

# The Environmental Damage Regulations; the new regime

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In March 2009, the Environmental Damage (Prevention and Remediation) Regulations 2009 (EDR)<sup>1</sup> transposed the Environmental Liability Directive (ELD)<sup>2</sup> into English law. The ELD, which is the European Union's first 'polluter pays' law,<sup>3</sup> imposes liability on an operator for preventing and remediating environmental damage caused by its activities.

The EDR supplement environmental liability legislation that has existed in the UK for about 150 years. Their introduction means that, for the first time in English law, a company together with its directors and officers is subject to criminal sanctions for failing to prevent or remediate environmental damage immediately that reasonable grounds exist to believe such damage has occurred. The duty to prevent or remediate environmental damage arises even before the competent authority is involved.

It is unlikely, however, that the EDR will achieve the fundamental principle of the ELD, that is, 'that an operator whose activity has caused the environmental damage or the imminent threat of such damage is to be held financially liable'.<sup>4</sup> This is because, although the EDR have extended the scope of the ELD in some respects, they have narrowed the scope in others and do not include all the requirements of the ELD.

This article examines the EDR and the effect and implications of their implementation and enforcement.

## 24 Application of the Environmental Damage Regulations

As discussed above, the EDR apply to an imminent threat of, or actual, environmental damage caused by an operator's activity, subject to relevant exemptions and defences.<sup>364</sup> As

also discussed, the EDR supplement existing environmental legislation and, in places, overlap with it. The question thus arises as to whether an enforcing authority must apply the EDR in lieu of other environmental legislation when there is an overlap. The Quick Guide implies that an authority should apply the EDR in such a case by stating that: 'Existing legislation with provisions for environmental liability remains in place. It may apply when cases fall outside the Regulations or, in some cases, in addition to the Regulations'.<sup>365</sup> The Quick Guide further states that:

- When imminent threats or damage fall within the Regulations, the Regulations must apply
- Other provisions remain in place to address damage outside the Regulations
- Where other provisions go further the additional aspects may apply in addition to the Regulations.<sup>366</sup>

This intent was reflected in the Second Consultation which stated, among other things, that '[i]n practice, it is anticipated that operators and enforcing authorities dealing with incidents of threatened or actual damage would look first at these Regulations, principally because they impose duties on operators. If and to the extent that they do not apply, then it may be appropriate to look at existing legislation'.<sup>367</sup>

The UK Government has, however, changed its position. The February 2009 Guidance stated that '[o]ther legislation remains in place to address any damage that falls outside the scope of the [EDR]' and that the EDR 'must be applied (because they place direct duties on operators to prevent and remedy damage)'.<sup>368</sup>

The November 2009 version of the Guidance, however, replaced this language with a statement that 'Part 2 of the Regulations contains powers, rather than duties for authorities to require operators to prevent damage and further damage. Authorities have discretion therefore whether to use these powers or not and may choose to require preventive measures

<sup>1</sup> 2009 SI/153, as amended by Environmental Damage (Prevention and Remediation) (Amendment) Regulations 2009, SI 2009/3275.

<sup>2</sup> Directive 2004/35/CE of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage, as amended. OJ L 143/56 (30 April 2004).

<sup>3</sup> ELD recital 2; see European Commission press release, Environmental Liability: Commission welcomes agreement on new Directive (IP/04/246) (20 February 2004).

<sup>4</sup> ELD recital 2.

<sup>364</sup> *ibid* regs 5(1)–(2) ('These Regulations apply in relation to environmental damage if it is caused by an activity in Schedule 2' and 'also apply in relation to environmental damage [to protected species and natural habitats and SSSIs] caused by any other activity if the operator [intended to cause such damage or was negligent]').

<sup>365</sup> Quick Guide p 9.

<sup>366</sup> *ibid*.

<sup>367</sup> Second Consultation, para 55. The Second Consultation also stated that it would not be appropriate for the Environment Agency to serve a works notice under the WRA 1991 'if and to the extent that the incident is governed by [the EDR]'. *ibid* para 50.

<sup>368</sup> February 2009 Guidance para A4.2.

using similar powers in other regulations, for example in the Water Resources Act 1991 or the Environmental Permitting Regulations 2007'.<sup>369</sup>

The UK Government's new position is a further illustration of the confusion generated by conflicting statements in its various pieces of guidance on the EDR. Much more seriously, however, its new position stems from its failure to transpose the provision of the ELD that states that '[t]he competent authority *shall* require that the preventive measures are taken by the operator'.<sup>370</sup>

The UK Government's new position goes still further to state that even though the EDR 'would generally take precedence over other regimes' in respect of the 'duty for authorities to require remediation where they establish that there is "environmental damage" and a liable operator',<sup>371</sup> the EDR need not be applied when the outcome required by them has been 'fully achieved ... including through other legislation which can be applied more rapidly'.<sup>372</sup> Thus, not only may an enforcing authority apply other legislation in respect of preventive measures and further remedial actions; it may also do so in respect of remedial measures.

If the other legislation is at least as stringent as the ELD, its application would not necessarily be a problem. The problem arises, however, because the WRA 1991 and most other English environmental legislation is less stringent than the ELD. For example, the WRA 1991, which imposes a power to act on the EA rather than a duty, provides that a person who causes or knowingly permits water pollution must restore the waters, including any flora and fauna that are dependent on the aquatic environment 'to their state immediately before the matter became present in the waters' only 'so far as it is reasonably practicable to do so'.<sup>373</sup> The ELD and the EDR do not contain such a qualification. Further, under the WRA 1991, the enforcing authority can require a person who causes or knowingly permits water pollution to remedy or mitigate the pollution.<sup>374</sup> In contrast, an enforcing authority must require an operator who damages water to return the water to its baseline condition under the ELD<sup>375</sup> and to 'achieve the same level of natural resource or services as would have existed' under the EDR.<sup>376</sup> Neither the ELD nor the EDR permit only 'mitigation'.

Still further, an operator does not have a duty immediately to prevent environmental damage and further environmental damage and to notify the enforcing authority of any such

damage under the WRA 1991 whereas such duties exist under the ELD and the EDR.<sup>377</sup> Still further, if the EA incurs expenses in investigating or carrying out works under the WRA 1991, it may recover expenses that it has 'reasonably incurred in doing so' from liable persons.<sup>378</sup> In contrast, the definition of 'costs' under the EDR and ELD is much broader than under the WRA 1991 and other existing UK environmental legislation.<sup>379</sup> Further, existing English legislation does not, of course, provide for complementary and compensatory remediation as does the ELD.

The application of less stringent environmental legislation in lieu of the ELD when the ELD applies to an imminent threat of, or actual, environmental damage thus breaches the ELD inasmuch as its more stringent provisions are not applied.<sup>380</sup> In particular, such a course of action could effectively negate the ELD provisions concerning preventive and emergency remedial actions unless a responsible operator complies with them voluntarily.

## 25 Triggering effect

If enforcing authorities such as the EA require operators who fail to carry out preventive measures and emergency remedial actions to carry out such measures and if the authorities enforce the notification requirements of the EDR, the EDR will have a triggering effect. For example, if an operator inadvertently discharges a large amount of hydrocarbons into an aquifer and the investigation of the pollution results in the discovery of prior pollution, the operator cannot be required to remediate all the pollution under the EDR even if an enforcing authority applies them. In such a situation, the enforcing authority must attempt to locate the prior polluters and require them to remediate the pollution under the WRA 1991. The alternative of requiring the operator to remediate only the pollution caused by it would not seem to be practicable because it would leave the groundwater in a polluted condition. Alternatively, if the operator's past incidents polluted the groundwater, the discovery of the pollution following the potential or actual EDR incident would trigger the requirement for the operator to remediate it under the WRA 1991 as well as the EDR.

A similar triggering effect may well arise under Part IIA if a potential or actual EDR incident results in the discovery of

369 Guidance para A4.2.

370 ELD art 5(4) (emphasis added); see text accompanying nn 240–45.

371 *ibid.*

372 *ibid.*

373 WRA 1991 s 161(1)(b)(iii); Anti-Pollution Works Regulations SI 1999/1006, reg 2.

374 WRA 1991 s 161(1)(b)(ii).

375 ELD art 6(1)(b), annex II(1)(a).

376 EDR sched 4, para 3.

377 ELD arts 5(1), (2); EDR regs 13, 14.

378 WRA 1991 s 161(1A)(3).

379 EDR reg 25; ELD art 2(16); see text accompanying nn 330–41.

380 ELD art 16(1) (authorising MS to maintain or adopt more stringent provisions than ELD). The UK Government (and other MS) are required to provide information on various factors to the European Commission by 30 April 2013 including the date on which enforcing authorities initiated proceedings under the ELD. *ibid* art 18(1), annex VI. Presumably, the Government will include ELD cases for which other environmental legislation has been applied. Its Incident Data Return for 'all qualifying incidents' indicates that it may not intend to do so.

contaminated land. In such a situation, the relevant authority would be required to locate appropriate persons to remediate contamination that they caused or knowingly permitted. Again, the operator whose activity caused the incident is not liable for remediating past contamination under the EDR.

## 26 Financial security

The ELD directs MS to 'take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency'.<sup>381</sup> The UK Government has encouraged this development by, among other things: public consultation with persons in the insurance industry, operators and other persons; meetings and communications with relevant persons; and liaising with such persons to raise public awareness of the ELD.

Environmental insurers, in particular, have responded well to the new liabilities under the ELD. Seven insurers now offer stand alone policies for such liabilities including three who entered the market after the ELD had been enacted.<sup>382</sup> These policies do not only fill the gaps in public liability policies for ELD-related liabilities; they fill the gaps for other environmental liabilities. Some environmental insurers have also developed endorsements to public liability policies to provide environmental and ELD 'lite' cover, that is insurance that provides some cover for such liabilities but less than that provided in stand alone policies.

Unfortunately, Defra may have reduced the demand for ELD-related insurance cover by stating in the Regulatory Impact Assessment that 'very few businesses are expected to take out insurance as a result of [the introduction of the EDR]'.<sup>383</sup>

381 *ibid* art 14(1). The ELD does not require MS to introduce mandatory financial security requirements for operators, that is, a requirement for an operator to show that it has funding for preventive and remedial measures if the operator's activities cause an imminent threat of, or actual, environmental damage. MS including Bulgaria, the Czech Republic, Portugal, Romania, Slovakia and Spain are introducing such requirements. The UK Government stated that it would not introduce financial security requirements due to its belief 'that businesses are best placed [sic] to take decisions about all aspects of their operations, including the optimum means of covering liabilities'. First Consultation para 4.19. Regardless of the merits or otherwise of introducing mandatory financial security, this statement considers only the protection of a business and not the protection of the public. The purpose of mandatory financial security is to protect the public from having to pay costs when the business that caused damage cannot do so; it is not to protect individual businesses.

382 The environmental insurers are ACE European Group Ltd, AIG Europe (UK) Ltd, Allianz Global, AXA Corporate Solutions Assurance SA, Chubb Insurance Company of Europe SA, Liberty International Underwriters Europe Ltd and XL Insurance Company.

383 Regulatory Impact Assessment p 3; see also *ibid* pp 13–14.

## Conclusion

In view of the UK Government's highly restrictive transposition of the ELD, it is no surprise that, when this article went to print in December 2009, there was not a single confirmed ELD case in the UK. The Government's estimate that the EDR would apply to less than 300 cases per year, that is, less than one per cent of an average of over 30,000 cases of environmental damage in England and Wales each year<sup>384</sup> has proven to be a substantial over-estimate even though it is technically correct. Indeed, even the Government's initial estimate in 2006 that minimum transposition, in which the EDR would not apply to all SSSIs, would give rise only to approximately 42 incidents of environmental damage per year<sup>385</sup> has also proved to be an over estimate.

As discussed in this article, the EDR do not fully transpose the ELD. Key limitations in the EDR are:

- the scope of water damage in the EDR is narrower than the scope in the ELD;
- the threshold for water damage in the EDR is higher than that in the ELD;
- the EDR do not apply to environmental damage that occurred between 30 April 2007 and 1 March 2009;
- the exemption for environmental damage caused by a natural phenomenon is broader than the exemption in the ELD;
- the exemption for commercial fishing in the EDR does not exist in the ELD;
- the EDR do not require an enforcing authority to order an operator to carry out preventive measures or emergency remedial actions even when the authority is aware of an imminent threat of, or actual, environmental damage and the responsible operator has failed or refused to carry out the necessary works whereas the ELD imposes a duty to do so;
- a person whose activity caused environmental damage may appeal a notification to carry out remedial measures on the ground that a third person caused the damage whereas this is not a defence in the ELD;
- the defences to liability for costs in the ELD have been transposed as grounds of appeal to liability in the EDR;
- the EDR unlawfully narrow the category of interested parties with a 'sufficient interest';
- the EDR unlawfully delegate the determination of persons

384 *ibid* p 5, para 5. The Regulatory Impact Assessment notes that, in 2007, the Environment Agency reported 744 incidents that had 'a serious impact on land or water in England and Wales'. *ibid* p 1.

385 First Consultation p 8, para 10. The above numbers could, of course, refer to the number of estimated incidents that would have been covered by the ELD if it had been fully transposed.

who are 'interested parties' to individual enforcing authorities;

- the EDR have not transposed the duty on an enforcing authority to provide reasons to an interested party who submits comments about an imminent threat of, or actual, environmental damage when the authority fails to act; and
- the EDR do not provide an interested party with a right of access to the courts to review the substantive as well as the procedural legality of the enforcing authority's decision not to act.

Another reason for the lack of EDR cases may be the designation of local authorities as enforcing authorities. Most, if not all, local authorities lack personnel to implement and enforce the EDR. The logical individual to do so would appear to be the Contaminated Land Officer (CLO). Many local authorities, however, do not have a full-time CLO. In addition, the EDR are arguably too complex for a part-time individual to have the time fully to understand, which is necessary in order to respond to notifications from interested parties as well as enforcing the regime. For example, not a single case of land damage had been reported under the EDR when this article went to print despite the Government having estimated, albeit speculatively, in 2008 that there would be approximately 60 additional cases of land damage within the scope of the EDR in the UK per year.<sup>386</sup>

Crucially, the failure of the EDR to place a duty on an enforcing authority to require a responsible operator to carry out preventive measures and emergency remedial actions means that the enforcing authority may apply less stringent legislation in lieu of the EDR on the premise that the authority may choose which power to enforce. This failure restricts the application of the EDR almost to the point that the EDR could become virtually meaningless except for the duty to remediate 'environmental damage' if an enforcing authority decides to enforce the EDR in this respect. Such a limitation inevitably reduces the amount of incidents to which the EDR are applied so that their application becomes a rarity.

The above limitations mean, among other things, that the EDR cannot achieve the mandate of the ELD that 'public authorities should ensure the proper implementation and enforcement of the scheme provided by [the ELD]'.<sup>387</sup>

The UK Government's failure adequately to transpose the ELD also has a snowball effect. Even if Defra and operators' and the insurance industry's trade organisations publicise the existence of the EDR, their efforts are likely to have little or no effect when operators realise that no or only a few ELD incidents have occurred. Operators may simply view the EDR as legislation that

does not and will not apply to them.

Insurers who have developed stand alone policies and endorsements to cover ELD-related liabilities may decide to discontinue their development and marketing of the products if there is little or no demand for them from operators. Insurance brokers who promote ELD-related policies to operators may also discontinue their efforts when the answer to their clients' inevitable question about the number of ELD incidents in the UK is none or only a few. Efforts to make more brokers aware of the EDR – and, as a result, increase awareness among operators – are also unlikely to succeed if the lack of ELD cases continues.<sup>388</sup>

Still further, if a catastrophic incident causes 'environmental damage' under the EDR subsequently occurs, the operator may well not have insurance to pay the cost of measures to remediate it because the operator did not know that the EDR existed or did not consider that it needed to purchase insurance to cover its potential liabilities. If the operator has insufficient assets to cover such costs, the cost will fall on taxpayers;<sup>389</sup> a result that conflicts with the introduction of the ELD as the first EU 'polluter pays' legislation.<sup>390</sup>

A further effect of the UK Government's restrictive transposition of the ELD is uncertainty for operators whose activities cause environmental damage that falls under the ELD but not the EDR. The ECJ will undoubtedly be called on again to interpret provisions of the ELD from the 27 MS of the EU.<sup>391</sup> If the cases involve ELD provisions that the UK Government has not transposed or has transposed inadequately, the Government will not only need to amend the EDR to bring them into compliance with the ELD, in addition, enforcing authorities will have a duty to require operators whose prior activities caused such environmental damage to carry out remedial measures if the incidents occurred within the last 30 years.<sup>392</sup> The cost to such operators will necessarily have increased from the time of the incident because, say, pollutants have migrated. The operators will also be liable for substantial interim costs that have increased during the interim period.<sup>393</sup>

388 See eg 'Education, education, education' *Post Magazine* p 21 (7 May 2009) (comparing awareness of ELD among UK brokers as 'on a par with quantum physics or conversational Mandarin Chinese').

389 Although a MS is not required to remediate environmental damage, the public reaction to damage to a valued natural resource may mean that the MS has no option other than to carry out remedial measures.

390 ELD art 1 recital 2; see European Commission press release: 'Environmental Liability: Commission welcomes agreement on new Directive' (IP/04/246) (20 February 2004).

391 See *Raffinerie Mediterranée SpA (ERG), Polimeri Europa SpA, Syndial SpA v Ministero dello Sviluppo Economico e.a.* (ECJ nos 378/08, 379/08, 380/08) (22 October 2009) (Advocate General Opinion concerning ELD).

392 ELD art 17.

393 The EDR recognise that further compensatory remedial measures are likely to become necessary due to an increase in the length of time between the initial environmental damage and the time at which the damaged natural resource is fully remediated. EDR reg 21(5).

386 Regulatory Impact Assessment, annex 4, para 5.

387 ELD recital 15.