Implementation of the Environmental Liability Directive in the UK

Alex Ibrahim
Nabarro LLP

- Discussion of the general principles of the ELD
- Explanation of the regulations transposing the ELD in the UK
- How the regulations operate in practice
- Regulators’ use of the regulations v other environmental legislation
- Environmental insurance – coverage available for ELD and market perception
- Implementation of the ELD in the UK – has it met expectations?
General principles of the ELD: Environmental Damage

- Prevention and remedying of “environmental damage”
- Three heads of “environmental damage”, damage to:
  - species and habitats
  - water
  - land (where there is a significant risk of adverse effects on human health)
- Applies to damage caused or an imminent threat of damage
- Not retrospective
General principles of the ELD: Liability and remediation

- The ELD provides for two types of liability:
  - strict liability
  - fault-based liability

- Requires operator to:
  - take immediate preventative action
  - promptly report an imminent threat and any damage caused
  - carry out remediation (or pay the regulator’s costs of any preventative or remedial measures undertaken)

- No criminal liability for causing damage but criminal sanctions for failure to comply with remediation notices
Regulations implementing the ELD in the UK

• England: Environmental Damage (Prevention and Remediation) Regulations 2009 (the “Regulations”)

• Wales: Environmental Damage (Prevention and Remediation) (Wales) Regulations 2009

• Scotland: Environmental Liability (Scotland) Regulations 2009

• Under the Regulations, “environmental damage” is damage to:
  
  - protected species or natural habitats or a site of special scientific interest (“SSSI”) (includes notified species or habitats for which the site of the SSSI has been designated)

  - surface water or groundwater (causing a deterioration in the status of the water body)

  - land (contamination by substances, preparations or organisms or microorganisms that results in a significant risk of adverse effects on human health)
Regulations implementing the ELD in the UK

- Activities listed in Schedule 2 of the Regulations:
  - operation of permitted installations
  - waste management operations
  - mining waste
  - discharges to surface water and groundwater
  - water abstraction
  - use of dangerous substances, pesticides, biocides
  - transport of dangerous or polluting goods
  - use, transport or release of GMOs
  - transboundary shipment of waste
Regulations implementing the ELD in the UK

Exemptions include:

• Not retrospective – damage caused by incidents or activities which finished before March 2009, not caught

• 30 year time limit – damage caused by events or emissions which took place 30 years before damage occurred is excluded

• Natural disasters – excludes damage caused by natural disasters (provided that operator took all reasonable precautions to protect against damage)

• Acts of terrorism – damage caused by acts of terrorism is excluded

• No causal link – environmental damage caused by diffuse pollution only caught if possible to establish a causal link between damage and specified activities
Regulations implementing the ELD in the UK

Defences include:

• No causal link – operator did not cause the environmental damage

• State of the art – damage caused by an activity which under current scientific/technical knowledge would not be expected to cause environmental damage (provided operator not at fault or negligent)

• Damage resulted from compliance with the instruction of a public authority or a permit (provided operator not at fault or negligent)

• Application of the defences
How the Regulations operate in practice

RELEVANT CASE
- Imminent threat of damage or reasonable grounds to believe there is environmental damage

IMMEDIATE ACTION: PREVENTING AND NOTIFYING DAMAGE
- Operator takes steps to limit or prevent further damage
- Operator notifies authority

DETERMINATION OF ENVIRONMENTAL DAMAGE
- Authority decides whether environmental damage under the Regulations has occurred and, if it has, notifies the responsible operator.

IDENTIFYING REMEDIAL MEASURES
- Operator proposes remedial measures
- Authority invites interested parties to submit observations
- Authority serves remediation notice on the operator

IMPLEMENTATION OF REMEDIAL MEASURES
- Operator takes remedial measures, including complementary and compensatory remediation as necessary

How the Regulations operate in practice

• Forms of remediation which can be required (Schedule 4 of the Regulations)

• Remediation of natural resources (other than land)
  - **Primary**: return to state which existed before damage
  - **Complementary**: where primary remedial measures will not result in full restoration
  - **Compensatory**: non-financial measures to compensate for interim loss of resources

• Remediation of land: removal of contaminants to ensure land no longer poses any significant risk of adverse effects on human health

• Failure to comply with a remediation notice
Regulators’ use of the Regulations

- Interaction between the Regulations and other environmental regimes:
  - Contaminated land
  - Pollution Prevention and Control
  - Waste
  - Water
  - Nature conservation

- Without prejudice to existing legislation

- Annex 4 of Government guidance: application to contaminated land

- Notification by interested parties
  - affected by environmental damage
    (can include bird watchers and ramblers)
  - have a sufficient interest (can include conservation charities)
Impact of the Regulations on operators

- Limited number of activities affected, already subject to existing environmental regimes

- But, the Regulations create new pro-active duties and liabilities to:
  - prevent and notify imminent threats of and further damage
  - carry out complementary and compensatory remediation

- Duties/liabilities difficult to assess and manage:
  - when has environmental damage been caused?
  - evidence of baseline conditions
  - how will complementary and compensatory remediation be determined?
Impact of the Regulations on operators

Ways of managing ELD liabilities:

• establish baseline conditions
• assess and identify areas of potential risk for environmental damage
• design and implement procedures to mitigate risk
• introduce reporting procedures for notifying regulator of environmental damage/threats
• check insurance coverage
• multi-jurisdictional sites
Environmental insurance for ELD

- No obligation on operators to take out insurance against liability under the Regulations
- Uncertainty as to which policies apply and what is covered
- Environmental Impairment Liability insurance
- Threat of mandatory financial security
Implementation of the ELD in the UK – has it met expectations?

- Limited use in the 5 years since implementation
- 23 reported cases in the UK
- Thresholds for establishing environmental damage
- Continued use of existing environmental regimes
Conclusions

• Pro-active duties and liabilities on operators to:
  - prevent and notify imminent threats of and further damage
  - carry out complementary and compensatory remediation

• Operators need to take steps to manage these liabilities

• Limited use by the regulators and reported cases to date

• Report from European Commission (deadline 30 April 2014)

• Possible future amendments to the ELD:
  - extension of strict liability for non-Annex III activities
  - extending the list of activities in Annex III;
  - the categorisation of environmental damage
  - clarification of the definition of water damage;
  - the inclusion of air damage; and
  - permit and state-of-the-art defences.
Contact

Alex Ibrahim
Senior Associate
NABARRO LLP
a.ibrahim@nabarro.com
T: +44 (0) 20 7524 6569