

Environmental Liability: RICS Information Paper and Implications for Chartered Surveyors

**Tim Elliott CEnv FRICS
Elliott Environmental Surveyors Ltd**



Environmental Liability

Summary of Practical implications for Surveyors:

- The regulations must apply – not voluntary.
- New scope of protection liability for environmental damage.
- Operator notification duties - also beware “whistle blowing” third parties.
- Operator preventative and remedial duties.
- Strict liability in certain cases – fault based liability in others.
- Onerous remedial standards – primary, compensatory, complementary.
- Third party liability and compensation.
- Insurance implications.
- Valuations.
- Opportunities for Surveyors

Environmental Protection and Sustainability

Sustainability is an important concern for the wider development world and land management.

Increasing pressure on natural resources is driving the evolution of environmental protection legislation to provide higher levels of protection that will ensure their long-term availability.

This brings with it new responsibilities for those involved directly or indirectly with potentially polluting operations.

Environmental Liability

The Environmental Damage Regulations (EDR)

- Who?** *Apply to all operators of economic activities.*
- What?** *The Environmental Damage Regulations.*
- Why?** *To enforce sustainability principles of the EC Treaty.*
- Where?** *All of the UK including specified areas of the marine environment with Regulations devolved to individual UK Parliaments.*
- When?** *Already apply in England and Wales, imminent in Scotland and Northern Ireland.*
- How?** *Introduces strict liabilities for operators of listed activities and raises the bar in many cases.*

⇒ Recently arrived, may affect you or your clients!

Environmental Liability

Background to the EDR

Aim to reinforce sustainability principles of the EC Treaty (1997):

Article 174(2)

“Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles

that preventive action should be taken,

that environmental damage should as a priority be rectified at source and

that the polluter should pay.”

Environmental Liability

Synopsis

Introduces duties for operators

- **Self-executing** duties to prevent and report environmental damage.
- Duty to remediate where environmental damage has occurred.
- Higher standards of remediation apply.

Introduces new powers and duties for enforcing authorities

- New powers to serve prevention notices.
- Powers to take action.
- Extensive provision to recover costs.
- Duty to serve remediation notices.

Implications for third party involvement

- Other parties affected, likely to be affected *or judged to have sufficient interest* may request action from an enforcing authority e.g. conservation groups.

Environmental Liability

Scope of the EDR

- Existing environmental protection regimes apply where requirements exceed the EDR.
=> *remedial work may need to satisfy several requirements*
- EDR limited to:

Damage to water

Damage to land

Damage to EC protected species or natural habitats or SSSIs

- EDR do not cover diffuse pollution where causal link cannot be established, e.g. diffuse water pollution from agriculture, CO₂e emissions (although legislation is also being tightened in these areas e.g. the Nitrate Pollution Prevention Regulations 2008, Carbon Reduction Commitment).

Environmental Liability

EDR are **prospective**, apply to incidents that occur **after** 1 March 2009, do not apply to:

- Damage that took place before this date.
- Damage or threat of damage after the date from an incident, event or emission that took place before the date.
- New damage from an incident, event or emission that derives from an activity that finished before the 1 March 2009.

e.g. historic landfill contaminating an aquifer:

IF

- landfill is no longer in use; and
- the aftercare period has elapsed,

=> then the operator would not be liable for remediation of environmental damage caused by its activities after the CIF date.

Environmental Liability

Damage to EC protected species or natural habitats or SSSIs

Environmental damage that has a significant adverse effect on conservation status

- Apply to species and their habitats specified from the Birds Directive.
- Apply to species and their habitats specified from the Natural Habitats Directive.
- Apply to species and their breeding sites or resting places for Annex IV of the Natural Habitats Directive.



Environmental Liability

Damage to EC protected species or natural habitats or SSSIs (cont.)

Environmental damage to SSSIs that adversely affects site integrity

- SSSIs include all SACs and SPAs.
- Apply to all species listed on the citation for a SSSI (geophysical features not included).



Environmental Liability

Environmental Damage to Water

Damage sufficient to lower its status under the Water Framework Directive

- Specified measures of biological quality.
- Specified chemicals and levels thereof.
- Specified physiochemical quality elements.
- Status does not have to be reclassified for the EDR to apply.

Environmental Liability

Environmental Damage to Land

Compare and contrast:

Regulation 4(5):

contamination of land by substances, preparations, organisms or micro-organisms that results in a significant risk of adverse effects on human health.

and

Contaminated Land Part IIA Section 78A(2) definition:

“Contaminated land” is 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—

- (a) significant harm is being caused or there is a significant possibility of such harm being caused; SPOSH or*
- (b) pollution of controlled waters is being, or is likely to be, caused;*

Environmental Liability

Liability

Operators are liable for preventing or remediating environmental damage where activities cause an imminent threat of, or actual environmental damage.

- **Operators activities listed in Schedule 2 of the EDR are strictly liable** for preventing or remediating an imminent threat of, or actual, environmental damage.
=> do not need to be at fault
- **For all other activities** (except recreational or purely domestic activities), operators are liable only in respect of an imminent threat of, or actual, environmental damage to SSSIs and protected species and must be the result of intent or negligence.
=> fault based

Environmental Liability

Strict Liability - Schedule 2 activities

- Operators with an Environmental Permit.
- Waste management operations, landfill sites and incinerators.
- Management of mining waste.
- Authorised discharges to surface water or groundwater, or authorised extraction and impoundment.
- Operators involved in the manufacture, use, storage, processing, filling, release into the environment and onsite transport of dangerous substances; dangerous preparations; plant protection products; or biocidal products.
- Transport operators.
- Operators that are involved with GMOs including genetically modified micro-organisms.
- Operators involved in the transboundary shipment of waste.

Environmental Liability

Duty to Prevent Environmental Damage

Where an operator's activities cause imminent threat of, or actual damage where there are reasonable grounds to believe it will become environmental damage, the operator must immediately:

- take all practicable steps to prevent the damage (e.g. spill containment and recovery measures, repair of faulty equipment).
- notify enforcing authority if measures do not eliminate the threat.
- Enforcing Authority have powers to serve a notice to prevent environmental damage (e.g. reported by third party) and carry out the work and recover costs where the operator cannot be found, fails to comply or in an emergency.

=> *No appeal process*

Environmental Liability

Emergency Remediation Duties

An operator of an activity that has caused environmental damage, or damage where there are reasonable grounds to believe that the damage will become environmental damage must immediately:

- **Take all practical steps to prevent further damage.**
- **Notify all details to the enforcing authority.**
- **Again, Enforcing Authority can carry out the work and recover costs where the operator cannot be found, fails to comply or in an emergency.**

=> Enforcing Authorities likely to take precautionary approach

=> No appeal process

Environmental Liability

Remediation Notices

- **The relevant Enforcing Authority has a duty to establish whether damage is environmental damage.**
- **A notice of liability to remediate can then be served which includes request for remediation proposals, e.g. 'permit' or 'state of the art' defences.**
- **The operator can appeal this stage of the process.**
- **If no appeal is submitted, or an appeal is unsuccessful, Enforcing Authority has a duty to consult land owners and any third party if they reported the damage over remediation strategy.**
- **Remediation notice can then be served specifying the measures to be taken with the opportunity to appeal the requirements of the notice.**

Environmental Liability

Remediation Standards

Water and Protected species or natural habitats or SSSIs

Pre-damage levels of natural resources or services as would have existed before the damage occurred.

+

Remove any significant risk to human health.

PRIMARY

COMPLEMENTARY

COMPENSATORY

Land

Remove any significant risk to human health in the context of current use or use for which planning permission has been granted.

Environmental Liability

Practical implications

- Introduces **new duties** for Operators as well as Enforcing Authorities.

=> and far reaching powers of cost recovery!

£ Work carried out on operator's behalf

£ Assessment costs

£ Administration costs

£ Establishing a remediation strategy

£ Consultation costs

£ Monitoring during and after

- Can be recovered up to 5 years after completion of remediation or identification of the responsible operator.
- Costs and interests are a charge on the operator's premises.

Environmental Liability

Case Examples:

- **1 Damage to Species and habitats –manure on calcareous grassland.**
- **2 Damage to water- groundwater contamination 2010.**
- **3 Land damage by fuel spill contamination.**
- **4 Damage to habitat of red kite.**

Environmental Liability

Damage to groundwater contamination set in 2010

- *Pesticide contamination of groundwater at abstraction point traced to landfill at several miles distance.*
- *Groundwater is a pathway for contamination of a nearby river via springs.*
- *Landfill falls under Schedule 2 activity as it is subject to an Environmental Permit.*
- *Drop in water quality status considered to represent environmental damage.*
- *Declining fish stocks investigated by EA and linked to pesticide. Systematic monitoring links pesticide contamination to landfill.*
- *Once environmental damage suspected, EA issue notice to prevent further damage – triggers site cleanup and installation of pump and treat system with monitoring.*
- *To determine whether environmental damage EA undertakes well installation, plus monitoring and assessment of groundwater and river.*
- *Extensive assessment identifies 10km of river affected.*
- *2 years engineering works plus 20+ year recovery period – installation of water treatment plant and enhancement of 9.6km of alternative river to be undertaken by landfill operator.*

Environmental Liability

Opportunities for Surveyors:

- Raising client awareness for example:
 - » Operators
 - » Land owners
 - » Potentially liable 3rd parties – land managers? Farmers?
 - » Self executing provisions of the EDR ⇒ prevention and reporting
- Assessing exposure and involvement
 - » Adequate protection from Acts of God
 - » Audit of potential environmental threats
 - » Previous requests by Authorities that could result in the issue of notices
- Advising on extent of exposure and risk minimisation measures
 - » Environmental assessments

Environmental Liability

RICS Information Paper

Guidance to the EDR written for Chartered Surveyors

- *Background and legislative context*
- *Changes introduced explained*
- *Details and definitions condensed and explained*
- *Application and exemptions*
- *Avoiding unwitting offences*
- *Third party concerns*
- *Source of information and advice*



RICS



ELLIOTT
Environmental Surveyors

RICS Information Paper- coming soon!

Tim Elliott CEnv FRICS

www.elliottsurveyors.co.uk

Tel: 01434 609345