

**DERBYSHIRE COUNTY COUNCIL
CABINET MEMBER FOR COUNCIL SERVICES**

9 July 2013

Report of the Director of Finance

POLLUTION LEGAL LIABILITY RISK IDENTIFICATION

1 Purpose of the Report

To seek Cabinet approval to the development and maintenance of a central repository detailing land which the Council owns or has a statutory or contractual responsibility for maintaining and upon which there is or may be contaminated materials. This is required in order to carry out an effective risk assessment of the extent of contamination and the associated risks, to formulate a risk mitigation strategy and to determine if additional insurance is required.

2 Information and Analysis

Background

The Council could be exposed to pollution claims which could include third party personal injury claims and/or clean-up costs relating to any (actual or alleged) pollution released from the Council's land or arising from its' historical activities.

A pollution claim is a claim arising from the sudden and accidental or gradual contamination of land such as clean-up costs, personal injury, claims for diminishment of property value, nuisance, along with the legal costs and expenses related to the incidents,

The Environmental Liability Directive creates strict liability in the case of polluting organisations and additionally obliges local upper/lower tier authorities to act if they become aware of damage.

The need to establish the extent of any risk the Council faces has been demonstrated by a number of high profile cases where landowners have been held liable for illnesses/diseases caused by pollution, some examples of these are provided in the appendix to this report.

Risk Identification

The types of activities which the Council undertakes, that could lead to such claims, are:

- a) being involved in planning project works that could release pollution –
 - i. Regeneration or economic development of brownfield sites
 - ii. investigation or remediation of sites under the Contaminated Land Strategy
- b) the acquisition of land where activities that caused contamination may have historically occurred.
- c) previous activities could have caused contamination
 - i. whether or not the Council still owns the land.
 - ii. Waste management operations, closed landfill sites
- d) Inability to identify “responsible persons” to carry out or reimburse the Council for remediation when acting as the enforcing authority.

In attempting to identify the risk to which the Council is exposed, land and property records have been examined. It was found that much of the known data is anecdotal in nature and held in numerous different ways. For example, an old database of contaminated land exists but this is incomplete and out of date.

Under the Council's Brownfield Action Plan there should be records of all relevant land in the County. If this could be matched with Council owned land it would assist the risk identification process.

It is known that the Council has responsibility for a number of sites where historical activities would expose the Council to potential claims. These sites include former industrial collieries, gasworks, cokeworks, tar pits and former/closed landfill locations, Grassmoor Lagoons is one such location on the site of a former cokeworks which has underground tar tanks/pits, deep sludge pits and potentially contaminated groundwater .

Some councils have been exposed to liabilities associated with the air migration of contaminated material. It is because brownfield development has generally included the covering over of sites rather than the removal of contaminated material.

There is confidence that the Council has no radioactive sites.

Derbyshire is an area that has pockets of high radon readings and it is anticipated that some of the Council's buildings will be affected. There is a separate team dealing with this issue.

To identify, assess and evaluate the Council's exposure to contaminated land, a register of all land owned by the Council or in which the Council has an interest needs to be developed. This register also needs to detail any and all contamination risks, including any restoration/remedial projects, cross referenced with details of the Council's Brownfield Action Plan. The Council currently has details of some sites of concern, but this information is by no means comprehensive and so an accurate assessment of the current risk cannot be undertaken.

Likelihood

The likelihood of such claims and costs will depend upon the way in which sites have been remediated both in the past and currently.

In consideration of the volume of previous industrial sites for which the Council is responsible and the incidence already of oozing tar pits at Blackwell it is estimated that the likelihood of claims is moderately high.

Impact

The impact of a pollution event could range from a small clean-up operation costing a few thousand pounds to a major clean-up with claims for personal injury which could exceed £1million.

In the Environmental Innovations Limited Green Paper on "Fines and the Hidden Costs of Environmental Pollution" published in November 2010 the costs of fines and clearing up river pollution to a water company were recorded at over £200,000.

The Environment Agency suggests an average oil spill costs a typical business up to £30,000 in fines, clean up charges and production losses.

Current Insurance Cover

Public Liability policies generally provide very limited cover in respect of pollution, with the exception of sudden, unintended and unexpected pollution which must occur and be identified within a short timeframe and within the policy period.

The Council's legal liability policies contain the standard cover outlined above and also provide a very limited extension.

In summary, we have the following cover:

- £5,000,000 limit any one claim (and in the annual aggregate) with a £125,000 excess.
- Cover is limited to pollution that has migrated from the owned site. For example, the pollution of a watercourse offsite following leakage of pollutants onsite.
- There are specific exclusions for:
 - Conditions existing prior to the policy inception date
 - Redevelopment including excavation and surface soil movement
 - Waste management operations
 - Liability assumed under contract
 - Asbestos/lead pollution (except clean-up costs for soil remediation and groundwater)

This cover was provided in the wake of the Corby toxic waste case, which is why it very specifically refers to migration of pollution.

In terms of the exposure faced by the Council the protection afforded by this cover is very limited and the Council should currently consider itself uninsured for the majority of this risk.

Available Insurance Cover

Wider Insurance cover is now available which would protect either specific identified sites or provide Council-wide protection.

The cost of a Council-wide policy is anticipated to be in the range of £30,000 to £70,000 depending upon the level of cover purchased, the excess and how the cover is structured.

To obtain formal quotations for such cover underwriters would need the register of contaminated land (both historical and current) that the Council owns, occupied (or has owned) including:

- Any available environmental surveys/audits
- Locations with inactive/closed landfills or surface impoundments
- Prior property use details
- Detail of storage tanks; both underground and above ground.
- Details of any planned/on-going remediation work
- Details of claims, reportable spills/leakages, prosecutions, and incidents that may reasonably expect a claim.

The Council does not seem to have this information in a readily available form at present. It is estimated that, using current information as a starting point, it will take four months to produce the information at an estimated internal resource cost of around £24,000. Any costs will be met from the Insurance Budget.

3 Considerations

In preparing this report the relevance of the following factors has been considered: financial, legal, prevention of crime and disorder, equality and diversity, human resources, environmental, health, property and transport considerations.

4 Key Decision

No

5 Call-in

No

6 Background Papers

Papers held in Risk & Insurance Section, Corporate Finance.

7 OFFICER'S RECOMMENDATION

That further investigatory work is carried out to develop a register of the risk in order to determine an appropriate mitigation strategy.

PETER HANDFORD

Director of Finance

County Hall
MATLOCK

19 June 2013

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Pollution Legal Liability Claim Examples:

Corby Group Litigation v Corby Borough Council [2009] EWHC 1944 (TCC)

In the 1980s, Corby Borough Council acquired contaminated land from the British Steel Corporation. It wanted to carry out regeneration following closure of the steelworks. The council transported hundreds of lorry loads of soil through Corby to a tip created for the project.

A number of children born in close proximity to the waste transportation route had deformities of their upper limbs.

The judge found Corby Borough Council liable in negligence, public nuisance and a breach of statutory duty for its reclamation of the Corby Steelworks between 1985 and 1997. This landmark decision was historically significant as the first in the world to establish a link between atmospheric toxic waste and birth defects. This held implications for other council reclamation programs and the methods of conducting reclamation.

A multi-million pound out of court settlement was agreed.

Crest Nicholson Residential Limited v Secretary of State for the Environment [2010] EWHC 561 (Admin)

Crest Nicholson acquired a site from Redland Minerals Limited which had been used for chemical production. In 2000 the local authority found the water course was contaminated and the Environment Agency served remediation notices on Redland and Crest.

The legal position is that the Polluter usually pays. However, in this case and even though the original polluter was known - Redland - Crest failed in their appeal against the remediation notice they received as the judge deemed them to have received sufficient information at the time of purchase.

Existing identified exposure

With information provided to date **some** of the following potential exposures have been identified:

Identified Land	Exposure	Comment
Unspecified	Historic gasworks	Most towns will have historically had their own gasworks.
Unspecified	Collieries	These would potentially feature tar pits, gas works and railways.
Blackwell	Tar Pits	There has been an incidence of an oozing tar pit recently onto a school playground.
Various unspecified	Tar Pits	
Grassmoor Lagoons	Coke-works, railway sides, underground tar tanks/pits, sludge pits (10m deep). Potentially groundwater is impacted with contaminants.	All sludge pits and risk areas are fenced within the site and there is a clean-up/redevelopment programme in place. Any works done now are rigorously assessed and any removal done carefully in closed vehicles.
Markham Vale	Contaminated material under South Tip	Largely developed site with some parts already sold off. Attempting to deal with the area containing contaminated material.
Cinder Hill	Tar Pits	Not a DCC site but there are possibly some holdings there
24 Identified former/closed Sites	Waste Management Facilities and former/closed Landfill Sites.	Sites are either retained or sold/surrendered with retained liabilities. Sites operated for disposal of household and other wastes.