

The Environmental Liability Directive

What does it mean for you?

May 2007

The Environmental Liability Directive (2004/35/CE, "ELD") came into force in April 2004 and the UK Government has missed the deadline of 30 April 2007 for transposition of this Directive into UK law.

Once implemented, the ELD will have fundamental implications for operators or controllers of certain activities listed in Annex III of the ELD, including operators of all PPC installations, people with discharges to surface water or groundwater, or water abstraction licences, waste management operators and anyone manufacturing, storing, using or releasing certain plant protection or biocidal products into the environment (which will include farmers).

This article summarises some of the key provisions of the ELD, looks at its implications for companies and provides information on the current Government proposals for implementation of the ELD.

Key elements of the Directive

The ELD aims to establish a common framework throughout the EU for prevention and remedying of "significant environmental damage", through use of the polluter pays principle.

Specific criteria are set out in the ELD for assessing when environmental damage is "significant" and this is defined by reference to:

- Biodiversity – e.g. significant adverse effects on the conservation status of species and natural habitats protected under EC legislation;
- Waters covered by the Water Framework Directive – e.g. significant adverse effects on their ecological, chemical, quantitative status and/or ecological potential; and
- Land – e.g. significant risks of adverse effects on human health.

In summary, the ELD requires operators to take preventative measures where there is an imminent threat

of environmental damage and to remediate environmental damage where this does occur.

Operators must also take all practical steps to control, contain, remove or otherwise manage relevant contaminants causing environmental damage and take necessary remedial measures in relation to the environmental damage in order to minimise its effects. In the longer term, the operator is required to restore the environment to the condition it was in immediately before the event giving rise to the damage occurred.

Furthermore, where environmental damage occurs, or where the preventative measures taken in relation to an imminent threat of damage have not been successful, operators must immediately notify the competent authority.

Strict and fault based liability

Under the terms of the ELD, an operator of an Annex III activity is to be held financially liable where an activity has caused significant environmental damage to biodiversity, waters covered by the Water Framework Directive or land, or the imminent threat of such damage.

The liability is to remediate the damaged environment to specified standards (as detailed in the table below) and is not based on a judicial process, or the paying of a fine – which means that liabilities could be significantly greater than under current regulatory regimes in the UK.

Liabilities under the ELD for each type of damage are also summarised below, along with the types of remediation and proposed thresholds for such damage under current Government proposals, set out in the Consultation on Options for Implementing the ELD (the UK Consultation Document). In summary:

- Primary remediation – deals with the original damaged resource or service (i.e. the damaged species or polluted water);
- Complementary remediation is required where it is

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not possible or cost effective to remediate the original damaged resource or service to its baseline condition and relies on improvement of a similar resource or service; and

- Compensatory remediation is intended to compensate

society for the time the resource or service that has suffered damage is not available – delivered by way of remediation (enhancement) equivalent to the loss, but at another site.

Summary of Basic ELD Requirements

Type of damage	Liability for operators of Annex III occupational activities	Liability of operators of other/ occupational activities	Standard of remediation	Type of remediation applicable	Government's proposed threshold
Protected species and natural habitats	Strict (N.B. Exemptions)	Fault based	Return the environment as a whole back to baseline condition, and remove any significant risk of an adverse effect on human health	Primary Complementary Compensatory	Test focuses on damage to Natura 2000 sites but takes account of significance of particular site to conservation status of habitat or species over natural range
Water	Strict (N.B. Exemptions)	None	Return the environment as a whole back to baseline condition, and remove any significant risk of an adverse effect on human health	Primary Complementary Compensatory	Number of criteria to be used
Land	Strict (N.B. Exemptions)	None	The removal of any significant risk of an adverse effect on human health	Remove significant risk of adverse effects on human health, taking account of actual or planned future use	Same as for contaminated land under Part 11A EPA 1990

What does it mean for you?

As can be seen from Table 1, operators of Annex III operational activities, known as "hazardous activities", will be held strictly liable for preventing or restoring any damage caused by those activities to land, water and protected habitats or species – unless an exemption or exception applies. The strict liability nature of these provisions means that there will be no need for regulators to show fault or negligence.

In addition, operators carrying out other less harmful activities, that are not Annex III activities, will be held liable when damage to protected habitats or species has been caused by their fault or negligence, unless an exemption or exception applies.

Exemptions

Following the possibilities offered by the Directive, the current Government proposal, as set out in the UK Consultation Document, is that operators may be exempt from clean up costs where the pollution released is within the terms of emission permits (the permit defence), or occurred despite use of best practice (the state of knowledge defence).

Exceptions

The wording of the ELD states that it will not apply to environmental damage or imminent threats of such damage from: "an armed conflict, hostilities, civil war or insurrection"; a "natural phenomenon of exceptional, inevitable and irresistible character"; or nuclear accidents. However, current

Government proposals are that the "natural phenomenon" exception will only apply if an operator can demonstrate that he took all reasonable steps to minimise the possibility or impact of environmental damage.

Timing of environmental damage or threat of damage

The provisions of the ELD are not retrospective, so only apply to environmental damage or imminent threats of such damage that take place, or derive from a specific activity which takes place, after 30 April 2007. Furthermore, the ELD does not apply to damage if more than 30 years have passed since the emission, event or incident giving rise to the damage occurred.

However, there is concern for UK industry and other operators in relation to incidents that take place between 30 April 2007 and whenever the UK Government manages to transpose the ELD into UK law. The CBI has called for guidance from Government on this issue.

Overlap with current regimes

The UK Consultation Document lacks a lot of detail on how the ELD will work in practice where "significant environmental damage" is already covered by existing UK regulatory regimes - such as the waste and contaminated land provisions in the Environmental Protection Act 1990, the PPC regime, the Water Resources Act 1990 and SSSI-related provisions. The UK Consultation Document indicates that further information on overlap of the ELD with current regulatory regimes will be provided through Defra guidance – however this is not available as yet.

Financial provision

Article 14 of the ELD states that Member States should take measures to encourage financial security instruments and markets by appropriate economic and financial operators including financial mechanisms in relation to insolvency, with

the aim of operators being able to use financial guarantees to cover their responsibilities under the ELD. The environmental insurance sector is watching the Member States' reaction to this provision, and the UK Government has taken this provision no further in its Consultation Document.

Conclusion

In conclusion, the provisions of the ELD could have substantial financial implications for operators of occupational activities listed in Annex III, which include PPC installations and a wide range of other companies, arising from strict liability for significant environmental damage to water, land or biodiversity. Fault-based liability will also apply to damage to protected species and natural habitats from all other occupational activities.

The ELD's requirements for operators to prevent an imminent threat of environmental damage and to remediate environmental damage where this does occur, along with the positive notification obligations to competent authorities that have not previously been a feature of UK environmental legislation, could lead to substantial further regulatory action. However, the impact of the ELD will depend very much on the steps taken by the UK Government to implement this legislation and explain the overlap with the current legislative regimes.

At present, whilst the deadline for implementation has been missed, there is considerable uncertainty for operators of PPC and other activities. However, they can take comfort in the fact that a competent authority has not even been designated, as yet, to enforce the forthcoming regime!

Further information

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