1990 leaves to be specified in secondary legislation. In addition to the necessary general provisions, the Regulations deal with five main subjects:

(a) special sites (see paragraphs 7 to 15 below);

(b) remediation notices (see paragraphs 16 to 20 below);

(c) compensation (see in paragraphs 21 to 38 below);

(d) appeals (see paragraphs 39 to 78 below); and

(e) public registers (see in paragraphs 79 to 100 below).

General Provisions

5 Regulation 1 contains the usual provisions on citation and references. Any reference to a numbered "section" in this guide refers to that section in Part IIA of the Environmental Protection Act 1990.

6 Since the primary legislation applies to the whole of Great Britain, regulation 1 specifically provides that these regulations apply only to England. The Scottish Executive and the National Assembly for Wales are responsible for any provision that will be made for Scotland or Wales.

Special Sites

7 Section 78C(8) provides that land is to be a special site if it is land of a description prescribed in regulations. Regulations 2 and 3, with Schedule 1, provide the necessary descriptions. The procedures related to special sites are described in section 16 of Annex 2 to this circular.

8 There are three main groups of cases where a description of land is prescribed for this purpose. The individual descriptions of land to be designated are contained in paragraphs (a) to (j) of regulation 2(1). If land is contaminated land ***and*** it falls within one of the descriptions, it must be designated as a special site. Otherwise, it cannot be so designated. The descriptions of land do not imply that land of that type is more likely to constitute contaminated land. They identify cases where, ***if*** the land is contaminated land, the Environment Agency is best placed to be the enforcing authority.

Water-pollution Cases

9 Regulations 2(1)(a) and 3 ensure that the Environment Agency becomes the enforcing authority in three types of case where the contaminated land is affecting controlled waters and their quality, and where the Environment Agency will also have other concerns under other legislation. These cases are set out in regulation 3, and are broadly as follows:

(a) *Wholesomeness of drinking water:* Regulation 3(a) covers cases where contaminated land affects controlled waters used, or intended to be used, for the supply of drinking water. To meet the description, the waters must be affected by the land in such a way that a treatment process or a change in treatment process is needed in order for such water to satisfy wholesomeness requirements. The standards of wholesomeness are currently set out in the Water Supply (Water Quality) Regulations 1989 (SI 1989/1147 as amended by SI 1989/1384 and SI

1991/1837), and the Private Water Supplies Regulations 1991 (SI 1991/2790). An intention to use water for the supply of drinking water would be demonstrated by the existence of a water abstraction licence for that purpose, or an application for such a licence.

(b) *Surface-water classification criteria:* Regulation 3(b) covers cases where controlled waters are being affected so that those waters do not meet or are not likely to meet relevant surface water criteria. These are currently set out in the Surface Waters (Dangerous Substances) (Classification) Regulations 1989, and the Surface Waters (Dangerous Substances) (Classification) Regulations 1992.

(c) *Major aquifers:* Regulation 3(c) covers cases where particularly difficult pollutants are affecting major aquifers. The Environment Agency will already be concerned both with pollutants of this type and with managing water resources. The list of pollutants is set out in paragraph 1 of Schedule 1. It corresponds to List I of the Groundwater Directive (80/86/EEC). The major aquifers are described in paragraph 2 of Schedule 1 by reference to the underground strata in which they are contained. The British Geological Survey publishes maps which show the location and boundaries of such strata.

10 For the purposes of regulation 3(c), the fact that contaminated land may be located over one of the listed underground strata does not by itself make the land a special site. The land must be contaminated land on the basis that is causing, or is likely to cause, pollution of controlled waters; the pollution must be by reason of one or more substances from schedule 1; and the waters being or likely to be polluted must be contained within the strata.

Industrial Cases

11 The subsequent items in regulation 2(1) ensure that the Environment Agency is the enforcing agency in respect of contaminated land which is, or has been, used as a site for industrial activities that either pose special remediation problems or are subject to regulation under other national systems, either by the Environment Agency itself, or by some other national agency. The designation of such sites as special sites is intended to deploy the necessary expertise and to help co-ordination between the various regulatory systems. The descriptions are in respect of:

(a) *Waste acid tar lagoons (regulations 2(1)(b):* Regulation 2(2) defines what falls into this description. The retention basins (or lagoons) concerned typically involve cases where waste acid tar arose from the use of concentrated sulphuric acid in the production of lubricating oils and greases or the reclamation of base lubricants from mineral oil residues. The description is not intended to include cases where the tars resulted from coal product manufacture, or where these tars were placed in pits or wells.

(b) *Oil refining (regulation 2(1)(c)(i)):* The problems resulting from this are again considered more appropriate for the expertise of the Environment Agency. As for waste acid tar lagoons, activities related to coal are not included.

(c) *Explosives (regulation 2(1)(c)(ii)):* The relatively few sites in this category pose specific problems, which are more appropriately handled by the Environment Agency.

(d) *IPC (Integrated Pollution Control) sites (regulation 2(1)(d)):* Sites which are regulated under Part I of the 1990 Act and which have become contaminated will

generally be regulated under those powers. But there may be situations where Part IIA powers will be needed. This item ensures that the Environment Agency will be the enforcing authority under Part IIA where it is already the regulatory authority under Part I. The description therefore refers to a "prescribed process designated for central control". In England, this means a Part A process. This description covers:-

(i) land on which past activities were authorised under "central control" but which have ceased;

(ii) land where the activities are continuing but the contamination arises from a non-"central control" process on the land; and

(iii) land where the contamination arises from an authorised "central control" process but a remediation notice could nevertheless be served. (Section 78YB(1) precludes the service of a remediation notice in cases where it appears to the authority that the powers in section 27 of the 1990 Act may be exercised.)

This description does not cover land where the Part I authorisation is obtained in order to carry out remediation required under Part IIA. It also does not cover land which has been contaminated by an activity which ceased before the application of "central controls", but would have been subject to those controls if it had continued after they came into force. Legislation to implement the Integrated Pollution Prevention and Control Directive (96/61/EC) may have implications for this item in the future - for example, activities which were not previously prescribed may become so at a future date.

(e) *Nuclear sites (regulation 2(1)(e)):* Regulation 2(4) defines what is to be treated as a nuclear site for this purpose. The designation of a nuclear site as contaminated land under these regulations will have effect only in relation to non-radioactive contamination. Any harm, or pollution of controlled waters, attributable to radioactivity will be dealt with under a separate regime to be introduced by regulations to be made under section 78YC. Consultation is under way on the form that this separate regime should take.

Defence Cases

12 Regulation 2(1)(f), (h) and (i) ensures that the Environment Agency deals with most cases where contaminated land involves the Ministry of Defence (MOD) estate. Broadly speaking, the descriptions include any contaminated land at current military, naval and airforce bases and other properties, including those of visiting forces; the Atomic Weapons Establishment; and certain lands at Greenwich Hospital (section 30 of the Armed Forces Act 1996). However, off-base housing or off-base NAAFI premises are not included, and nor is property which has been disposed of to civil ownership or occupation. Training areas and ranges that MOD does not own or occupy but may use occasionally do not fall within the descriptions. Regulation 2(1)(g) describes land formerly used for the manufacture, production or disposal of chemical and biological weapons and related materials, regardless of current ownership. In all these cases, the Environment Agency is best placed to ensure uniformity across the country and liaison with the Ministry of Defence and the armed forces.

OTHER ASPECTS OF SPECIAL SITES

13 *Adjoining/adjacent land (regulation 2(1)(j):* Where the conditions on a special site lead to adjacent or adjoining land also being contaminated land by reason of the presence of substances which appear to have escaped from the special site, that adjacent or adjoining land is also to be a special site. This does not apply where the special site is one of the water-pollution cases described in regulations 2(1)(a) and 3. With this exception, the Environment Agency will be the enforcing authority for the adjoining land as well as for the special site that has caused the problem. This approach is intended to avoid regulatory control being split.

14 *Waste management sites:* Land used for waste management activity, such as landfill, is not as such designated as a special site. This is because Part II of the 1990 Act already contains wide powers for the Environment Agency to ensure that problems are tackled. However, such land may fall within one or more of the special site descriptions, for example if pollution of controlled waters is being caused. The interface between Part IIA controls and waste management controls is described at Annex 1, paragraphs 54 to 57.

15 *Role of the Environment Agency:* It remains the task of the local authority to decide, in the first instance, whether land within the description of a special site is contaminated land or not. The work of the Environment Agency as enforcing authority only starts once that determination is made. However, the statutory guidance on the identification of contaminated land says that, in making that determination, local authorities should consider whether, if land were designated, it would be a special site. If that is the case, the local authority should always seek to make arrangements with the Environment Agency to carry out any inspections of the land that may be needed, on behalf of the local authority (see Annex 3, paragraphs B.26 to B.30).

Remediation Notices

16 Section 78E(1) requires a remediation notice to specify what each person who is an appropriate person to bear responsibility for remediation is to do by way of remediation and the timescale for that remediation. Where several people are appropriate persons, section 78E(3) requires the remediation notice to state the proportion which each of them is to bear of the costs of that remediation (see Chapter D of Annex 2). Section 78E(6) then provides that regulations may lay down other requirements on the form and content of remediation notices and the associated procedure.

17 Regulation 4 sets out the additional requirements about the content of a remediation notice. The overall intention is to make the notice informative and self-contained. There should be a clear indication of what is to be done; by whom; where; by when; in relation to what problem; the basis for the authority's actions; who else is involved; the rights of appeal; that a notice is suspended if there is an appeal; and other key information.

Copying Remediation Notices to Others

18 As well as serving the remediation notice on the appropriate person or persons, regulation 5 requires the enforcing authority, at the same time as it serves a remediation notice on the appropriate person(s), to send a copy of the notice to:

(a) anyone whom the authority considers to be the owner or occupier of any of the relevant land or waters, and whom they have therefore consulted under section 78G(3)(a) about rights that may need to be granted to enable the work to be done;

(b) anyone whom the authority considers will be required to grant rights over the land or waters to enable the work to be done, and whom they have therefore consulted under section 78G(3)(b) about such rights;

(c) anyone whom the authority considers to be the owner or occupier of any of the land to which the notice relates and whom they have therefore consulted under section 78H(1)about the remediation to be required; and

(d) the Environment Agency, where the local authority is the enforcing authority, or the local authority, where the Environment Agency is the enforcing authority.

19 It will be good practice for the authority to indicate to the recipient in which capacity they are being sent a copy of the notice. Where a remediation notice is served without consultation because of imminent danger of serious harm (see sections 78G(4) and 78H(4)), the copies should be sent to those who would have been consulted if there had not been an emergency.

Model Notices

20 Although the Regulations prescribe the content of remediation notices, they do not prescribe the form of the remediation notice. However, the Department and the Environment Agency aim to draw up a model form which all enforcing authorities can use, in the interests of consistency and minimising preparatory work.

Compensation for Rights of Entry Etc

21 Under section 78G(2), any person (the "grantor") whose consent is required before any thing required by a remediation notice may be done must grant (or join in granting) the necessary rights in relation to land or waters. For example, an appropriate person may be required to carry out remediation actions upon land which he does not own, perhaps because it has been sold since he caused or knowingly permitted its contamination. Another example may be where access to adjoining land owned or occupied by the grantor's land is needed to carry out the necessary works.

22 The rights that the grantor must grant (or join in granting) are not some special statutory right, but a licence or similar permission of the kind which any person would need to enter on land which they do not own or occupy and carry out works on it.

23 Regulation 6 and Schedule 2 set out a code for compensation payable to those who are required to grant such rights and who thereby suffer detriment. The provisions are closely modelled on those which apply for compensation payable in relation to works required in connection with waste management licences.

Applications for Compensation

24 Under paragraph 2 of schedule 2, applications must be made by grantors within:

(a) twelve months of the date of the grant of any rights;

(b) twelve months of the final determination or abandonment of an appeal, or

(c) six months of the first exercise of the rights,

whichever is the latest.

25 Paragraph 3 requires applications to be made in writing and delivered at or sent by pre-paid post to the last known address of the appropriate person to whom the rights were granted. They must include a copy of the grant of rights and any plans attached to it; a description of the exact nature of any interest in the land concerned; and a statement of the amount being claimed, distinguishing between each of the descriptions of loss or damage in the Regulations and showing how each amount has been calculated.

26 Paragraph 4 of the Schedule sets out the various descriptions of loss or damage for which compensation may be claimed. Distinctions are drawn between the grantor's land out of which the rights are granted, any other land of the grantor which might be affected, and other forms of loss. They can be summarised broadly as

(a) *depreciation:* depreciation in the value of

(i) any relevant interest (that is, the interest in land as a result of holding which the grantor is able to make the grant) which results from the ***grant*** of the rights; or

(ii) any other interest in land, which results from the ***exercise*** of the rights;

(b) *disturbance:* loss or damage sustained in relation to the grantor's relevant interest, equivalent to the compensation for "disturbance" under compulsory purchase legislation; this might arise where for example there was damage to the land itself or things on it as a consequence of the exercise of the rights, or a loss of income or a loss of profits resulted from the grant of the right or its exercise;

(c) *injurious affection:* damage to or injurious affection of the grantor's interest in any other land (that is, land not subject to the grant of rights); this again is analogous to the compensation for "injurious affection" under compulsory-purchase legislation; this might arise where the works on the contaminated land had some permanent adverse effect on adjoining land; and

(d) *abortive work:* loss in respect of carried out by, or on behalf of, the grantor which is rendered abortive as a result of the grant or the work done under it; this might arise where, for example, access to a newly erected building on the land was no longer possible after the grant of the rights, so that the building could no longer be used (paragraph 5(4) of Schedule 2 ensures that this can include expenditure on drawing up plans etc).

Professional Fees

27 Compensation can also be claimed for any reasonable expenses incurred in getting valuations or carrying out legal work in order to make or pursue the application itself (paragraph 5(6) of Schedule 2).

Rules for Assessing Compensation

28 Paragraph 5 of Schedule 2 ensures that the basic rules in section 5 of the Land Compensation Act 1961 apply to these cases. In particular, this section indicates what is meant by "value" when assessing depreciation.

29 To guard against the possibility of unnecessary things being done on land in order to claim or inflate compensation, paragraph 5(3) requires the value of such things to be ignored in assessing compensation.

Position of Mortgagees

30 There may be cases where mortgagees join in with mortgagors in the grant of rights, or grant such rights themselves. This might be because they are a mortgagee in possession, or they may have reserved the right to join in the grant of any rights. In these cases, mortgagees fall within section 78G(5) and are able to obtain compensation in their own right

31 The effect of paragraph 6(1) of Schedule 2 is that in all cases where there is a mortgage, the compensation is paid to the mortgagee (to the first one, if there are several mortgagees), but that it is then applied as if it were the proceeds of sale. This ensures that the mortgagor, or any other mortgagee, will get any appropriate share. Paragraph 5(5) prevents two payments of compensation (ie one each to mortgagee and owner) for the same interest in land.

Disputes

32 Disputes about compensation may be referred, by either party, to the Lands Tribunal (paragraph 6(3)). The Tribunal's procedure rules (SI 1996/1022) enable the Tribunal, with the consent of the parties, to determine a case on the basis of written representations, without the need for an oral hearing (rule 27). Rule 28 provides for a simplified procedure aimed at enabling certain cases to be dealt with speedily and at minimum expense to the parties. In such cases, the hearing takes place before a single Member of the Tribunal acting as arbitrator. Parties may in straightforward cases, and with the Tribunal's permission, be represented at hearings by a non-lawyer, such as a professional valuer.

Payment

33 Payments are to be made on the date or dates agreed by the parties (paragraph 6(2)) or as soon as practicable after the determination in cases where there is a dispute.

INTEREST

34 Interest may be payable on compensation, for example where applications take a long time to resolve. The Planning and Compensation Act 1991 makes provision for the calculation of interest on compensation. It will apply to compensation applications made under these regulations, because of the Planning and Compensation Act 1991 (Amendment of Schedule 18) Order 1999 (SI 1999/[n]), which also provides the date from which interest is to be payable for the various types of compensation.

Other Cases

35 Compensation under Part IIA is not available for any loss resulting from remediation work other than in relation to the heads of compensation specified in the Regulations. Nor is it available in cases where there is no remediation notice - for example where remediation is carried out voluntarily, without a remediation notice being served. In such cases, there is no requirement for the grant of rights: any rights that are needed must be acquired by negotiation in the usual way.

36 Where a local authority exercises powers of entry under section 108 of the Environment Act 1995 in connection with its contaminated land functions, the relevant compensation provisions are those at Schedule 18 of the 1995 Act.

Role of the Enforcing Authority

37 Arrangements for compensation under Part IIA are a matter for the grantor and the appropriate persons concerned, and the enforcing authority is not involved. However, it is required to consult those who may have to grant rights and to send them a copy of the remediation notice (see paragraph 18(b) above).

38 In addition, it good practice for authorities to let those who they have consulted because they may be required to grant rights to the appropriate person(s) know the final outcome of the determination of any appeal against the remediation notice, so that they are alerted to the need to be ready to apply for compensation.

Appeals Against Remediation Notices

39 Remediation notices must include information on the right to appeal against them (see paragraph 16 above). This section of this guide shows how the provisions in Part IIA fit together with the provisions in regulations 7 to 15 and the normal practice of the Department of the Environment, Transport and the Regions in handling appeals.

Matters Affecting Appeals Generally

TIME-LIMIT FOR APPEALS

40 Any appeal must be made within twenty-one days of receiving the remediation notice (*section 78L(1)*). There is no provision for extending this time-limit.

THE GROUNDS FOR APPEAL

41 Any appeal against a remediation notice must be made on one or more of the grounds set out in regulation 7(1). In broad terms, the grounds concern the following matters:

> (a) whether the land is contaminated land as defined; this ground may arise either because of failure to act in accordance with the statutory guidance in Chapters A and B of Annex 3 or because the identification is otherwise unreasonable;

(b) what is required to be done by way of remediation; this ground may arise either because of failure to have regard to the statutory guidance in Chapter C of Annex 3 or because the requirements are otherwise unreasonable;

(c) whether an appellant is an appropriate person to bear responsibility for a remediation action; section 78F is relevant;

(d) whether someone else is also an appropriate person for a remediation action; section 78F is relevant; under this ground, the appellant must claim either to have found someone else who has caused or knowingly permitted the pollution or that someone else is also an owner or occupier of all or part of the land;

(e) whether the appellant should have been excluded from responsibility for a remediation action; this ground may arise because of failure to act in accordance with the statutory guidance in Chapter D of Annex 3;

(f) the proportion of cost to be borne by the appellant; this ground may arise either because of failure to act in accordance with the statutory guidance in Chapter D of Annex 3 or because the determination of the appellant's share is otherwise unreasonable;

(g) whether the notice complies with restrictions in the Act on the serving of notices; section 78H(1) and (3) is relevant;

(h) whether the case is one of imminent danger of serious harm from the contaminated land; section 78H(4) is relevant;

(i) whether remediation is taking, or will take, place without a remediation notice; section 78H(5) of the Act is relevant;

(j) whether remediation requirements breach restrictions on liability for pollution of controlled waters; section 78J is relevant;

(k) whether remediation requirements breach restrictions on liability relating to escaping substances; section 78K is relevant;

(l) whether the authority has itself agreed to carry out the remediation at the cost of the person served with the remediation notice; section 78N(3)(b) of the Act is relevant;

(m) whether the authority should have decided that the recipient of the remediation notice would benefit from waiver or reduction of cost recovery on grounds of hardship or in line with the statutory guidance in Chapter E of Annex 3, that it therefore had power itself to carry out the remediation and that it was thus precluded from serving a remediation notice; sections 78N(3)(e) and 78P(1) and (2) are relevant;

(n) whether the authority's powers to remediate were exercisable because this was a case where hardship or the statutory guidance in Chapter E of Annex 3 should lead to a waiver or reduction in cost recovery; this ground may arise either because of failure to have regard to hardship or the statutory guidance in Chapter E or because the decision was otherwise unreasonable; sections 78N(3)(e) and 78P(1) and (2) are relevant;

(o) whether regard was had to site-specific guidance from the Environment Agency; section 78V(1) is relevant;

(p) whether enough time was allowed for remediation; the guidance in Chapter C of the statutory guidance may be relevant;

(q) whether the notice would make an insolvency practitioner, an official receiver or other receiver or manager personally liable in breach of the limits on such liability; section 78X(3)(a) and (4) is relevant;

(r) whether certain powers under the Integrated Pollution Control system (Part I of the Environmental Protection Act 1990) or under the waste management licensing system (Part II of that Act) were available to the authority; section 78YB(1) and (3) are relevant; the powers concerned are those in section 27 (Part I) and section 59 (Part II); and

(s) whether there is some informality, defect or error concerning the notice, not covered above; in an appeal on this ground, the appellate authority must dismiss the appeal if it is satisfied that the informality, defect or error was not a material one.

SUSPENSION OF REMEDIATION NOTICE UPON APPEAL

42 Once an appeal has been duly made, the remediation notice concerned is suspended (regulation 15). It remains suspended either until the appeal is finally determined or is withdrawn (abandoned) by the appellant. "Duly made" for this purpose means that an appeal must be made within the time limit, and in accordance with the Regulations.

Appeals Relating to Land which is not a Special Site

43 If the remediation notice was served by a local authority, appeals are to a magistrates' court (see section 78L(1)(a)). (However, if the land has subsequently been designated a special site and the notice has been adopted by the Environment Agency, any appeal would be to the Secretary of State.)

44 Regulation 8 sets out the requirements for making such an appeal. It provides that the appeal must be by way of a complaint for an order. At the same time as submitting the complaint to the justices' clerk, the appellant must:

(a) file (that is, deposit with the justices' clerk) a notice of appeal (which is different from the complaint) and serve a copy of this notice on:

(i) the enforcing authority;

(ii) any other appropriate person named in the remediation notice;

(iii) any person who is named in the appeal as an appropriate person; this relates to appeal ground (d);

(iv) any person named in the remediation notice as the owner or occupier of the land.

(b) file a copy of the remediation notice, and (because they will not have had it previously) serve a copy on any person named in the appeal as an appropriate person who was not named as such in that remediation notice;

(c) file a statement of the names and addresses of the above persons (except for the enforcing authority). These will normally be found in the remediation notice, except for details of any additional person named in the appeal as an appropriate person. This ensures that the Court has a list of all those to whom notice may need to be given at a later stage

45 The notice of appeal must state the appellant's name and address, and the grounds of the appeal, including details of matters relied on in support. These may take the form of supporting documents.

46 The justices' clerk or the court may give directions for the handling of the case including the timetable, documents and evidence (for example, it will be helpful to arrange for exchanging evidence). This function may be delegated to other court staff in accordance with relevant magistrates' court rules (see regulation 8(5)).

47 Any of the persons involved in paragraph 44(a) above will be given notice of the hearing and have an opportunity to be heard, including the appellant and the enforcing authority.

48 In accordance with the usual practices for determining who hears cases in magistrates' courts, it is expected that most appeals of this kind will be heard by a stipendiary magistrate.

49 An appellant who wishes to abandon (withdraw) an appeal to the court may request the court's permission to do so (but see paragraph 77 below, if there is a proposed modification to the remediation notice).

50 After the appeal has been determined or abandoned, the court has power to award costs in accordance with section 64 of the Magistrates Courts Act 1980. This provides that the court has the power to award such costs as are just and reasonable.

51 The appellant and the local authority have a right to appeal against the decision of the magistrates' court on the appeal. Under regulation 14, the appeal is made to the High Court. The procedure on such a further appeal is governed by the Rules of the Supreme Court on statutory appeals to the High Court. If any other appropriate person named in the remediation notice or the notice of appeal exercised their right to appear at the hearing before the magistrates' court, they will also have a similar right of appeal.

Special Sites Appeals

52 If land is a special site, and the remediation notice was served or adopted by the Environment Agency, appeals are to the Secretary of State for the Environment, Transport and the Regions.

53 The appellant in a special site case must appeal by submitting a "notice of appeal" to the Secretary of State. No particular form is prescribed for such a notice of appeal but, in accordance with regulation 9, it must state:

(a) the appellant's name and address;

(b) the grounds of appeal;

(c) details of matters relied on in support; these may take the form of supporting documents; and

(d) whether the appellant wishes the appeal to be in the form of a hearing, or alternatively have the appeal decided on the basis of written representations.

54 The appellant must at the same time serve a copy of the notice of appeal on

(a) the Environment Agency;

(b) any other appropriate person named in the remediation notice;

(c) any person who is named in the appeal as an appropriate person; this relates to appeal ground (d);

(d) any person named in the remediation notice as the owner or occupier of the land.

55 The appellant must also send to the Secretary of State

(a) a list of the names and addresses of the above persons (except for the Agency); these will normally be found in the remediation notice, except for details of any additional person named in the appeal as an appropriate person; and

(b) a copy of the remediation notice.

56 The appellant must also (because they will not have had it previously) serve a copy of the remediation notice on any person named in the appeal as an appropriate person, or as an owner or occupier, who was not named as such in that remediation notice.

57 Appeals to the Secretary of State should be submitted to the Planning Inspectorate. Their current address and telephone number are as follows

The Planning Inspectorate,
Room 1413,
Tollgate House,
Houlton Street,
BRISTOL BS2 9DJ

Tel: 0117 987 8812

INITIAL PROCEDURE ON AN APPEAL TO THE SECRETARY OF STATE

58 Within 14 days of receiving a copy of the notice of appeal, the Environment Agency, in accordance with regulation 10, must notify all others whom the appellant was required to send a copy of the appeal. This notification will ensure that they know there is an appeal, and will make them aware that:

(a) written representations to the Secretary of State may be made within 21 days from the receipt of the Environment Agency's notice;

(b) such representations will be copied to the appellant and the Agency; and

(c) those who make representations will be informed about any public hearing.

59 All written representations made to the Secretary of State at any time throughout the appeal should be dated with the date on which they are submitted.

60 Most cases will be decided by Inspectors appointed on the Secretary of State's behalf, under the provisions of section 78L(6) which allow for appeal decisions to be delegated to them. References to the Secretary of State in the procedures set out below may be taken to include the inspector, except where the context indicates otherwise.

61 Some cases may, however, be recovered for decision by the Secretary of State. In these "recovered" cases, the Secretary of State will determine the appeal on the basis of a written report from the inspector. In accordance with regulation 11(4), this report must contain conclusions and recommendations, or reasons for not making recommendations In accordance with regulation 12, when the appeal has been determined, a copy of this report will be sent to the appellant and to all those on whom the appellant was required to serve a copy of the notice of appeal, along with the notification of the determination of the appeal.

62 Each special-site appeal will be looked at individually to decide whether it should be "recovered". The categories most likely to be recovered are as follows

(a) cases involving special sites of major importance or having more than local significance;

(b) cases giving rise to significant local controversy;

(c) cases which raise significant legal difficulties; and

(d) cases which raise major, novel issues and which could therefore set a precedent.

63 Other special site appeal cases may on occasion merit being "recovered" for decision by the Secretary of State.

DECIDING AN APPEAL TO THE SECRETARY OF STATE

64 A hearing will be arranged if either of the parties asks for that to be done. Otherwise, the appeal will be decided on the basis of written representations, unless the Secretary of State decides that it is desirable to hold a hearing or a public local inquiry.

WRITTEN REPRESENTATIONS

65 If the appeal is being decided by written representations, the procedure will normally be as follows:-

Step 1

The Secretary of State will invite the Agency to respond to the grounds of appeal; to provide any other information that it relies on to support its decision to serve the remediation notice within 28 days; and to send the appellant a copy of its response at the same time as it is submitted to the Secretary of State.

Step 2

The appellant will then be given an opportunity to comment on the representations from the Agency. These should be made within 14 days of the date of submission of the Agency's representations and must be copied to them at the same time. The Secretary of State will also send to the appellant and the Agency copies of the representations received under regulation 10 (other than the copy of the Agency response mentioned in step 1 above, which will already have been copied to the appellant). The Secretary of State will seek their comments, which should also be given within 14 days.

Step 3

Arrangements will be made for an Inspector to visit the appeal site. As far as possible, a mutually convenient time will be arranged. The Agency, the appellant and any other person sent a copy of the notice of appeal under regulation 9(2) will be invited to attend. Should any of the parties not be present at the time arranged, the Inspector may decide not to defer the visit. No representations about the appeal can be made during the visit but must be made in writing under the procedures for making representations and within the appropriate time limits. The visit may continue in the absence of one or more of the parties.

66 This procedure is intended to allow the determination of appeals as expeditiously as possible. However, the Secretary of State may in certain exceptional cases set time limits which differ from those above, or may extend a time limit either before or after it has expired. The Secretary of State may also request exchanges of information in addition to those mentioned above.

HEARINGS

67 Where an appeal is to be decided after a hearing, in accordance with regulation 11(1) - (3), the Agency and those required to be sent a copy of the notice of appeal under regulation 9(2) will be invited to make representations at the hearing. Other persons may be heard at the discretion of the Inspector. The Agency will inform other persons of the date of the hearing where they have previously expressed an interest in the case.

68 A pre-hearing timetable will be provided for the submission of written statements. Failure to provide this information, within the specified timescales, could lead to hearings being adjourned resulting in unnecessary delays. The conduct of the hearing will be for the Inspector to determine, and will generally follow the Code of Practice for Hearings given at Annex 2 of DOE Circular 15/96. It may sometimes be necessary to hold a pre-inquiry meeting to discuss the nature of the evidence to be given, who is likely to participate and the programme to be adopted.

69 The presumption is that hearings will be held in public. However, a hearing, or any part of it, may be held in private if the Inspector hearing the appeal decides that there are particular and special grounds for doing so, such as reasons of commercial confidentiality, or national security.

PUBLIC INQUIRIES

70 The holding of a public local inquiry under regulation 11(1)(b) is expected to be more appropriate for particularly complex or locally controversial cases. A pre-inquiry timetable will be provided for the submission of statements and proofs of evidence. It is important that this is adhered to. Inquiry proceedings are more formal in nature than the

majority of hearings. Inquiries will be conducted in accordance with the spirit of the Town and Country Planning (Inquiries Procedures) Rules 1992. The rules require details of the inquiry to be posted locally.

ABANDONMENT OF APPEALS

71 An appellant who wishes to abandon (withdraw) a special site appeal must notify the Secretary of State in writing, who will in turn notify all those who have received notice of the appeal in accordance with regulation 9(3) and (5). The appeal is deemed to be abandoned on the day the Secretary of State receives the notice of the abandonment. Abandonment may be refused by the Secretary of State under regulation 9(4) if the appellant has been notified of a modification to the remediation notice under regulation 13 (see paragraph 77 below).

NOTIFICATION OF APPEAL DECISION

72 Regulation 12 requires that the appellant must be notified in writing of the decision on the appeal, and sent a copy of any report made to the Secretary of State by an inspector. The decision letter, and the report if any, must be copied by the Secretary of State to the Agency and to anyone who was entitled to receive a copy of the notice of the appeal.

73 Details of decision letters on special-site cases will be placed on the register. Copies will also be available for a small charge from the addresses shown above in paragraph 57 above, as long as they do not contain confidential information or trade secrets. Further information can also be obtained from the same source.

AWARD OF COSTS

74 Costs may be awarded where there is a hearing or a public local inquiry. Awards of costs will follow existing general guidance in Department of the Environment Circular 8/93, which governs planning appeals and similar cases. This means that each party will bear their own costs unless there has been unreasonable behaviour leading to unnecessary expense, as described in that Circular. In cases decided by written representations, the parties must meet their own expenses.

APPEALS OR COMPLAINTS AGAINST THE DECISION

75 There is no statutory right of appeal against a decision made on appeal by the Secretary of State. Once a decision letter has been issued, the decision is final, and the Secretary of State and the inspector can no longer consider any representations or make any further comments on the merits or otherwise of the case. A party to the appeal may be able to seek judicial review of the decision in the High Court. If they consider that there has been maladministration in reaching the decision, they may also ask an MP to take up the matter with the Parliamentary Commissioner for Administration (the Ombudsman), though the Ombudsman cannot re-open the appeal.

76 If anyone has a complaint about the handling of an appeal by the Planning Inspectorate, they should write to the Complaints Officer at the address shown in paragraph 57 above.

Modification of Remediation Notices

77 Section 78L(2)(b) enables an appellate authority to modify the remediation notice which is the subject of the appeal. If it proposes to do so in a way which is less favourable to the appellant, then regulation 13 applies. Under regulation 13, the appellate authority must notify the appellant and those persons who were required to be sent a copy of the notice of appeal under regulations 8(2) or 9(2). The appellant and those persons have a right to make representations, and the appellant has a right to be heard. If this right to be heard is exercised, the enforcing authority also has the right to be heard. The appellate authority may refuse to permit an appeal to be withdrawn if it has given notice of a proposed modification of the remediation notice (regulations 8(4)(c) and 9(4)).

Additional Remediation Notices to Reflect an Appeal Decision

78 A decision by the appellate authority to quash or modify a remediation notice on appeal may also have implications for a person who has not been served with a remediation notice. This might arise where, in particular, an appeal succeeds on the grounds that there is another person who should be held liable instead of or as well as the appellant. In such cases the enforcing authority will need to consider serving a further remediation notice(s) which take(s) into account the appellate authority's decision. Such additional notices would need to fulfil all the relevant requirements of the Act, regulations, and the statutory guidance, in the usual way. They would attract the normal rights of appeal.

Public Registers

79 Section 78R requires each enforcing authority to keep a public register. The public register is intended to act as a full and permanent record, open for public inspection, of all regulatory action taken by the enforcing authority in respect of the remediation of contaminated land, and will include information about the condition of land.

80 As record of regulatory activity, registers are broadly similar in purpose to, and part of the suite of, registers kept in relation to other environmental protection controls, including those kept under Part I and Part II of the Act (IPC etc, and waste regulation); and planning registers kept under the Town and Country Planning Acts, which may also contain valuable information relevant to the condition of land in particular locations.

81 The Agency register is to be kept at the Agency office for the area in question, and the local authority register is kept at the authority's principal office (regulation 16(3)).

Content of the Registers

82 Section 78R(1) specifies what material is to be entered on the register. It leaves the details of that material to be prescribed in regulations. These details are set out in Schedule 3.

83 It is good practice to ensure that the register is so organised that all the entries relating to a particular site can be readily consulted in connection with each other.

84 Schedule 3 requires registers to include *full particulars of* certain matters, rather than *copies of* the various forms of notice and other documents listed. However, there is no legal objection to authorities placing a copy of the various documents on the register. Any document not placed on the register may, in any case, be accessible under the Environmental Information Regulations 1992 (SI 1992/3240, as amended).

Information to be Placed on the Register

INFORMATION ABOUT REMEDIATION

85 For a ***remediation notice***, the effect of regulation 16 and Schedule 3 is that the following information must be placed on the register:

Site Information

(a) the location and extent of the contaminated land sufficient to enable it to be identified; this requirement would ideally be met by showing its address and the estimated area in hectares, together with a plan to a suitable scale and a National Grid reference;

(b) the significant harm or pollution of controlled waters by reason of which the land is contaminated land;

(c) the substances by reason of which the land is contaminated land and, if any of the substances have escaped from other land, the location of that other land;

(d) the current use of the land in question;

Remediation Information

(e) the name and address of the person on whom the notice is served;

(f) what each appropriate person is to do by way of remediation, and the periods within which they are required to each of the things;

86 In cases where site investigation reports obtained by or provided to the authority, which relate to the condition of land or any remediation action, are likely to be publicly accessible under the Environmental Information Regulations, it would also be good practice to include a reference to such information. The entry could include:

(a) a description of the information,

(b) the date on which it was prepared,

(c) the person by whom and for whom it was prepared, and

(d) where it is available to be inspected or copied.

87 It would also be good practice for the remediation particulars referred to paragraph 88(f) above to include an indication of whether the action required was “assessment action”, “remedial treatment action” or “monitoring action” (see the definitions of these terms in paragraph C.8 of Chapter C of the statutory guidance, reflecting section 78A(7)).

88 For ***remediation declarations***, ***remediation statements*** and ***notifications of claimed remediation*** (that is notifications for the purposes of section 78R(1)(h) or (j)), the requirement is to enter full particulars of the instrument in question, together with the site information described at paragraphs 85(a)-(d) above. This means that the registers should show, in addition to the date of the instrument and the site information, at least:

(a) ***for remediation declarations*** (see paragraphs 4 and 5 of Schedule 3): the reason why the authority was precluded from specifying a particular remediation action (where, therefore, in the case of pollution of controlled waters, the authority considered that remediation of pollution was precluded on the basis that it would be unreasonable, having regard to the nature of that pollution, the register will show why the authority considered that the contamination was not significant);

(b) ***for remediation statements*** (see paragraphs 6 and 7 of Schedule 3): the remediation action that has been, is being or will be taken, the timescale for that action and the details of the person who is taking it;

(c) ***for notifications of claimed remediation*** (see regulations 16(2) and paragraph 11 of Schedule 3): the remediation action that is claimed to have been taken, the timescale of that action and the details of the person who claims to have taken it.

89 In respect of notifications of claimed remediation, it is open to the person giving the notification to include additional material. In particular, it will be in the interests of both regulators and those giving the notifications to include, in addition, an indication of what the work carried out was intended to achieve; a description of any appropriate quality assurance procedure adopted relating to what has been claimed to be done; and a description of any verification measures carried out for the purpose of assessing the effectiveness of the remediation in relation to the particular significant harm or pollution of controlled waters to which it was referable.

90 Section 78R(3) makes clear that an entry in the register relating to notifications of claimed remediation in no way represents any endorsement or confirmation by the authority maintaining the register that remediation measures have been carried out nor, therefore, that land is no longer contaminated land. It would be good practice to ensure that this disclaimer is clearly associated with all entries of this kind.

91 ***Other environmental controls:*** The register is required, by paragraphs 14 and 15 of Schedule 3, to include information in cases of the two situations where a site may be formally identified as contaminated land but is dealt with under other environmental controls, instead of under Part IIA (see section 78YB(1) and (3)). These other powers are section 27 in Part I of the Environmental Protection Act 1990 (Integrated Pollution Control) and section 59 in Part II of that Act (waste management licensing). In both cases, the register is required to include, in addition to the site information described in paragraphs 85(a)-(d) above particulars of any steps about which the enforcing authority knows that have been taken under those other powers.

92 The register is also required, by paragraph 16 of Schedule 3, to include information about any cases where particular remediation actions cannot be specified in a remediation notice because they would have the effect of interfering with a discharge into controlled waters for which consent has been given under Chapter II of Part III of the Water Resources Act 1991 (see section 78YB(4)). In addition to the site information described in paragraphs 85(a)-(d) above, the register is required to give particulars of the discharge consent.

OTHER INFORMATION

Special Sites

93 Where the land is a special site, the register should include the information required in respect of any other site. In addition, under paragraph 10 of Schedule 3, the register is required to include:

(a) the notice designating it as such (given by a local authority under section 78C(1)(b) or 78C(5)(a), or by the Secretary of State under section 78D(4)(b));

(b) an identification of the description of land under which it is a special site (see regulations 2 or 3 and Schedule 1)

(c) any notice given by the appropriate Agency of its decision to adopt a remediation notice;

(d) any notice given by or to the enforcing authority under section 78Q(4) terminating the designation.

Agency Site-specific Guidance

94 Under paragraph 13 of Schedule 3, the register is required to include the date of any site-specific guidance issued by the Environment Agency under section 78V(1**).** Where such site-specific guidance exists, information in it may be required to be available to the public under the Environmental Information Regulations. Where this is likely, it would be good practice to include a reference to where it is available to be inspected or copied.

Appeals against a Remediation Notice

95 Where a person on whom a remediation notice has been served appeals against that notice, the register is required, under paragraphs 2 and 3 of Schedule 3, to include full particulars of:

(a) any appeal against a remediation notice, including the date and the name and address of the appellant; and

(b) the decision on such an appeal.

96 If there is an appeal to the High Court against the judgement of a magistrates' court on an appeal against a remediation notice, the requirement to include the decision on the appeal extends to including on the register the decision of the High Court on that further appeal. It would also be good practice to include on the register any judgement of the High Court, or subsequent appeal judgement, on an application for judicial review of the determination of the Secretary of State on an appeal against a remediation notice.

Appeals against a Charging Notice

97 Where the owner or occupier of any land appeals to the county court under section 78P(8) against a notice charging costs to be recovered by the enforcing authority on his land, the register is required to contain full particulars of:

(a) any appeal against a charging notice; including the date and the name and address of the appellant; and

(b) the decision on such an appeal.

Convictions

98 Under paragraph 12 of Schedule 3, the register is required to include full particulars of any conviction under section 78M (failure to comply with a remediation notice), including the name of the offender, the date of conviction, the penalty imposed, and the name of the Court.

99 Authorities should regard to the provisions of the Rehabilitation of Offenders Act 1974, under which convictions of individuals can become spent. The Department understands that it would not be unlawful under that Act to retain details of a spent conviction on the register, but nonetheless retention would seem contrary to its spirit. The Department recommends therefore that authorities should regularly review their registers with the aim of identifying and removing spent convictions, although it may be desirable to continue to record that an offence has taken place. In the case of convictions of a body corporate, the 1974 Act does not apply, but it would seem equitable for the same approach to be applied as for the spent convictions of individuals.

CONFIDENTIALITY

100 Sections 78S and 78T set out restrictions on information to be placed on the register because of considerations of national security or commercial confidentiality. The effect of these provisions is explained in Annex 2, paragraphs 17.8 to 17.19.

ANNEX 5 - Guide to the Environment Act 1995 (Commencement Order No. [n] and Saving Provision) Order 1999

COMMENCEMENT OF PART IIA ENVIRONMENTAL PROTECTION ACT 1990

1 Commencement Order No.1 (S.I. 1995/1983) brought into force section 57 of the Environment Act 1995 ("the 1995 Act"), in so far as was necessary to enable the Secretary of State to consult on and issue statutory guidance and make regulations.

2 The main effect of the Environment Act 1995 (Commencement No. [n] and Saving Provision) Order 1999 (SI 1999/[n]) is to bring the remainder of section 57 of the 1995 Act into force on [1 April 2000]. This, in turn, brings the Part IIA regime into force.

REPEALS AND OTHER AMENDMENTS TO THE 1990 ACT

3 The Order also brings into force the following amendments to the 1990 Act:

(a) an amendment to the definition of a statutory nuisance in section 79, excluding any matter which consists of, or is caused by, land in a contaminated state;

(b) the repeal of the following sections (neither of which ever came into force):

(i) section 61, which would have created specific duties for waste regulation authorities as respects closed landfills, and

(ii) section 143, which would have required local authorities to compile registers of land which may be contaminated; and

(c) an amendment to section 161, relating to the use of the affirmative resolution procedure for any order under the new section 78M(4) (which deals with changes to the maximum level of fines for non-compliance with remediation notices).

SAVING PROVISION RELATING TO STATUTORY NUISANCE

4 Article 3 of the Order makes a saving provision with respect to the dis-application of the Statutory Nuisance system from land contamination problems. Any matter will continue to be treated as a statutory nuisance in any case where an abatement notice under section 80(1) of the 1990 Act, or a court order under section 82(2)(a) or (b) of that Act, was in force with respect to the matter in question at the date that Part IIA came into force. This will enable any regulatory action to continue without interruption.

ANNEX 6 - Glossary of Terms

The statutory guidance (and other parts of this Circular) uses a number of terms which are defined in Part IIA of the 1990, other Acts or in the guidance itself. The meanings of the most important of these terms are set out below, along with a reference to the section in the Act or the paragraph in which the relevant term is defined.

Terms which are defined in statutes (mostly in section 78A of the 1990 Act) are shown with underlining.

Animal or crop effect: significant harm of a type listed in box 3 of Table A of Chapter A.

Apportionment: any determination by the enforcing authority under section 78F(7) (that is, a division of the costs of carrying out any remediation action between two or more appropriate persons). *Paragraph D.5(e)*

Appropriate person: defined in section 78A(9) as:

> "any person who is an appropriate person, determined in accordance with section 78F..., to bear responsibility for any thing which is to be done by way of remediation in any particular case."

Assessment action: a remediation action falling within the definition of remediation in section 78A(7)(a), that is the doing of anything for the purpose of assessing the condition of the contaminated land in question, or any controlled waters affected by that land or any land adjoining or adjacent to that land. *Paragraph C.8(e)*

Attribution: the process of apportionment between liability groups. *Paragraph D.5(e)*

Building effect: significant harm of a type listed in box 4 of Table A of Chapter A.

Caused or knowingly permitted: test for establishing responsibility for remediation, under section 78F(2); see paragraphs 9.8 to 9.14 of Annex 2 for a discussion of the interpretation of this term.

Changes to Substances: an exclusion test for Class A persons set out in Part 5 of Chapter D. *Paragraphs D.62 to D.64*.

Charging notice: a notice placing a legal charge on land served under section 78P(3)(b) by an enforcing authority to enable the authority to recover from the appropriate person any reasonable cost incurred by the authority in carrying out remediation.

Class A liability group: a liability group consisting of one or more Class A persons. *Paragraph D.5(c)*

Class A person: a person who is an appropriate person by virtue of section 78F(2) (that is, because he has caused or knowingly permitted a pollutant to be in, on or under the land). *Paragraph D.5(a)*

Class B liability group: a liability group consisting of one or more Class B persons. *Paragraph D.5(c)*

Class B person: a person who is an appropriate person by virtue of section 78F(4) or (5) (that is, because he is the owner or occupier of the land in circumstances where no Class A person can be found with respect to a particular remediation action). *Paragraph D.5(b)*

Collective action: a remediation action which addresses together all of the significant pollution 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. *Paragraph D.22(b)*

Common action: a remediation action which addresses together all of the significant pollution 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. *Paragraph D.22(a)*

Contaminant: a substance which is in, on or under the land and which has the potential to cause harm or to cause pollution of controlled waters. *Paragraph A.12*

Contaminated land: defined in section 78A(2) as

> "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) pollution of controlled waters is being, or is likely to be, caused."

Contaminated Land (England) Regulations 1999 : regulations (SI 1999/[n]**)** made under Part IIA – described in Annex 4.

Controlled waters: defined in section 78A(9) by reference to Part III (section 104) of the Water Resources Act 1991; this embraces territorial and coastal waters, inland fresh waters, and ground waters.

Cost recovery decision : any decision by the enforcing authority whether:

> a) to recover from the appropriate person all the reasonable costs incurred by the authority in carrying out remediation, or
>
> b) not to recover those costs or to recover only part of those costs. *Paragraph E.8*

Current use: any use of the land which is currently being made, or is likely to be made, of the land. This definition is subject to the certain qualifications. *Paragraph A.26*

Ecological system effect : significant harm of a type listed in box 2 of Table A of Chapter A.

Enforcing authority: defined in section 78A(9) as:

> (a) in relation to a special site, the Environment Agency;
>
> (b) in relation to contaminated land other than a special site, the local authority in whose area the land is situated.

Escaped Substances: an exclusion test for Class A persons set out in Part 5 of Chapter D. *Paragraphs D.65 to D.67*

Excluded Activities: an exclusion test for Class A persons set out in Part 5 of Chapter D. *Paragraphs D.47 to D.50*

Exclusion: any determination by the enforcing authority under section 78F(6) (that is, that a person is to be treated as not being an appropriate person). *Paragraph D.5(d)*

Hardship: a factor underlying any cost recovery decision made by an enforcing authority under section 78P(2). See paragraphs 10.8 to 10.10 of Annex 2 for a discussion of the interpretation of this term.

Harm: defined in section 78A(4) as:

> "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."

Human health effect: significant harm of a type listed in box 1 of Table A of Chapter A.

Industrial, trade or business premises: defined in section 78M(6), for the purpose of determining the penalty for failure to comply with a remediation notice, as:

> "premises used for any industrial, trade or business purposes or premises not so used on which matter is burnt in connection with any industrial, trade or business process, and premises are used for industrial purposes where they are used for the purposes of any treatment or process as well as where they are used for the purpose of manufacturing."

Inspection using statutory powers of entry: any detailed inspection of land carried out through use of powers of entry given to an enforcing authority by section 108 of the Environment Act 1995. *Paragraph B.21*

Introduction of Pathways or Receptors: an exclusion test for Class A persons set out in Part 5 of Chapter D. *Paragraphs D.68 to D.72*.

Intrusive investigation: an investigation of land (for example by exploratory excavations) which involves actions going beyond simple visual inspection of the land, limited sampling or assessment of documentary information. *Paragraph B.20(c)*

Liability group: the persons who are appropriate persons with respect to a particular significant pollutant linkage. *Paragraph D.5(c)*

Local authority: defined in section 78A(9) as meaning any unitary authority, district council, the Common Council of the City of London, the Sub-Treasurer of the Inner Temple and the Under-Treasurer of the Middle Temple.

Monitoring action: a remediation action falling within the definition in section 78A(7)(c), that is "making of subsequent inspections from time to time for the purpose of keeping under review the condition of the land or waters". *Paragraph C.8(g)*

Orphan linkage: a significant pollutant linkage for which no appropriate person can be found, or where those who would otherwise be liable are exempted by one of the relevant statutory provisions. *Paragraphs D.12, D.14 and D.17*

Owner: defined in section 78A(9) as:

> "a person (other than a mortgagee not in possession) who, whether in his own right or as trustee for any other person, is entitled to receive the rack rent of the land, or where the land is not let at a rack rent, would be so entitled if it were so let."

Part IIA: Part IIA of the Environmental Protection Act 1990.

Pathway: one or more routes or means by, or through, which a receptor:

(a) is being exposed to, or affected by, a contaminant, or

(b) could be so exposed or affected. *Paragraph A.14*

Payments Made for Remediation : an exclusion test for Class A persons set out in Part 5 of Chapter D. *Paragraphs D.51 to D.56*

Person acting in a relevant capacity : defined in section 78X(4), for the purposes of limiting personal liability, as any of the following:

> "(a) a person acting as an insolvency practitioner, within the meaning of section 388 of the Insolvency Act 1986 (including that section as it applies in relation to an insolvent partnership by virtue of any order made under section 421 of that Act;
>
> "(b) the official receiver acting in a capacity in which he would be regarded as acting as an insolvency practitioner within the meaning of section 388 of the Insolvency Act 1986 if subsection (5) of that section were disregarded;
>
> "(c) the official receiver acting as a receiver or manager;
>
> "(d) a person acting as a special manager under section 177 or 370 of the Insolvency Act 1986;…
>
> "(f) a person acting as a receiver or receiver and manager under or by virtue of any enactment, or by virtue of his appointment as such by an order of a court or by any other instrument."

Pollutant: a contaminant which forms part of a pollutant linkage. *Paragraph A.17*

Pollutant linkage: the relationship between a contaminant, a pathway and a receptor. *Paragraph A.17*

Pollution of controlled waters : defined in section 78A(9) as:

> "the entry into controlled waters of any poisonous, noxious or polluting matter or any solid waste matter."

Possibility of significant harm : a measure of the probability, or frequency, of the occurrence of circumstances which would lead to significant harm being caused. *Paragraph A.27*

Receptor: either:

(a) a living organism, a group of living organisms, an ecological system or a piece of property which:

(i) is in a category listed in Table A in Chapter A as a type of receptor, and

(ii) is being, or could be, harmed, by a contaminant; or

(b) controlled waters which are being, or could be, polluted by a contaminant. *Paragraph A.13*

Register: the public register maintained by the enforcing authority under section 78R of particulars relating to contaminated land.

Related companies: those which are members of a group of companies consisting of a "holding company" and its "subsidiaries", where these terms have the same meaning as in section 736 of the Companies Act 1985. *Paragraph D.46(b)*

Relevant date: the date on which the enforcing authority first served on anyone a notice under section 78B(3) identifying the land as contaminated land (used in assessing whether appropriate persons are "related companies"). *Paragraph D.46(a)*

Relevant information: information relating to the assessment of whether there is a significant possibility of significant harm being caused, 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 the determination of whether any land is contaminated land for the purposes of Part IIA, in that the use of the information is consistent with providing a level of protection of risk in line with the qualitative criteria set out in Tables A and B of Chapter A. *Paragraph A.31*

Relevant land or waters: the contaminated land in question, any controlled waters affected by that land and any land adjoining or adjacent to the contaminated land on which remediation might be required as a consequence of the contaminated land being such land. *Paragraph C.8(d)*

Remedial treatment action: a remediation action falling within the definition in section 78A (7)(b), that is the doing of any works, the carrying out of any operations or the taking of any steps in relation to any such land or waters for the purpose:

(a) of preventing or minimising, or remedying or mitigating the effects of any significant harm, or any pollution of controlled waters, by reason of which the contaminated land is such land, or

(b) of restoring the land or waters to their former state. *Paragraph C.8(f)*

Remediation: defined in section 78A(7) as

"(a) the doing of anything for the purpose of assessing the condition of -

"(i) the contaminated land in question;

"(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 or waters for the purpose -

"(i) of preventing or minimising, or remedying or mitigating the effects of any significant harm, or any 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."

Remediation action: any individual thing which is being, or is to be, done by way of remediation. *Paragraph C.8(a)*

Remediation declaration: defined in section 78H(6). It is a document prepared and published by the enforcing authority recording remediation actions which it would have specified in a remediation notice, but which it is precluded from specifying by virtue of sections 78E(4) or (5), the reasons why it would have specified those actions and the grounds on which it is satisfied that it is precluded from specifying them in a notice.

Remediation notice: defined in section 78E(1) as a notice specifying what an appropriate person is to do by way of remediation and the periods within which he is required to do each of the things so specified.

Remediation package: the full set or sequence of remediation actions, within a remediation scheme, which are referable to a particular significant pollutant linkage. *Paragraph C.8(b)*

Remediation scheme: the complete set or sequence of remediation actions (referable to one or more significant pollutant linkages) to be carried out with respect to the relevant land or waters. *Paragraph C.8(c)*

Remediation statement: defined in section 78H(7). It is a statement prepared and published by the responsible person detailing the remediation actions which are being, have been, or are expected to be, done as well as the periods within which these things are being done.

Risk: the combination of:

(a) the probability, or frequency, of occurrence of a defined hazard (for example, exposure to a property of a substance with the potential to cause harm); and

(b) the magnitude (including the seriousness) of the consequences. *Paragraph A.9*

Shared action: a remediation action which is referable to the significant pollutant in more than one significant pollutant linkage. *Paragraph D.21(b)*

Single-linkage action: a remediation action which is referable solely to the significant pollutant in a single significant pollutant linkage. *Paragraph D.21(a)*

Significant harm: defined in section 78A(5). It means any harm which is determined to be significant in accordance with the statutory guidance in Chapter A (that is, it meets one of the descriptions of types of harm in the second column of Table A of that Chapter).

Significant pollutant: a pollutant which forms part of a significant pollutant linkage. *Paragraph A.20*

Significant pollutant linkage: a pollutant linkage which forms the basis for a determination that a piece of land is contaminated land. *Paragraph A.20*

Significant possibility of significant harm: a possibility of significant harm being caused which, by virtue of section 78A(5), is determined to be significant in accordance with the statutory guidance in Chapter A.

Sold with Information: an exclusion test for Class A persons set out in Part 5 of Chapter D. *Paragraph D.57 to D.61*

Special site: defined by section 78A(3) as:

> "any contaminated land -
>
> "(a) which has been designated as such a site by virtue of section 78C(7) or 78D(6)...;and
>
> "(b) whose designation as such has not been terminated by the appropriate Agency under section 78Q(4)...".
>
> The effect of the designation of any contaminated land as a special site is that the Environment Agency, rather than the local authority, becomes the enforcing authority for the land.

Substance: defined in section 78A(9) as:

> "any natural or artificial substance, whether in solid or liquid form or in the form of a gas or vapour."