

CONTAMINATED LAND PROVISIONS

Part IIA, Environmental Protection Act 1990

**An Overview of Part IIA
for Appropriate Persons**

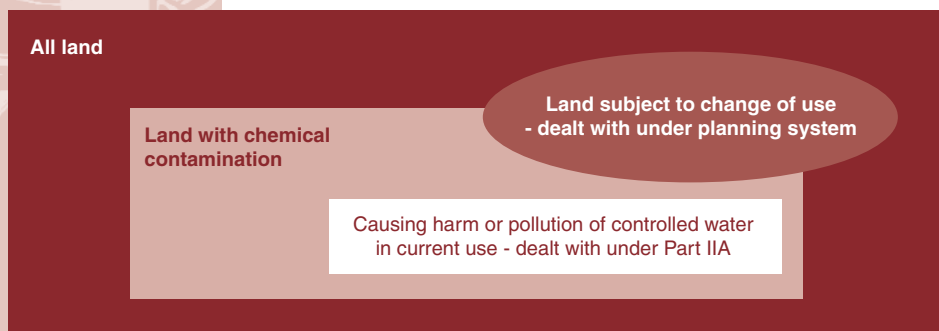
1. Scope and Purpose

The purpose of this guidance note is to answer questions relating to Part IIA and to highlight the likely impact that the provisions will have on those who own or occupy contaminated land or who may be liable for the contamination (Appropriate Persons). It provides an overview to the main provisions of the regime, highlighting the key decision stages and where responsibilities for action lie, as well as outlining what would be required in a remediation statement.

The note should not be used to inform action under Part IIA: the Act, Regulations and Statutory Guidance should always be referred to and independent legal and specialist technical advice sought as necessary. This note is based on SEPA's current interpretation of the legislation, regulations and guidance and is issued for information purposes only. It should not be relied upon by third parties who should always seek their own advice on matters of interpretation. The note is only applicable in Scotland.

2. What are the provisions of Part IIA?

Part IIA is aimed at addressing the legacy of land which is already chemically contaminated, for example by past industrial, mining and waste disposal activities. It introduces, for the first time, a statutory definition of contaminated land. It focuses on land that in its current use is causing, or has the potential to cause, significant harm or pollution of controlled waters. Land contamination where a change of use is concerned is still dealt with under the planning system. Other regimes, such as Pollution Prevention and Control (PPC) are concerned with the prevention of new contamination. The relationship of Part IIA statutorily contaminated land to other land is shown below:



The suitable for use approach requires that the risks associated with the land contamination are assessed on a site by site basis - there are no standards for differentiating between contaminated and 'uncontaminated' land.

Other key features of Part IIA are that:

- the primary regulatory role rests with Scottish local authorities.
- it does not currently apply to radioactive contamination of land.
- it seeks to promote voluntary remediation.
- it follows the polluter pays principle, whilst ensuring that the cost burdens are proportionate and reasonable.

The primary legislation contains the structure and main provisions of the new regime. It consists of sections 78A to 78YC of the Environmental Protection Act 1990, which were inserted by section 57 of the Environment Act 1995. In addition to the requirements contained in the primary legislation, operation of the regime is subject to regulations and statutory guidance.

- Statutory guidance provides the detailed framework for the definition, identification and remediation of contaminated land, as well as exclusion from, and apportionment of, liability for remediation and the recovery of costs of remediation and relief from hardship.
- Regulations made under Part IIA deal with: the descriptions of land which are required to be designated as special sites; the contents of, and arrangements for serving, remediation notices; compensation to third parties for granting rights of entry etc to land; grounds and procedures of appeal against a remediation notices; and particulars to be included in the public registers.

3. What are Local Authorities and SEPA required to do under Part IIA?

A summary of the powers and duties of the enforcing authorities are provided below:

Local Authorities

- Duties to:
- inspect their areas to identify contaminated land and to designate special sites
 - ensure remediation of land identified as contaminated
 - maintain remediation registers for contaminated land

- Powers to:
- recover cost for remediation undertaken itself

Scottish Environment Protection Agency (SEPA)

- Duties to:
- ensure remediation of land designated as a special site
 - maintain a remediation register for special sites
 - prepare a national report on the state of contaminated land

- Powers to:
- to provide site specific advice to local authorities on contaminated land
 - recover cost for remediation undertaken itself

4. What is contaminated land?

For the purposes of Part IIA, contaminated land is identified 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:

- significant harm is being caused or there is a significant possibility of such harm being caused; or
- pollution of controlled waters is being, or is likely to be caused."

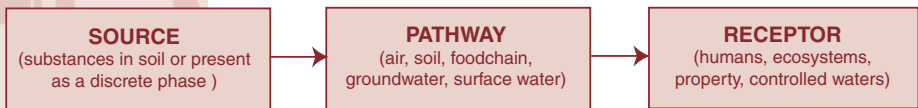
Harm is defined as "harm to the health of living organisms or other interference with the ecological systems of which they form a part, and in the case of man includes harm to his property".

Substance is defined as "any natural or artificial substance whether in solid or liquid form or in the form of gas or vapour".

The standard definition of land applies, which includes land under water. The term pollution of controlled waters is as defined in section 78A of Part IIA as "the entry into controlled waters of any poisonous, noxious or polluting matter or any solid waste matter". Controlled waters have the same meaning as in section 30A of the Control of Pollution Act (COPA) 1974 and include:

- relevant territorial waters, extending seaward for three miles from the baseline from which the breadth of the territorial sea adjacent to Scotland is measured
- coastal waters, extending from the baselines above as far as the limit of the highest tide or as far as the fresh-water limit of the river or watercourse which adjoins waters within that area
- inland waters, including the waters of any relevant loch or pond and rivers and other watercourses above the fresh-water limit
- groundwaters contained in underground strata, wells, boreholes, excavation into underground strata or similar.

It is important to realise that Part IIA only covers a sub-set of land which is chemically contaminated. The Part IIA definition of contaminated land relies heavily on the concept of a pollutant linkage i.e. the presence of a source of contamination which has the potential to impact on a receptor by means of a pathway.



The statutory guidance limits what can be considered as a receptor under Part IIA to certain designated ecosystems, human health, property and controlled waters. It also provides guidance on what should be considered to represent significant harm, or a significant possibility of significant harm, and should be referred to for further information.

5. How will contaminated land be identified?

The process of identification of contaminated land consists of a number of stages, which are outlined below and highlighted in Flowchart A. Under Part IIA, local authorities are required to cause their areas to be inspected from time to time to identify contaminated land. The statutory guidance requires that local authorities develop and publish a strategic approach to the identification of contaminated land which merits detailed individual inspection. The strategy should indicate how the local authority will identify potentially contaminated areas and how these areas will be prioritised to be assessed in more detail. The identification is to be done as a result of information gathered by the local authority and information received from other regulatory bodies, organisations or individuals.

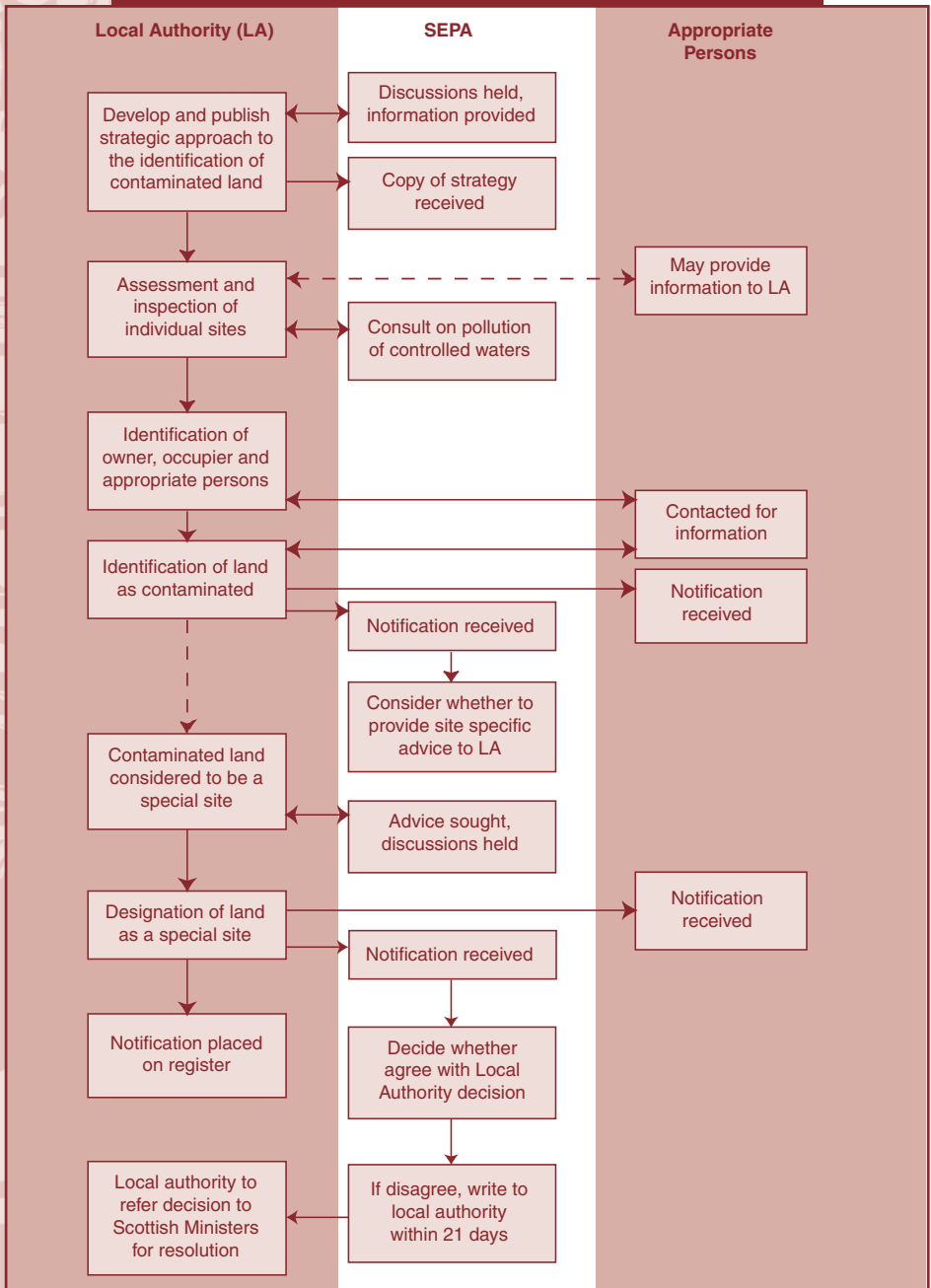
It is the responsibility of local authorities to determine whether any particular site is contaminated land, based on the outcome of their assessment and on the balance of probabilities that one or more pollutant linkages are present. In making their assessment, local authorities are required to consult with the Scottish Environment Protection Agency (SEPA) regarding pollution of controlled waters and with Scottish Natural Heritage (SNH) concerning harm to ecological systems. In the process of identification, appropriate persons may be contacted for information by the local authority.

If you are concerned that your land may be identified as contaminated, you could consider contacting the local authority and making whatever information you have available to them. It should be noted that the intention to undertake remedial action, as opposed to actual remedial action, is unlikely to prevent land from being identified as statutorily contaminated land.

If a local authority does not have sufficient information to arrive at a decision, then it may undertake a detailed investigation of the land. Local authorities can undertake, or authorise others to undertake, an inspection using statutory powers of entry. Compensation may be payable by the local authority for any disturbance caused.

Regulations provide for the designation of a sub-set of contaminated land as special sites. A special site is contaminated land which meets one of the descriptions in the regulations, for example land on which a process subject to Integrated Pollution Control is, or has been, operated. Special sites do not necessarily represent the most heavily contaminated land. Special site designation is the responsibility of local authorities, who are required to seek advice from SEPA. Once a special site has been designated as such, SEPA becomes the enforcing authority. Local authorities remain the enforcing authority for all other statutorily contaminated land.

Flowchart A: Identification of Contaminated land



6. What happens once land has been identified as contaminated?

Local authorities are required to give notice of land identified as contaminated (or designated as a special site) to: SEPA; the owner of the land; any person who appears to the local authority to be in occupation of the whole or any part of the land; and each person who appears to the authority to be an Appropriate Person. The notifications of contaminated land and the special site designations are required to be placed on the public register. There is no mechanism for Appropriate Persons to appeal against a local authority's decision that land is a special site.

Where any land has been identified as contaminated land, the enforcing authority has a duty to secure remediation. This process comprises a number of stages, as detailed below and highlighted in Flowchart B. There is at least a three month consultation period (bypassed in cases where urgent remediation is justified) following identification of contaminated land, or designation as a special site. During this period, the enforcing authority, site owner, occupier and other appropriate persons should reach decisions on the remediation mechanisms.

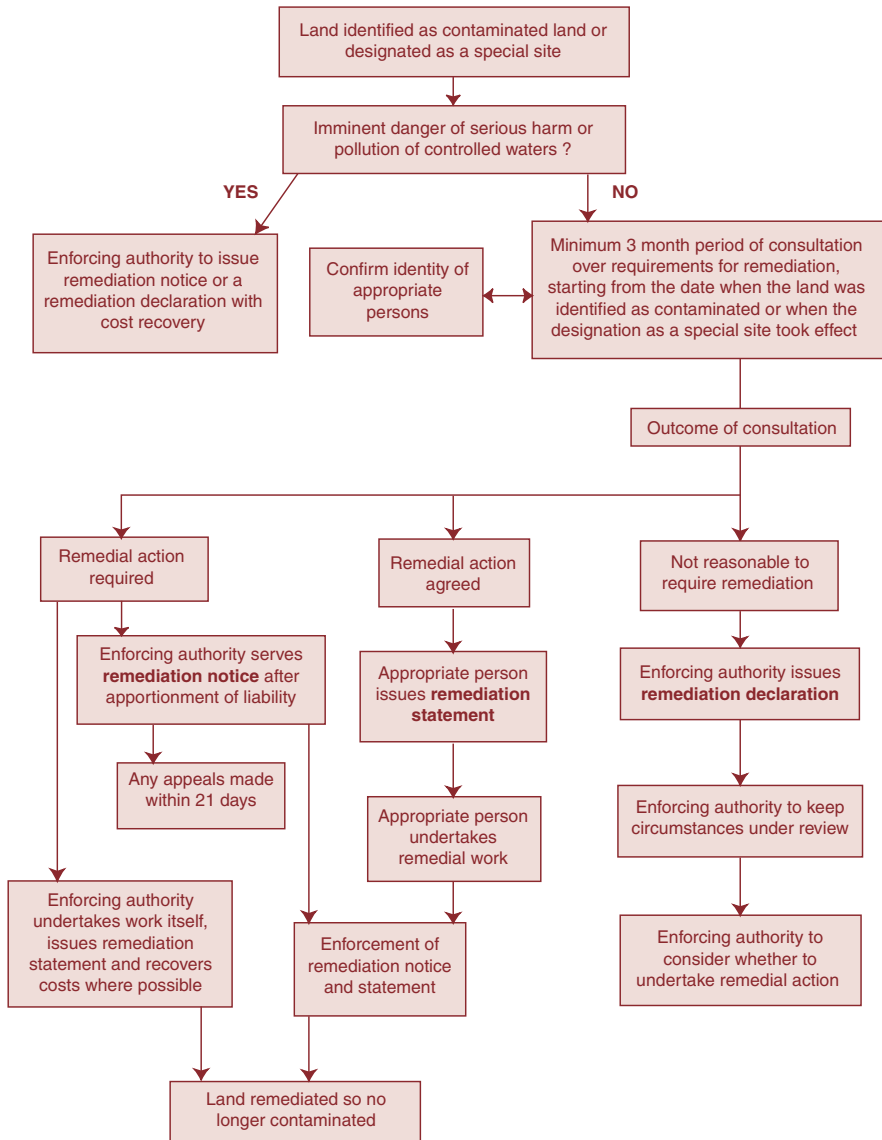
There are in general four possible outcomes of the consultations:

1. the appropriate person agrees to undertake remediation and issues a **remediation statement**, in consultation with the enforcing authority.
2. the enforcing authority serves a **remediation notice** on the appropriate person/s, where no indication is provided that appropriate remediation will be undertaken.
3. the enforcing authority uses its powers to undertake remediation itself and issues a **remediation statement**.
4. it is unreasonable require remediation and the enforcing authority issues a **remediation declaration** (if circumstances change after a remediation declaration has been issued, a remediation notice can be subsequently served).

7. What is remediation and what is likely to be required?

The term remediation has a wide meaning under Part IIA, as it includes assessment of condition, undertaking remedial treatment and monitoring the condition. These remediation actions may well be phased and they may also be used to further characterise identified pollutant linkages, in order to inform the requirements for remedial treatment. The aim of remedial works should be to remove the pollutant linkage, either by reducing or removing the contamination source, breaking the pathway or removing the receptor. The standard of remediation should be such that significant harm or pollution of controlled waters is no longer being or is likely to be caused, provided that it is also reasonable with regards to the cost involved and the seriousness of the harm of pollution of controlled waters being caused. Enforcing authorities are required to have regard to the Statutory Guidance when deciding whether remediation is reasonable.

Flowchart B: Remediation of Contaminated Land



8. Who is responsible for the cost of remediation?

The Appropriate Persons are those identified by the enforcing authorities as bearing the responsibility for, and therefore the costs of, remediation of the land. They will typically include some or all of those persons who were provided with notification that land has been identified as contaminated, although there may be some additional persons identified or some discounted during consultation on remediation. In cases where a remediation notice is served, the enforcing authority will decide on who should bear what proportion of the liability, and whether any person is excluded from liability. Potential Appropriate Persons should refer to Chapter D of the Statutory Guidance and should contact the Enforcing Authority if they could benefit from the exclusion, apportionment and attribution procedures. Where appropriate persons issue a remediation statement, then they may agree the apportionment of costs between themselves.

In considering liability for remediation of contaminated land, Part IIA introduces the concepts of Class A and Class B appropriate persons. An Appropriate Person is any person who is to bear responsibility for any thing which is to be done by way of remediation in any particular case. In the first instance, any person who caused or knowingly permitted a substance to be in, on or under the land (Class A persons) are responsible. Where no Class A persons can be found, responsibility passes to the current owner or occupier of the land (Class B persons). Where neither Class A or B persons can be found, the Enforcing Authority has powers to remediate the land. It should be noted that some owners or occupiers may be Class A persons because of their own past actions or omissions or because of a transfer of liability during land transactions.

9. What is agreed remediation and what is a remediation statement?

There are many benefits to appropriate persons in agreeing to undertake remediation and to issue a remediation statement. For example: an exemption from landfill tax may be obtained for waste taken off-site for disposal; costs can be apportioned by mutual agreement; appeals will be avoided; and the remediation strategy can be designed to satisfy your own, as well as regulatory, objectives and timescales.

A key stage in the process of preparing and issuing a remediation statement, is discussion with the enforcing authority. The Statutory Guidance refers to agreed remediation and it is this phrase that is used here, to indicate that agreement should be reached between the Appropriate Persons and enforcing authority as to what is required by way of remediation. Appropriate Persons are therefore encouraged to discuss their proposals with the enforcing authority before preparation of a statement commences. It is anticipated that a joint remediation statement will be issued by all appropriate persons, rather than each person issuing a statement separately.

Section 78H(7) of the Environmental Protection Act indicates that the Appropriate Person should prepare and publish a remediation statement detailing:

- the things which are being, have been, or are expected to be, done by way of remediation.
- the name and address of the person who is doing, has done, or is expected to do, each of those things.
- the periods within which each of those things is being, has been, or is expected to be, done.

The Regulations specify the content of a remediation notice, which provides a useful guide as to what may be required in a remediation statement. Annex 1 to this note outlines what may be included in a remediation statement. The exact details contained in a statement and its structure will vary for each site. Appropriate Persons are advised to determine what the enforcing authority requires in a remediation statement and to discuss whether any information is to be excluded on the grounds of commercial confidentiality and national security. It is possible to vary a remediation statement through issue of a new statement.

If a remediation statement is not published within a reasonable period of time following the site being identified as contaminated land or designated as a special site, then an enforcing authority may decide to secure remediation through service of a notice. Where a remediation statement has been issued, but the actions have failed to be carried out, the enforcing authority may also consider serving a remediation notice. Even if the remediation actions described in the remediation statement are being carried out as planned, the enforcing authority may consider that additional remediation is necessary. The Statutory Guidance details the circumstances in which this may occur.

10. What happens if a remediation notice is served?

A remediation notice outlines what is to be done by way of remediation and the time period in which it is expected to be done. The content of remediation notices is detailed in the Regulations. Notices can be served on one or more Appropriate Persons. There is no limit to the number of remediation notices which may be served.

If a remediation notice is served on you and you wish to make an appeal against the notice, you should do so within a period of 21 days beginning with the day on which the notice is served. The Regulations list the grounds on which an appeal can be made. Appeals against notices served by a local authority should be made to the sheriff court and appeals against notices served by SEPA should be made to the Scottish Ministers. Further information regarding appeals will be contained in any notice served.

If a person on whom an enforcing authority serves a remediation notice fails, without reasonable excuse, to comply with any of the requirements, that person will be guilty of an offence. Enforcing authorities have powers to report for prosecution appropriate persons who fail to comply with the remediation notice. Persons convicted of the offence of non-compliance with a remediation notice will be liable to a fine. Where a person fails to comply with any of the requirements of a remediation notice, the enforcing authority is

given powers to carry out the remedial action itself and to recover costs from the Appropriate Persons.

11. What appears in the public registers?

The Act and Regulations specify what information is to be made available in public registers, subject to exclusion on the grounds of national security and commercial confidentiality. The public register information relates primarily to remediation activity and will contain particulars relating to remediation notices, appeals against notices, remediation declarations, remediation statements, designation of special sites and convictions for offences as well as contaminated land notifications.

Any person who has carried out remediation required by a notice or described in a remediation statement may notify the enforcing authority of the action that has been claimed to be carried out. Enforcing authorities are under a duty to place such notifications of claimed remediation on the public register. There is likely to be benefit to an Appropriate Person in substantiating what has been done by way of remediation at a particular contaminated land site. Anyone consulting the public register will see that action has been taken to address the contamination.

12. What should I be doing?

The enforcing authorities will make contact with potential Appropriate Persons at the appropriate stage in the regulatory processes. If you consider that there is merit in establishing dialogue before then, you should consider making contact directly with the individual local authority, or SEPA in the case of special sites.

13. Further information

The Environment Act 1995, Contaminated Land (Scotland) Regulations 2000 and Scottish Executive Rural Affairs Department Circular 1/2000 should be referred to for further information. Details can be found on The Scottish Executive Web site (www.scotland.gov.uk).

Details of other guidance relating to contaminated land can be found on The Department of Environment, Transport and the Regions Web site (www.detr.gov.uk/pubs/index.htm).

Annex 1: Proposed Structure and Content of a Remediation Statement

This annex lists the potential requirements of a remediation statement within a proposed structure. The statement should have a version number and date of issue, so that any variation to it can be easily identified. Whoever issues the statement should either sign it, or enclose a covering letter with the statement.

1. Introduction and Background

The purpose of this section is to state what is needed to be done by way of remediation with reference to the Notice(s) of Identification and/or Designation and Appropriate Persons. The content of this section should include:

- The location of the site and the area of the site which the statement applies to, including a site plan.
- The current use(s) of the site.
- Reference to the Notice(s) of Identification or Designation, detailing why land was identified as contaminated, date of issue of Notice and whom the Notice was issued by.
- A list of all the significant pollutant linkages for the site and the basis on which they were deemed significant.
- Names and addresses of the Appropriate Persons, with an indication of whether they are an owner, occupier or otherwise liable.
- Persons responsible for doing the things mentioned in the statement, with an indication of apportionment of responsibility where more than one person is involved.
- Other relevant background information.

2. Remedial Objectives

The purpose of this section is to list the proposed remedial objective for each linkage and the means by which they have been derived. The basis on which each remedial objective has been proposed should be indicated and where possible, objectives should be expressed in quantitative measurable terms incorporating an indication of the degree of confidence referable to that objective.

3. Overview of Remediation Scheme

The purpose of this section is to provide an overview of the things which are being, have been or are expected to be done by way of remediation. A remediation scheme represents a complete set or sequence of actions relating to one or more pollutant linkage, which are carried out in relation to the relevant waters or land. This section should include:

- An overview of the remediation scheme for the site, which should indicate how the significant pollutant linkages are to be addressed and summarise all assessment, remedial treatment and monitoring actions.
- Reference to any significant pollutant linkages which have been excluded from the scheme, with full justification provided on the basis for exclusion.
- Details of when the remediation is to commence and when the remediation objectives are to be met, with reference to all phases of the remediation scheme.

Appropriate Persons may also wish to forward supporting information to indicate that the scheme will achieve at least the same standard of remediation as would be required had the Enforcing Authority issued a remediation notice.

4. Assessment Actions

The purpose of this section is to detail the assessment actions which are being, have been, or are expected to be done to assess the condition of the contaminated land, the controlled waters affected by the land, or any adjacent land. The reasons for undertaking assessment actions may include: characterisation of the pollutant linkage to enable decisions on the appropriate remediation objectives to be made; and establishing the technical specification or design of remedial treatment actions. This section should:

- State which pollutant linkage the assessment action relates to and provide detail of the assessment to be undertaken.
- Describe in detail how the action will be conducted.
- Provide details of installations, monitoring, sampling, analysis, quality assurance etc.
- State any potential emissions from undertaking the action and how these will be controlled.
- Describe how the action will be used to inform other phases of the remediation scheme.

5. Remedial Treatment Actions

The purpose of this section is to detail the things which are being, have been or are expected to be done for each pollutant linkage by way of: preventing, minimising, remedying or mitigating the effects of harm or pollution of controlled waters on which land has been identified as contaminated; and restoring land or waters to a satisfactory state. Any such remedial treatment action should include appropriate verification measures.

Information should be provided for each action on the technique/s, method/s or technology to be used, including their likely effectiveness, durability and practicality. The pollutant linkage(s) being addressed by each action should be highlighted. More detailed information may be necessary in a case where an Appropriate Person proposes a "Novel", rather than an "established" technique. This may comprise of: details of the track record of the technique; clear identification of the "unknowns" and how these will be considered and monitored; and a description of what actions or alternative solutions will be undertaken if the technique is not successful, how these actions will be initiated and the timescale for the implementation of these actions.

Information should also be provided on the implementation of the remedial treatment actions. A description should be provided of the measures put in place to ensure that the remediation will be undertaken in a way that the objectives will be met. This should include:

- A description of how each technique will operate.
- Identification of critical factors relating to the effectiveness and durability of the technique.
- Detail how and what action will be initiated if a critical factor fails.

In terms of verification of the effectiveness of remedial treatment actions, a description should be provided of the measures in place to verify that the remediation objectives have been met, both during and after completion of site works. Detailed descriptions of protocols for any installation works, sampling/monitoring strategy, sample handling protocols, analytical methods and protocols etc. should be appended as appropriate.

6. Monitoring Actions

This section should provide detail of monitoring actions to be taken to detect changes which might occur in any component of a significant pollutant linkage which is not being addressed by an assessment or remedial treatment action. The main purpose of a monitoring action is to keep under review the need for assessment or remedial treatment action.



7. Records and Reporting

This section should describe in detail the type of records that will be maintained for the assessment, remedial treatment and monitoring actions undertaken. It should also describe how the records will be used to demonstrate that the remedial objectives are being met and how any incidents or failures in the process are to be reported. Where remediation is undertaken which is not subject to any licensing provisions, records should ideally be maintained to verify that the remedial works are not having an environmental impact. A summary of any operational records, monitoring records to be kept or reports to be prepared should be provided, in particular where it is intended that reference is made to these is any notice of claimed remediation.

