



Implementation of the Environmental Liability Directive in the UK

Alex Ibrahim
Nabarro LLP



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CLARITY MATTERS

Implementation of the Environmental Liability Directive (Directive 2004/35/EC) (“ELD”) in the UK: Overview

- 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 micro organisms 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



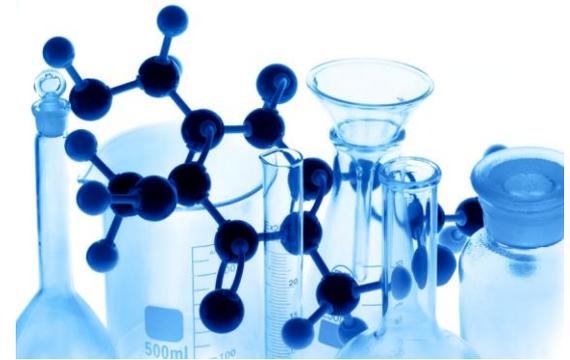
Regulations implementing the ELD in the UK

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

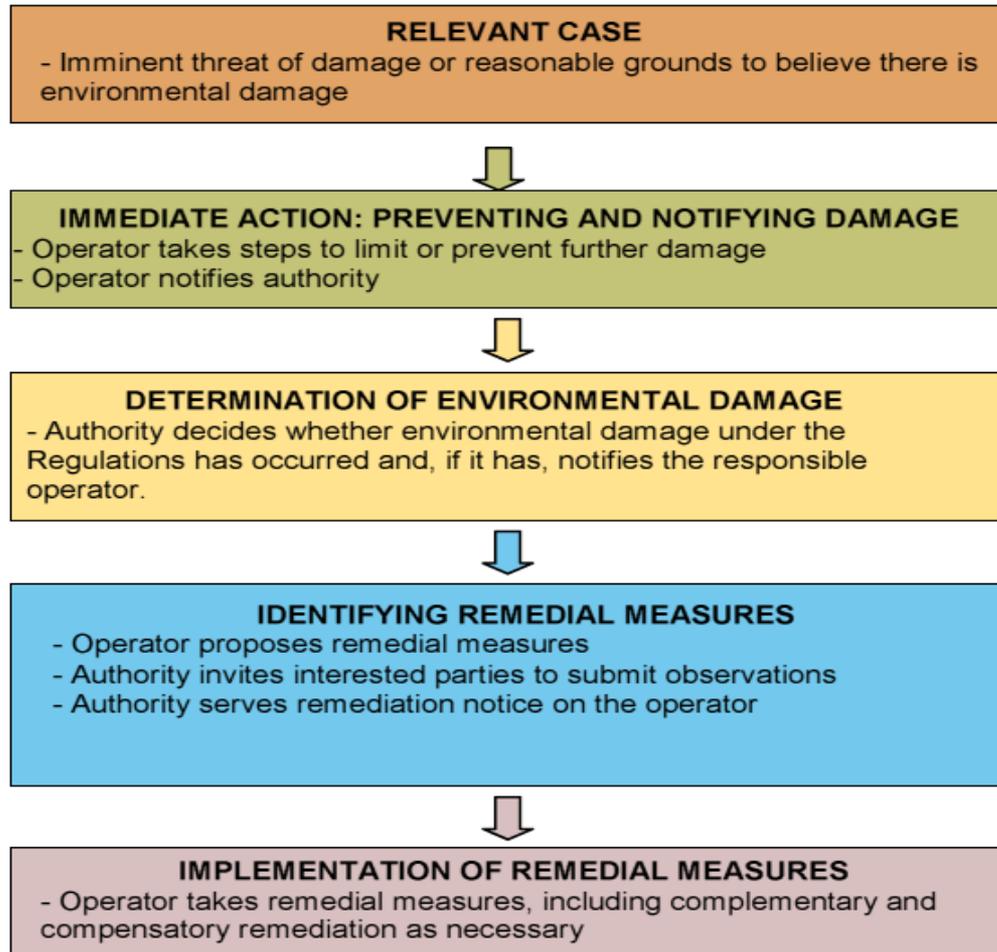


Defences include:

- 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



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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



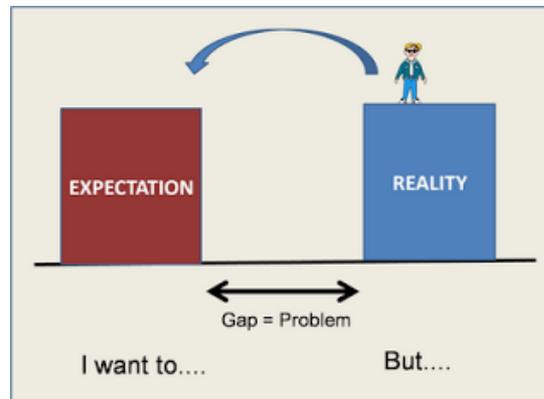
Environmental insurance for ELD

- 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

