



Llywodraeth Cynulliad Cymru
Welsh Assembly Government

Part 2A
Statutory Guidance on Contaminated Land
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Introduction

This Statutory Guidance contains 5 chapters issued by the Welsh Assembly Government under Part 2A of the Environmental Protection Act 1990. It comprises the guidance issued in November 2001 and further guidance issued by the Welsh Assembly Government to accompany modifications made to Part 2A by the Radioactive Contaminated Land (Modification of Enactments) (Wales) Regulations 2006 so as to apply the regime in Part 2A to include situations where harm is being caused as a result of the presence of radioactivity in, on or under the land.

The further guidance is incorporated into the 2001 guidance, and for convenience the additional text is clearly marked. The numbering has been changed to mirror that in England as requested by some respondents.

This Statutory Guidance replaces the version that was issued in November 2001. The statutory guidance below is signposted at the beginning of each chapter, to indicate which passages are of general application, which concern only matters attributable to radioactivity, and which concern only matters not attributable to radioactivity.

In any statutory provisions recited by this guidance, references to “the Secretary of State” are to be read as references to “the National Assembly for Wales” (by virtue of the National Assembly for Wales (Transfer of Functions) Order 1999) and subsequently, on the coming into force of the Government of Wales Act 2006, to “the Welsh Ministers”.

CHAPTER A – Statutory Guidance on the Definition of Contaminated Land

Part 1 Scope of the Chapter

Applies generally.

Part 2 Definitions of Terms and General Material

Applies generally.

Part 3 Significant Harm and the Significant Possibility of Significant Harm

Only applies to situations involving contaminants which are not radioactive.

Part 4 The Pollution of Controlled Waters

Only applies to situations involving contaminants which are not radioactive.

Part 5 Harm attributable to Radioactivity and the Significant Possibility of Harm

Only applies to situations involving contaminants which are radioactive.

PART 1 - Scope of the Chapter

A.1 The statutory guidance in this Chapter is issued under section 78A(2), (5) and (6) and section 78A(2), (5) and (6) (as modified) of Part 2A 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.2A In relation to harm so far as attributable to radioactivity, the definition of contaminated land has been modified by regulation 5(1) of The Radioactive Contaminated Land (Modification of Enactments) (Wales) Regulations 2006 ("the Modification Regulations") to read:

"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) harm is being caused, or

(b) there is a significant possibility of such harm being 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.3A Regulation 5(5) of the Modification Regulations modifies section 78A(5) in relation to harm so far as attributable to radioactivity to provide that:

“the questions –

(a) whether harm is being caused, and

(b) whether the possibility of harm being caused is “significant”,

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) and section 78A(2) (as modified) 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 this 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 2A of the Environmental Protection Act 1990 has the same meaning for the purposes of the guidance in this Chapter.

A.7A In relation to harm so far as attributable to radioactivity, unless otherwise stated, any word, term or phrase given a specific meaning in Part 2A of the Environmental Protection Act 1990, as modified by the Modification Regulations, has the same meaning for the purposes of the guidance in this Chapter.

A.8 Any reference to "Part 2A" means Part 2A of the Environmental Protection Act 1990. In relation to harm so far as attributable to radioactivity, any reference to "Part 2A" means Part 2A of the Environmental Protection Act 1990, as modified.

A.8A Any reference to a "section" in primary legislation means a section of the Environmental Protection Act 1990, unless it is specifically stated otherwise. Any reference to a "section (as modified)" means a section of the Environmental Protection Act 1990 as modified by the Modification Regulations, unless it is specifically stated otherwise.

A.8B Any reference to "harm so far as attributable to radioactivity" and "other than in relation to harm so far as attributable to radioactivity" means harm so far as attributable to any radioactivity possessed by any substance and other than in relation to harm so far as attributable to any radioactivity possessed by any substance, respectively.

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; or
- (c) any person who is, or could be, subject to lasting exposure so far as attributable to radioactivity.

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.18A In relation to harm so far as attributable to radioactivity, 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 they contain radionuclides.

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,
 - (iv) is likely to result in such pollution,

(v) is resulting in harm so far as attributable to radioactivity being caused to any person in the pollutant linkage, or

(vi) presents a significant possibility of harm so far as attributable to radioactivity being caused to any person in the pollutant linkage.

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. The guidance in Part 5 relates to harm so far as attributable to radioactivity and the significant possibility of such harm being caused.

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) provide that what harm is to be regarded as "significant" and whether the possibility of significant harm being caused is significant is to 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	<p>Death, disease, serious injury, genetic mutation, birth defects or the impairment of reproductive functions.</p> <p>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.</p> <p>In this Chapter, this description of significant harm is referred to as a "human health effect".</p>
2	<p>Any ecological system, or living organism forming part of such a system, within a location which is:</p> <ul style="list-style-type: none"> • 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 candidate Special Areas of Conservation or potential Special Protection Areas given equivalent protection; • any habitat or site afforded policy protection under Technical Advice Note 5 (TAN5) on nature conservation (ie candidate Special Areas of 	<p>For <u>any</u> protected location:</p> <ul style="list-style-type: none"> <input type="checkbox"/> harm which results in an irreversible adverse change, or in some other substantial adverse change, in the functioning of the ecological system within any substantial part of that location; or <input type="checkbox"/> harm which affects any species of special interest within that location and which endangers the long-term maintenance of the population of that species at that location. <p>In addition, in the case of a protected location which is a European Site (or a candidate Special Area of Conservation or a potential Special Protection Area), harm which is incompatible with the favourable conservation status of natural habitats at that location or species typically found there.</p> <p>In determining what constitutes such harm, the local authority should have regard to the advice of the Countryside Council for Wales and to the requirements of the need to put in relevant SI and number.</p> <p>In this Chapter, this description of significant harm is referred to as an "ecological system effect".</p>

	<p>Conservation, potential Special Protection Areas and listed Ramsar sites); or</p> <ul style="list-style-type: none"> any nature reserve established under section 21 of the National Parks and Access to the Countryside Act 1949. 	
3	<p>Property in the form of:</p> <ul style="list-style-type: none"> 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. 	<p>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.</p> <p>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.</p> <p>In this Chapter, this description of significant harm is referred to as an "animal or crop effect".</p>
4	<p>Property in the form of buildings.</p> <p>For this purpose, "building" means any structure or erection, and any part of a building including any part below ground level, but does not include plant or machinery comprised in a building.</p>	<p>Structural failure, substantial damage or substantial interference with any right of occupation.</p> <p>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.</p> <p>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.</p> <p>In this Chapter, this description of significant harm is referred to as a "building effect".</p>

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 2A. 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 and which is consistent with any existing planning permission (or is otherwise lawful under town and country planning legislation). This definition is subject to the following qualifications:

(a) the current use should be taken to include any temporary use, permitted under town and country planning legislation, to which the land is, or is likely to be, put from time to time;

(b) 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.34 below);

(c) 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); however, in assessing the likelihood of any such informal use, the local authority should give due attention to measures taken to prevent or restrict access to the land; and

(d) 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	<p>Human health effects arising from</p> <ul style="list-style-type: none"> • the intake of a contaminant, or • other direct bodily contact with a contaminant 	<p>If the amount of the pollutant in the pollutant linkage in question:</p> <ul style="list-style-type: none"> • 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 intake or direct bodily contact, assessed on the basis of relevant information on the toxicological properties of that pollutant. <p>Such an assessment should take into account:</p> <ul style="list-style-type: none"> • 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. <p>The question of whether an intake or exposure is unacceptable is independent of the number of people who might experience or be affected by that intake or exposure.</p> <p>Toxicological properties should be taken to include carcinogenic, mutagenic, teratogenic, pathogenic, endocrine-disrupting and other similar properties.</p>
2	<p>All other human health effects (particularly by way of explosion or fire).</p>	<p>If the probability, or frequency, of occurrence of significant harm of that description is unacceptable, assessed on the basis of relevant information concerning:</p> <ul style="list-style-type: none"> • that type of pollutant linkage, or • that type of significant harm arising from other causes. <p>In making such an assessment, the local authority should take into account the levels of risk which have been judged unacceptable in other similar contexts and should give particular weight to cases where the pollutant linkage might cause significant harm which:</p>

		<ul style="list-style-type: none"> • would be irreversible or incapable of being treated; • would affect a substantial number of people; • would result from a single incident such as a fire or an explosion; or • would be likely to result from a short-term (that is, less than 24-hour) exposure to the pollutant.
3	All ecological system effects.	<p>If either:</p> <ul style="list-style-type: none"> • significant harm of that description is more likely than not to result from the pollutant linkage in question; or • there is a reasonable possibility of significant harm of that description being caused, and if that harm were to occur, it would result in such a degree of damage to features of special interest at the location in question that they would be beyond any practicable possibility of restoration. <p>Any assessment made for these purposes should take into account relevant information for that type of pollutant linkage, particularly in relation to the ecotoxicological effects of the pollutant.</p>
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.
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 2A, 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 general, when considering significant harm to non-human receptors, the local authority should apply the tests set out in the relevant entries in Table B to determine whether there is a significant possibility of that harm being caused. However, 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) there is a reasonable possibility of significant harm being caused;
and

(b) that harm would result from either:

(i) a single incident such as a fire or explosion, or

(ii) a short-term (that is, less than 24-hour) exposure of the receptor to the pollutant.

A.33 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.34 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(b) 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.35 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.36 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.37 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.38 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.39 The term "continuing to enter" should be taken to mean any entry additional to any which has already occurred.

PART 5 – Harm attributable to Radioactivity and the Significant Possibility of Harm

A.40 Part 5 applies only so far as the harm or the significant possibility of harm is attributable to radioactivity.

A.40A Section 78A(4) (as modified) defines “harm” as meaning “lasting exposure to any person resulting from the after-effects of a radiological emergency, past practice or past work activity.”

A.40B Section 78A(5) (as modified) provides that whether harm is being caused or whether the possibility of harm being caused is “significant” is to be determined in accordance with this guidance.

Whether Harm is being caused

A.41 The local authority should regard harm as being caused where lasting exposure gives rise to doses that exceed one or more of the following:

- (a) an effective dose of 3 millisieverts per annum;
- (b) an equivalent dose to the lens of the eye of 15 millisieverts per annum; or
- (c) an equivalent dose to the skin of 50 millisieverts per annum.

A.42 The local authority should disregard any human receptors which are not likely to be present, given the “current use” of the land or other land which might be affected.

A.43 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 and which is consistent with any existing planning permission (or is otherwise lawful under town and country planning legislation). This definition is subject to the following qualifications:

- (a) the current use should be taken to include any temporary use, permitted under town and country planning legislation, to which the land is, or is likely to be, put from time to time;
- (b) 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.50 below); and
- (c) 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); however, in assessing the likelihood of any such informal

use, the local authority should give due attention to measures taken to prevent or restrict access to the land.

Whether the Possibility of Harm Being Caused is Significant

A.44 The term “possibility of harm” should be taken as referring to a measure of the probability, or frequency, of the occurrence of circumstances which would lead to lasting exposure being caused. In paragraphs A.45 and A.46, the reference to “potential annual effective dose” and “potential annual equivalent dose”, refer to doses that are not certain to occur.

A.45 Where:

(a) the potential annual effective dose is below or equal to 50 millisieverts per annum; and

(b) the potential annual dose equivalents to the lens of the eye and to the skin are below or equal to 15 millisieverts and 50 millisieverts respectively,

the local authority should regard the possibility of harm as significant if, having regard to any uncertainties, the potential annual effective dose from any lasting exposure multiplied by the probability of the dose being received is greater than 3 millisieverts.

A.46 Where the conditions in A.45 are not met, the local authority should consider whether the possibility of harm being caused is significant on a case by case basis. In deciding whether the possibility of harm being caused is significant, the local authority should take into account relevant information concerning:

(a) the potential annual effective dose;

(b) any non-linearity in the dose-effect relationship for stochastic effects;

(c) the potential annual equivalent dose to the skin and to the lens of the eye;

(d) the nature and degree of any deterministic effects associated with the potential annual dose;

(e) the probability of the dose being received;

(f) the duration of the exposure and timescale within which the harm might occur; and

(g) any uncertainties associated with subparagraphs (a) to (f) above.

A.47 In paragraph A.46, the reference to:

(a) “relevant information” means information which is appropriate, scientifically-based and authoritative;

(b) “stochastic effects” means the type of health effect (the principal one being radiation-induced cancer) where the likelihood of radiation-induced health effects which may be assumed to be linearly proportional to the radiation dose over a wide range of doses and where the severity of the health effect is not dependent on the level of the dose; and

(c) “deterministic effects” means the type of health effect (such as a radiation-induced cataract of the eye) which occur following a dose of radiation above a certain level, with the severity of the health effect dependent on the level of the dose.

A.48 In considering the timescale in subparagraph A.47(f), the local authority should take into account any evidence that the “current use” of the land (as defined in paragraphs A.42 and A.43) will cease in the foreseeable future.

A.49 The possibility of 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.43 above) should not be regarded as a significant possibility of harm for the purposes of this Chapter.

A.50 When considering the possibility of harm being caused in relation to any future use or development which falls within the description of a “current use” as a result of subparagraph A.43(b), 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.

CHAPTER B - Statutory Guidance on the Identification of Contaminated Land

Part 1 Scope of the Chapter

Applies generally.

Part 2 Definitions of Terms

Applies generally.

Part 3 The Local Authority's Inspection Duty

Paragraphs B.9 to B.18 only apply to situations involving contaminants which are not radioactive. Paragraphs B.17A, B.18A and B.19A only apply to situations involving contaminants which are radioactive. The remaining paragraphs apply generally to all types of contaminants.

Part 4 Determining Whether Land Appears to be Contaminated Land

Paragraphs B.44 to B.51 only apply to situations involving contaminants which are not radioactive. Paragraphs B.51A to B.51G only apply to situations involving contaminants which are radioactive. The remaining paragraphs apply generally to all types of contaminants.

PART 1 - Scope of the Chapter

B.1 The statutory guidance in this Chapter is issued under sections 78A(2), 78A(2) (as modified) and 78B(2) of Part 2A 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.2A In relation to harm so far as attributable to radioactivity, section 78B(1) (as modified) provides that:

" (1) Where a local authority considers that there are reasonable grounds for believing that any land may be contaminated, it shall cause the land to be inspected for the purpose of –

(a) identifying whether it is contaminated land; and

(b) enabling the authority to decide whether the land is land which is required to be designated as a special site.

(1A) The fact that substances have been present on the land shall not of itself be taken to be reasonable grounds for the purpose of subsection (1)."

B.3 For all cases 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.4A In relation to harm so far as attributable to radioactivity section 78A(2) (as modified) 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) harm is being caused, or

(b) there is a significant possibility of such harm being caused;

and, in determining whether any land appears to be such land, a local authority shall, subject to subsection (5), act in accordance with guidance issued by the Secretary of State in accordance with section 78YA 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; whether pollution of controlled waters is being or is likely to be caused; whether harm is being caused; and whether the possibility of harm being caused is significant 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 2A 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.7A In relation to harm so far as attributable to radioactivity, unless otherwise stated, any word, term or phrase given a specific meaning in Part 2A of the Environmental Protection Act 1990, as modified by the Modification Regulations, has the same meaning for the purposes of the guidance in this Chapter.

B.8 Any reference to "Part 2A" means Part 2A of the Environmental Protection Act 1990. In relation to harm so far as attributable to radioactivity, any reference to "Part 2A" means Part 2A of the Environmental Protection Act 1990, as modified.

B.8A Any reference to a "section" in primary legislation means a section of the Environmental Protection Act 1990, unless it is specifically stated otherwise. Any reference to a "section (as modified)" means a section of the Environmental Protection Act 1990 as modified by the Modification Regulations, unless it is specifically stated otherwise.

B.8B Any reference to "harm so far as attributable to radioactivity" and "other than in relation to harm so far as attributable to radioactivity" means harm so far as attributable to any radioactivity possessed by any substance and other than in relation to harm so far as attributable to any radioactivity possessed by any substance, respectively.

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) be 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 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 statutory regeneration bodies, the Countryside Council for Wales, Cadw and the Food Standards Agency.

B.12 The local authority should set out its approach as a written strategy, which it should formally adopt and publish. 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 and the Countryside Council for Wales (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.

Reasonable Grounds Approach to Inspection

B.17A Under section 78B(1) as modified, the trigger for a local authority to cause land to be inspected for the purposes of identifying whether the land is contaminated land is where it considers that there are reasonable grounds for believing that land may be contaminated. It will have such reasonable grounds where it has knowledge of relevant information relating to:

(a) a former historical land use, past practice, past work activity or radiological emergency, capable of causing lasting exposure giving rise to the radiation doses set out in paragraph A.41; or

(b) levels of contamination present on the land arising from a past practice, past work activity or radiological emergency, capable of causing lasting exposure giving rise to the radiation doses set out in paragraph A.41.

B.17B In B.17A, references to “relevant information” mean information that is appropriate and authoritative and may, for example, include:

(a) information held by the local authority, including information already gathered as part of its strategic approach to Part 2A as described in paragraphs B.9 to B.14 above or as part of the town and country planning process; or

(b) information received from a regulatory body, such as the Environment Agency or the Health and Safety Executive.

Inspecting Particular Areas of Land

B.18 Applying the strategic approach to carrying out its inspection duty under section 78B(1) 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 (Wales) Regulations 2006, and is therefore required to be designated as a special site.

B.18A Where the local authority is satisfied that there are reasonable grounds under section 78B(1) as modified for believing land may be contaminated (in relation to radioactivity), it should carry out a detailed inspection of the land. 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 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 regulation 2 of the Contaminated Land (Wales) Regulations 2006, and is therefore required to be designated as a special site.

B.19 To be sufficient for the first of these purposes in paragraphs B.18 and B.18A the information should include, in particular, evidence of the actual presence of a pollutant.

B.19A In relation to harm so far as attributable to radioactivity, when undertaking detailed inspection as set out in paragraph B.20 the local authority should in the first instance, aim to identify that there is a reasonable possibility both of the presence of a receptor, and that this receptor could be exposed to a contaminant.

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. In relation to harm so far as attributable to radioactivity, the local authority should have regard to any advice provided by the Environment Agency on the manner in which to carry out such an inspection;

(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 survey (for example using hand-held radiation meters). In relation to harm so far as attributable to radioactivity, the local authority should have regard to any advice provided by the Environment Agency on the manner in which to carry out such an inspection; or

(c) intrusive investigation of the land (for example by exploratory excavations). In relation to harm so far as attributable to radioactivity, the local authority should always seek to make arrangements with the Environment Agency for the Agency to carry out such an inspection.

B.21 Section 108 of the Environment Act 1995 and section 108 of the Environment Act 1995 as modified by the Modification Regulations 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) further, in cases involving an intrusive investigation,

(i) that it is likely that the contaminant is actually present, and

(ii) given the current use of the land as defined at paragraph A.26 and A.43, that the receptor is actually present or is likely to be 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, water pollution or damage to natural resources or features of historical or archaeological interest which might be caused as a result of its investigation. Before carrying out any intrusive investigation on any area notified as a site of special scientific interest (SSSI), the local authority should consult the Countryside Council for Wales on any action which, if carried out by the owner or occupier, would require the consent of the Countryside Council for Wales under section 28 of the Wildlife and Countryside Act 1981.

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 regulations made under Part 2A, 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, land which is occupied by the Ministry of Defence, or land which is contaminated land by virtue of radioactive contamination.

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 (Wales) Regulations 2006.

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 and, in relation to harm so far as attributable to radioactivity, section 108 of the Environment Act 1995 as modified by the Modification Regulations. 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, or by a consultant appointed for that purpose. 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;
- (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); **and**
- (d) in relation to harm so far as attributable to radioactivity, the views of the Environment Agency concerning the desirability of a separate determination of part of the land.

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 **six** possible grounds for the determination, (corresponding to the parts of the definition of contaminated land in section 78A(2)) **and 78A(2) (as modified)** 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);
- (d) pollution of controlled waters is likely to be caused (see paragraph B.51 below);
- (e) harm so far as attributable to radioactivity is being caused (see paragraphs B.51A to B.51E); or**
- (f) there is a significant possibility of harm so far as attributable to radioactivity being caused (see paragraphs B.51G to B.51H).**

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 the Countryside Council for Wales. 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.

B.43A In making a determination in relation to harm so far as attributable to radioactivity, the local authority should consult the Environment Agency (providing the Environment Agency with a draft record of the determination) and have regard to the Environment Agency's advice on the basis for, and the extent of land covered by, the determination before determining land as contaminated land.

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) the potential pollutant in question is more likely than not to enter these controlled waters and, when it enters the controlled waters, will be in a form 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.

DETERMINING THAT “HARM SO FAR AS ATTRIBUTABLE TO RADIOACTIVITY IS BEING CAUSED”

B.51A In relation to harm so far as attributable to radioactivity, the local authority should determine that land is contaminated land on the basis that such harm is being caused where:

(a) it has carried out a scientific and technical assessment of the dose arising from the pollutant linkage, according to relevant, appropriate, authoritative and scientifically based guidance on such assessments, having regard to any advice provided by the Environment Agency, and taking into account the requirements of paragraph B.51F;

(b) that assessment shows that such harm is being caused; and

(c) there are no suitable and sufficient risk management arrangements in place to prevent such harm.

B.51B In following any such guidance on the assessment of dose, 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.51C To simplify such an assessment of dose, 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 harm so far as attributable to radioactivity is being caused; and

(b) there are no suitable and sufficient risk management arrangements in place to prevent such harm.

B.51D 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 harm attributable to radioactivity;

(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 presence of human beings) 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 or of radiation surveys);

(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; and

(e) the basis of derivation of the guideline values has taken into account the requirements of paragraph B.51F.

B.51 E 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.

B.51F The estimation of an effective dose and an equivalent dose should be undertaken in accordance with Articles 15 and 16 of Council Directive 96/29/EURATOM of 13 May 1996 laying down basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionizing radiation. The estimation of an effective or equivalent annual dose should not include the local background level of radiation from the natural environment.

DETERMINING THAT "THERE IS A SIGNIFICANT POSSIBILITY OF HARM SO FAR AS ATTRIBUTABLE TO RADIOACTIVITY BEING CAUSED"

B.51G The local authority should determine that land is contaminated land on the basis that there is a significant possibility of harm so far as attributable to radioactivity being caused (as defined in Chapter A), where:

(a) it has carried out a scientific and technical assessment of the potential dose arising from the pollutant linkage, according to relevant, appropriate, authoritative and scientifically based guidance on such assessments, having regard to any advice provided by the Environment Agency, and taking into account the requirements of paragraph B.51F;

(b) that assessment shows that there is a significant possibility of such harm being caused; and

(c) there are no suitable and sufficient risk management arrangements in place to prevent such harm.

B.51H In following any such guidance on assessment of the potential dose, 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.

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

Applies generally.

Part 2 Definitions of Terms

Applies generally.

Part 3 Securing Remediation

Applies generally.

Part 4 The Standard to Which Land or Waters Should be Remediated

Applies generally.

Part 5 The Reasonableness of Remediation

Paragraphs C.37 to C.43 only apply to situations involving contaminants which are not radioactive. Paragraphs C.43A to C.43J only apply to situations involving contaminants which are radioactive. The remaining paragraphs apply generally to all types of contaminants.

Part 6 The Practicability, Effectiveness and Durability of Remediation

Applies generally.

Part 7 What is to be Done by Way of Remediation

Applies generally.

PART 1 - Scope of the Chapter

C.1 The statutory guidance in this Chapter is issued under section 78E(5) of Part 2A 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 2A 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.2A In relation to harm so far as attributable to radioactivity, section 78E (as modified) provides:

“(4) Subject to subsection (4A), the only things by way of remediation which the enforcing authority may do, or require to be done, under or by virtue of this Part 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 in question.

(4A) Where remediation includes an intervention, that part of the remediation which consists of an intervention may only be considered reasonable -

(a) where the reduction in detriment due to radiation is sufficient to justify any adverse effects and costs, including social costs, of the intervention; and

(b) where the form, scale and duration of the intervention is “optimised”.

(4B) For the purpose of subsection (4A), the form, scale and duration of the intervention shall be taken to be “optimised” if the benefit of the reduction in health detriment less the detriment associated with the intervention is maximised.

(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 to be remediated pursuant to the 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 and section 78N (as modified)).

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 and radioactive substances research programmes of the National Assembly For Wales 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 2A 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.5A In relation to harm so far as attributable to radioactivity, unless otherwise stated, any word, term or phrase given a specific meaning in Part 2A of the Environmental Protection Act 1990, as modified by the Modification Regulations, has the same meaning for the purposes of the guidance in this Chapter.

C.5B Any reference to "harm so far as attributable to radioactivity" and "other than in relation to harm so far as attributable to radioactivity" means harm so far as attributable to any radioactivity possessed by any substance and other than in relation to harm so far as attributable to any radioactivity possessed by any substance, respectively.

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; or

(ii) any controlled waters affected by that land; or

(iii) any land adjoining or adjacent to that land;

(b) the doing of any works, the carrying out of any operations or the taking of any steps in relation to any such land for the purpose-

(i) of preventing or minimising, or remedying or mitigating the effects of, any significant harm, or 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.6A In relation to harm so far as attributable to radioactivity, "remediation" is defined in section 78A(7) (as modified) as meaning:

"(a) the doing of anything for the purpose of assessing the condition of-

(i) the contaminated land in question; or

(ii) any land adjoining or adjacent to that land;

(b) the doing of any works, the carrying out of any operations or the taking of any steps in relation to any such land for the purpose-

(i) of preventing or minimising, or remedying or mitigating the effects of any harm by reason of which the contaminated land is such land; or

(ii) of restoring the land to its 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".

C.6B In relation to harm so far as attributable to radioactivity, section 78A (as modified) further provides in subsection (7A):

"For the purpose of paragraph (b) of subsection (7) above, "the doing of any works, the carrying out of any operations or the taking of any steps in relation to any such land" shall include ensuring that-

(a) any such area is demarcated;

(b) arrangements for the monitoring of harm are made;

(c) any appropriate intervention is implemented; and

(d) access to or use of land or buildings situated in the demarcated area is regulated."

C.7 The definition of remediation given in section 78A and 78A (as modified) 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.7A "Intervention" is defined in the Schedule to the Modification Regulations as meaning:

"a human activity that prevents or decreases the exposure of individuals to radiation from sources which are not part of a practice or which are out of control, by acting on sources, transmission pathways and individuals themselves." For the purposes of this Chapter, an intervention is taken to be a type of remedial treatment action.

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) and 78A(7)(a) (as modified) (see paragraphs C.6 and C.6A above);

(f) a "remedial treatment action" means a remediation action falling within the definition in section 78A(7)(b) and 78A(7)(b) (as modified) (see paragraphs C.6 and C.6A above);

(g) a "monitoring action" means a remediation action falling within the definition in section 78A(7)(c) and 78A(7)(c) (as modified) (see paragraphs C.6 and C.6A above);

(h) in relation to harm so far as attributable to radioactivity, "justification" means ensuring that the reduction in detriment due to radiation is sufficient to justify any adverse effects and costs, including social costs, of the intervention;

(i) in relation to harm so far as attributable to radioactivity, "optimisation" means ensuring that the form, scale and duration of the intervention maximises the benefit of the reduction in health detriment less the detriment associated with the intervention;

(j) in relation to harm so far as attributable to radioactivity, "detriment" principally means a health detriment, but may also include other detriments, for example, a detriment associated with blight.

C.9 Any references to "Part 2A" means Part 2A of the Environmental Protection Act 1990. In relation to harm so far as attributable to radioactivity, any reference to "Part 2A" means Part 2A of the Environmental Protection Act 1990, as modified.

C.9A Any reference to a "section" in primary legislation means a section of the Environmental Protection Act 1990, unless it is specifically stated otherwise. Any reference to a "section (as modified)" means a section of the Environmental Protection Act 1990 as modified by the Modification Regulations, unless it is specifically stated otherwise.

C.9B Any reference to “harm so far as attributable to radioactivity” and “other than in relation to harm so far as attributable to radioactivity” means harm so far as attributable to any radioactivity possessed by any substance and other than in relation to harm so far as attributable to any radioactivity possessed by any substance, respectively.

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) and section 78E(4) (as modified) (see Part 5 of this Chapter). Part 6 of this Chapter provides further guidance relevant to 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) or, in relation to harm so far as attributable to radioactivity, section 78A(2) (as modified). 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, nor, in relation to harm so far as attributable to radioactivity, is such harm being caused or there is a significant possibility of such harm 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 78E(5)(b) (as modified) 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) or section 78A(2) (as modified)), and that the effects of any significant harm, harm so far as attributable to radioactivity, 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 the appropriate person considers it in the appropriate person's interests to do so, for example if the appropriate person 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 or any harm so far as attributable to radioactivity, 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 or harm so far as attributable to radioactivity 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 (whether or not attributable to radioactivity) or pollution of controlled waters in question.

C.22A In respect of sub-paragraph C.22(b), where the remediation of harm involves an intervention, the remediation will only be reasonable if the intervention is justified and optimised as set out in paragraphs C.43B to C.43J below.

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 sub-paragraph 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 sub-paragraph C.18(a);

(b) achieves the aim in sub-paragraph C.18(b); and

(c) puts arrangements in place to remedy the effect of any significant harm, pollution of controlled waters **or harm so far as attributable to radioactivity** 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, pollution of controlled waters **or harm so far as attributable to radioactivity**. 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, pollution of controlled waters **or the effects of harm so far as attributable to radioactivity** 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 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 (whether or not attributable to radioactivity) 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. In respect of the remediation of harm so far as attributable to radioactivity, the remediation will only be reasonable where any intervention that forms part of the remediation is justified and optimised (see paragraphs C.43B to C.43J below).

C.31 For the purposes of C.30, 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 (whether or not attributable to radioactivity) or pollution of controlled waters which might otherwise be caused; or
- (b) mitigating the seriousness of any effects of any significant harm, pollution of controlled waters, or harm so far as attributable to radioactivity.

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 interests, 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 as their estimate of the amount of compensation which would be payable if the owner of the land or other interest had granted rights under section 78G(2) or 78G(2) (as modified) to permit the action to be carried out and had claimed compensation under section 78G(5) and regulation 6 of the Contaminated Land (Wales) Regulations 2006 (whether or not such a claim could actually be made).

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) or 78G(5) (as modified). 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 Other than in respect of an intervention, 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, **other than in respect of an intervention** 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 (other than so far as attributable to radioactivity) 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 the Countryside Council for Wales.

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.

Seriousness of Harm attributable to Radioactivity

C.43A When evaluating the seriousness of any harm attributable to radioactivity for the purposes of assessing the reasonableness of any remediation, the enforcing authority should consider:

(a) whether the harm is already being caused;

(b) the degree of the possibility of the harm being caused;

(c) the nature of the harm with respect, in particular, to:

(i) the extent and type of effects that may arise from the harm,

(ii) the number of people who might be affected, and

(iii) whether the effects would be irreversible, and

(d) the context in which the effects might occur, in particular the relative risk associated with the harm in the context of wider exposure risks

Justification and Optimisation

C.43B The concepts of justification and optimisation only apply in relation to harm so far as it is attributable to radioactivity and where a remediation involves an intervention. The enforcing authority should ensure that any intervention that forms part of a remediation scheme or remediation package is both justified and optimised.

C.43C The principle of justification recognises that an intervention may bring about reduction in doses and other harmful impacts but may incur costs and other adverse effects. Costs are not restricted to financial costs, but also include costs to society.

C.43D To ensure optimisation, the enforcing authority should choose the option that maximises the net benefit of the intervention, from the interventions that are justified.

C.43E For an intervention to be optimised on land affected by both radioactive and non-radioactive significant pollutant linkages, the optimisation should also have regard to the effect of any remedial actions addressing the non-radioactive significant pollutant linkage(s).

C.43F The assessment of whether a potential intervention is justified and optimised should include the preparation of:

(a) an estimate of the financial costs of the intervention, taking into account the guidance in paragraphs C.34 to C.36;

(b) a statement of the social costs and adverse effects (see paragraphs C.43I and C.43J below) associated with the intervention; and

(c) a statement of the benefits (e.g. reduction in radiation exposure) likely to result from the intervention.

C.43G In making an assessment of whether the intervention is justified or optimised, the enforcing authority should:

(a) consult publications of international bodies, including the International Atomic Energy Agency;

(b) apply the approaches of multi-attribute analysis in assessing the balance between the various factors that need to be taken into consideration and the weightings which may be appropriate to assign to the various attributes;

(c) consult with relevant stakeholder groups so as to understand their perceptions of the relative importance of different attributes; and

(d) consider quantitative and qualitative methods as a decision-making aid in helping to reveal the key issues and assumptions and allowing an analysis of the sensitivity to various assumptions.

C.43H In assessing benefits and costs, including social costs, the enforcing authority should also consider paragraphs C.55-C.57 below.

The Social Costs and Adverse Effects of Remediation

C.43I In relation to harm so far as attributable to radioactivity, the type of social costs and adverse effects to be considered as arising from an intervention may, for example, include:

(a) social disruption such as vacating property, or limiting its use, or restricting access to it;

(b) doses to remediation workers;

(c) heavy traffic from vehicles associated with the intervention;

(d) risks:

(i) to water, air, soil and plants and animals;

(ii) of nuisance through noise or odours;

(iii) to the countryside or places of special interest; and

(iv) to a building of special architectural or historic interest (that is, a building listed under town and country planning legislation or a building in a designated Conservation Area) or a site of archaeological interest (as defined in article 1(2) of the Town and Country Planning (General Permitted Development) Order 1995); and

(e) the generation of waste and, where relevant, the transport and disposal of such waste.

C.43J The enforcing authority should consider both the seriousness of impacts of any social costs and also the likely duration of any impact.

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 78E(5)(b) (as modified) 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. In relation to harm so far as attributable to radioactivity, such impacts are considered in the justification and optimisation process described in Part 5.

C.52 Specific pollution control permits or authorisations may be needed for some kinds of remediation processes, for example:

(a) authorisations under the Pollution Prevention and Control Act 1999 and its regulations;

(b) site or mobile plant licences under Part 2 of the Environmental Protection Act 1990 (waste management licensing);

(c) abstraction licences under Part 2, or discharge consents under Part 3, of the Water Resources Act 1991; or

(d) authorisations for accumulation and disposal of radioactive waste under the Radioactive Substances Act 1993.

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;

(c) without adversely affecting the countryside or places of special interest; and

(d) without adversely affecting a building of special architectural or historic interest (that is, a building listed under town and country planning legislation or a building in a designated Conservation Area) or a site of archaeological interest (as defined in article 1(2) of the Town and Country Planning (General Permitted Development) Order 1995) (S.I. 1995/418).

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. 1998/2746). (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 or intervention (in relation to harm so far as attributable to radioactivity);
- (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 or harm so far as attributable to radioactivity, 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. In the case of harm so far as attributable to radioactivity, remedial treatment action shall if necessary and to the extent of the lasting exposure risk involved, include ensuring that:

(a) any area of land is demarcated;

(b) any appropriate intervention is implemented; and

(c) access to or use of land or buildings situated in the demarcated area is regulated.

C.67A 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), only 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 **not** a significant possibility of significant harm, **or harm so far as attributable to radioactivity**, 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

Applies generally.

Part 2 Definitions of Terms

Applies generally.

Part 3 The Procedure for Determining Liabilities

Applies generally.

Part 4 General Considerations Relating to the Exclusion, Apportionment and Attribution Procedures

Applies generally.

Part 5 Exclusion of Members of a Class A Liability Group

Applies generally.

Part 6 Apportionment Between Members of any Single Class A Liability Group

Applies generally.

Part 7 Exclusion Of Members Of A Class B Liability Group

Applies generally.

Part 8 Apportionment Between the Members of a Single Class B Liability Group

Applies generally.

Part 9 Attribution of Responsibility Between Liability Groups

Applies generally.

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 2A 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 that person 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 that person 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 2A" means Part 2A 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.

D.6A Any reference to "harm so far as attributable to radioactivity" means harm so far as attributable to any radioactivity possessed by any substance.

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 2A. Numerous separate remediation actions may be required, which may not correlate neatly with those who are to bear responsibility for the costs. The degree of responsibility for the state of the land may vary widely. Determining liability for the costs of each remediation action can be correspondingly complex.

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 **or, to any harm so far as attributable to radioactivity**. 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 paragraphs D.103 to D.109 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 paragraphs D.103 to D.109 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 2A. This could apply where:

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

(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 section 78K (as modified)); or

(c) a person is exempted from liability by virtue of 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 paragraphs D.103 to D.109 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. **In relation to harm so far as**

attributable to radioactivity, where the linkage is an orphan linkage, the enforcing authority has a duty to carry out 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, that person 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.85 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 appropriate persons and thus responsible for all or part of the costs of a remediation action;
- (b) they agree, or have agreed, the basis on which they wish to divide that responsibility; and
- (c) a copy of the agreement is provided to the enforcing authority and none of the parties to the agreement informs the authority that it challenges the application of the agreement;

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

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, with respect to effects of the exclusion tests on apportionment (see paragraph D.43 below in particular), under section 78F(7). It 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 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 that person 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 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 the payee or buyer is to bear in respect of the payee's or buyer's 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 the payee's or buyer's 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 "related companies".

D.45 Where the question to be considered in any exclusion test concerns the relationship between, or the relative positions of, two or more related companies, the enforcing authority should not apply the test so as to exclude any of the related companies. For example, in Test 3 ("Sold with Information"), if the "seller" and the "buyer" are related companies, the "seller" would not be excluded by virtue of that Test.

D.46 For these purposes, "related companies" are those which are, or were at the "relevant date", members of a group of companies consisting of a "holding company" and its "subsidiaries". The "relevant date" is that on which the enforcing authority first served on anyone a notice under section 78B(3) identifying the land as contaminated land, and the terms "holding company" and "subsidiaries" have the same meaning as in section 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 Assembly Government's view, carry such limited responsibility, if any, that exclusion would be justified even where the activity is held to amount to "causing or knowingly permitting" under Part 2A. 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 (or withholding) financial assistance to another person (whether or not that other person is a member of the liability group), in the form of any one or more of the following:

- (i) making a grant,
- (ii) making a loan or providing any other form of credit, including instalment credit, leasing arrangements and mortgages,
- (iii) guaranteeing the performance of a person's obligations,
- (iv) indemnifying a person in respect of any loss, liability or damage,
- (v) investing in the undertaking of a body corporate by acquiring share capital or loan capital of that body without thereby acquiring such control as a "holding company" has over a "subsidiary" as defined in section 736 of the Companies Act 1985, or
- (vi) providing a person with any other financial benefit (including the remission in whole or in part of any financial liability or obligation);

(b) underwriting an insurance policy under which another person was insured in respect of any occurrence, condition or omission by reason of which that other person has been held to have caused or knowingly permitted the significant pollutant to be in, on or under the land in question; for the purposes of this sub-paragraph:

- (i) underwriting an insurance policy is to be taken to include imposing any conditions on the person insured, for example relating to the manner in which the insured person carries out the insured activity, and
- (ii) it is irrelevant whether or not the insured person can now be found;

(c) as a provider of financial assistance or as an underwriter, carrying out any action for the purpose of deciding whether or not to provide such financial assistance or underwrite such an insurance policy as is mentioned above; this sub-paragraph does not apply to the carrying out of any intrusive investigation in respect of the land in question for the purpose of making that decision where:

- (i) the carrying out of that investigation is itself a cause of the existence, nature or continuance of the significant pollutant linkage in question, and
- (ii) the person who applied for the financial assistance or insurance is not a member of the liability group;

(d) consigning, as waste, to another person the substance which is now a significant 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; (for the purpose of this subparagraph, it is irrelevant whether or not the person to whom the waste was consigned can now be found);

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

(f) as owner of the land in question, licensing at any time its occupation by another person who has subsequently caused or knowingly permitted the presence of the significant 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;

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

(h) taking, or not taking, any statutory enforcement action:

(i) with respect to the land, or

(ii) against some other person who appears to the enforcing authority to have caused or knowingly permitted the presence of the significant pollutant in question, whether or not that other person can now be found;

(i) providing legal, financial, engineering, scientific or technical advice to (or design, contract management or works management services for) another person (the "client"), whether or not that other person can now be found:

(i) in relation to an action or omission (or a series of actions and/or omissions) by reason of which the client has been held to have caused or knowingly permitted the presence of the significant 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) as a person providing advice or services as described in sub-paragraph (i) above carrying out any intrusive investigation in respect of the land in question, except where:

(i) the investigation is itself a cause of the existence, nature or continuance of the significant pollutant linkage in question, and

(ii) the client is not a member of the liability group; 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 the contractor 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 that person's 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 there is a group of transactions or a wider agreement (such as the sale of a company or business) including a sale of land, that sale of land should be taken to have been at arms' length where the person seeking to be excluded can show that the net effect of the group of transactions or the agreement as a whole was a sale at arms' length;

(d) in transactions since the beginning of 1990 where the buyer is a large commercial organisation or public body, permission from the seller for the buyer to carry out 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, **radioactive decay** or other change (the "intervening change") involving:

(i) both a substance (the "earlier substance") which would not have formed part of the significant 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 the first person caused or knowingly permitted the presence in, on or under the land of the earlier substance, but who 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 that person could reasonably have been expected to do to prevent the intervening change happening.

D.64 If all of the circumstances in paragraph D.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, 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 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, the second person should bear the same responsibility as the first person;
- (b) if the second person did not have the means and opportunity, the second person's 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, the second person's 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 permitted 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 the person 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 the person 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 that member's 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 that member's 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 group);
- (b) if there are two or more Class A liability groups, then an equal share of the cost of carrying out the common action should be attributed to each of those groups, and no cost should be attributed to any Class B liability group); 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, before the service of a remediation notice, to the satisfaction of the enforcing authority that the result of an attribution made on the basis set out in paragraphs D.99 and D.100 above would have the effect of the liability group of which the appropriate person 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 where:

(a) the significant pollutant linkage relates solely to the pollution of controlled waters (and not to significant harm **or harm in so far as it is attributable to radioactivity**) and no Class A person can be found;

(b) no Class A or Class B persons can be found; or

(c) those who would otherwise be liable are exempted by one of the relevant statutory provisions (ie sections 78J(3), 78K, **78K (as modified)** or 78X(3)).

D.104 In any case where only one significant pollutant linkage has been identified, and that is an orphan linkage, the enforcing authority should itself bear the cost of any remediation which is carried out.

D.105 In more complicated cases, there may be two or more significant pollutant linkages, of which some are orphan linkages. Where this applies, the enforcing authority will need to consider each remediation action separately.

D.106 For any remediation action which is referable to an orphan linkage, and is not referable to any other linkage for which there is a liability group, the enforcing authority should itself bear the cost of carrying out that action.

D.107 For any shared action which is referable to an orphan linkage and also 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.

D.108 For any shared action which is referable to an orphan linkage and also 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.109 For any shared action which is referable to an orphan linkage and also to a significant pollutant linkage for which there is a Class B liability group (and not to any significant pollutant linkage for which there is a Class A liability group) the enforcing authority should adopt the following approach:

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

(b) where the remediation action is a collective action, the enforcing authority should estimate the hypothetical cost of the action which would be needed to remediate separately the effects of the linkage for which that group is liable. The enforcing authority should then attribute the costs of carrying out the collective action between itself and the Class B liability group so that the expected liability of that group does not exceed that hypothetical cost.

CHAPTER E - Statutory Guidance on the Recovery of the Costs of Remediation

Part 1 Scope of the Chapter

Applies generally.

Part 2 Definitions of Terms

Applies generally.

Part 3 Cost Recovery Decisions

Applies generally.

Part 4 Considerations Applying Both to Class A & Class B Persons

Applies generally.

Part 5 Specific Considerations Applying to Class A Persons

Applies generally.

Part 6 Specific Considerations Applying to Class B Persons

Applies generally.

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.2A In relation to harm so far as attributable to radioactivity, section 78P is modified to have effect as if the words "78J(7) and" were omitted.

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 2A 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 cost recovery").

E.9 Any reference to "Part 2A" means Part 2A 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.

E.9A Any reference to "harm so far as attributable to radioactivity" means harm so far as harm attributable to any radioactivity possessed by any substance.

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 such a 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 or 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:

- (a) whether recovery of the full cost attributable to that person would mean that the enterprise is likely to become insolvent and thus cease to exist; and
- (b) if so, the cost to the local economy of such a closure.

E.22 Where the cost of closure appears to be greater than the costs of remediation which the enforcing 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.

E.23 However, the authority should not waive or reduce its costs recovery where:

- (a) it is clear that an enterprise has deliberately arranged matters so as to avoid responsibility for the costs of remediation;
- (b) it appears that the enterprise would be likely to become insolvent whether or not recovery of the full cost takes place; or
- (c) it appears that the enterprise could be kept in, or returned to, business even if it does become insolvent under its current ownership.

E.24 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 €50 million, or an annual balance sheet total not exceeding €43 million.

E.25 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 2(1)(a) of the Local Government Act 2000, including any strategy which it has published under section 4 of that Act concerning the use of such powers).

E.26 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.27 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.28 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.29 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.30 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.31 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.32 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.33 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 such a person was not carrying on a business. This is because in the former case the person 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.34 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 being treated as an appropriate person. For example, this might apply where a company has been dissolved.

E.35 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.36 Where an appropriate person is making a case for the authority's costs recovery to be waived or reduced by virtue of paragraph E.35 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.37 The statutory guidance in this Part sets out specific considerations relating to cost recovery decisions where the appropriate person is a Class B person, as defined in Chapter D (that is, a person who is liable by virtue of their ownership or occupation of the contaminated land, but who has not caused or knowingly permitted the significant pollutant to be in, on or under the land).

Costs in Relation to Land Values

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

E.39 The enforcing authority should consider waiving or reducing its costs recovery from a Class B person if that person demonstrates to the satisfaction of the authority that the costs of remediation are likely to exceed the value of the land. In this context, the "value" should be taken to be the value that the remediated land would have on the open market, at the time the cost recovery decision is made, disregarding any possible blight arising from the contamination.

E.40 In general, the extent of the waiver or reduction in costs recovery should be sufficient to ensure that the costs of remediation borne by the Class B person do not exceed the value of the land. However, the enforcing authority should seek to recover more of its costs to the extent that the remediation would result in an increase in the value of any other land from which the Class B person would benefit.

Precautions Taken before Acquiring a Freehold or a Leasehold Interest

E.41 In some cases, the appropriate person may have been reckless as to the possibility that land the appropriate person has acquired may be contaminated, or the appropriate person may have decided to take a risk that the land was not contaminated. On the other hand, the appropriate person may have taken precautions to ensure that the appropriate person did not acquire land which is contaminated.

E.42 The authority should consider reducing its costs recovery where a Class B person ("that person") who is the owner of the land demonstrates to the satisfaction of the authority that:

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

(b) when that person acquired the land, or accepted the grant of assignment of the leasehold, that person 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 that person should not bear the whole cost of remediation.

E.43 The enforcing authority should bear in mind that the safeguards which might reasonably be expected to be taken will be different in different types of transaction (for example, acquisition of recreational land as compared with commercial land transactions) and as between buyers of different types (for example, private individuals as compared with major commercial undertakings).

Owner-occupiers of Dwellings

E.44 Where a Class B person owns and occupies a dwelling on the contaminated land in question, the enforcing authority should consider waiving or reducing its costs recovery where that person satisfies the authority that, at the time the person purchased the dwelling, that person did not know, and could not reasonably have been expected to have known, that the land was adversely affected by presence of a pollutant.

E.45 Any such waiver or reduction should be to the extent needed to ensure that the Class B person in question bears no more of the cost of remediation than it appears reasonable to impose, having regard to that person's income, capital and outgoings. Where the appropriate person has inherited the dwelling or received it as a gift, the approach in paragraph E.44 above should be applied with respect to the time at which that person received the property.

E.46 Where the contaminated land in question extends beyond the dwelling and its curtilage, and is owned or occupied by the same appropriate person, the approach in paragraph E.44 above should be applied only to the dwelling and its curtilage.

THE HOUSING RENEWAL GRANT ANALOGY

E.47 In judging the extent of a waiver or reduction in costs recovery from an owner-occupier of a dwelling, an enforcing authority which is a local authority may wish to apply an approach analogous to that used for applications for housing renovation grant (HRG). These grants are assessed on a means-tested basis, as presently set out in the Housing Renewal Grants Regulations 1996 (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.48 The HRG approach can be applied as if the appropriate person were applying for HRG and the authority had decided that the case was appropriate for grant assessment. Using this analogy, the authority would conclude that costs recovery should be waived or reduced to the extent that the appropriate person contributes no more than if the work were house renovations for which HRG was being sought. For this purpose, any upper limits for grants payable under HRG should be ignored.

E.49 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.