



A Green Paper on the European Liability Directive and the Polluter Pays Principle

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THE POLLUTER PAYS PRINCIPLE

SUMMARY

The Polluters Pays Principle at the heart of the European Liability Directive (ELD) is set to dwarf the Environment Agency's fines, and hangs like the sword of Damocles over any business that fails to understand its importance and potential impact. But how many businesses know about the ELD, and have taken steps to mitigate the risks?

The European Liability Directive and the Polluter Pays Principle

Environmental awareness is often considered to be a new thing, so it's surprising to discover that as far back as 1388 a UK law was passed that made it illegal to dump animal waste, dung or litter into ditches and rivers. What is less surprising is that over 600 years later we still require legislation to control pollution. Although a night in the stocks may be considered too old school, what is becoming increasingly evident is that the current penalties are not harsh enough. The Environment Agency has been making news recently in its attempts to get courts to impose larger fines, sadly their pleas are nothing new either. Back in 2003 the imposing of 'pocket change' fines was doing little to deter the environmentally unfriendly actions of some businesses. Sir John Harman, The Environment Agency's Chairman said at the time "we must make fines commensurate with the environmental impact and with the turnovers gained in non compliance for these big businesses".

Recently, Dr Paul Leinster, The Environment Agency's Chief Executive said "we want to see higher fines for pollution incidents to provide a greater deterrent. There are still an average of two serious pollution incidents a day and this is too many". The Waste Management Industry still appear to be the worst offenders, reportedly accounting for a third of all serious pollution incidents in 2008. Although investigations are still ongoing, a Waste Management company looks to be responsible for the cyanide pollution incident in October this year which devastated a stretch of the River Trent and wiped out thousands of fish. Thanks in the most part to the swift action of the Environment Agency, the contamination, which had initially threatened the entire 117 mile length of the river, was contained to a relatively small area.

We would argue however, that as well as increasing the fines the EA should publish the fact that companies are liable for the full remediation costs under the polluter pays principle that underpins Environmental Liability Directive ELD 2004/35/EC. Although the average fine in 2008 was £10,080, the remediation costs can run into thousands if not millions of pounds, making the fines look insignificant and worse still, not covered by most companies' insurance policies.

And there is no escape! Modern forensic advances have made tracing the source of contamination a relatively simple process. One would hope that the moral obligations alone would keep companies from becoming polluters but it's difficult not to believe that there is at least some element of weighing the cost of pre-emptive containment measures against the cost of being fined if an accident should happen. The Environment Agency successfully brought 722 cases against firms for environmental offences last year, resulting in fines and costs totaling £5.3 million. Dr Leinster said "Major pollution incidents continue to reduce, thanks to more effective environmental regulation by the Environment Agency and efforts made by businesses to manage their activities better. But we will prosecute businesses and individuals where it is clear that they are not taking sufficient precautions."

Cost is no longer an excuse for not taking such precautions, companies like Environmental Innovations Limited a UK based designer and manufacturer of containment solutions can supply systems for a fraction of the cost of bunding a site. They have combined advances in technology with out of the box thinking to design fully automated systems which offer 24/7 365 day protection and cleverly use the sites existing drainage as a containment vessel to capture the spill. The vast majority of installations can be made without civil work and can be seamlessly integrated into existing alarm systems. This ensures that notification of an accident to key staff and emergency services is made simultaneously to the locking off of the drainage system, thereby preventing the spill from getting off site. This unique alternative to spill kits has the added advantage of being environmentally friendly as the system is totally reusable and offers the opportunity for the spill to be treated and the various elements re-cycled. Brian M Back EIL's Chairman welcomes the Environment Agency's campaign for greater fines but states "the level of ignorance amongst many senior directors is staggering, few are aware of the potential consequences of failure to comply with ELD 2004/35/EC or the ongoing requirements of ISO14001 certification. Something which will not impress their shareholders when the fines are added to the remediation costs and negative publicity starts to cascade down". David Cole the company's Managing Director and Chief Designer said

“we have several clients who have reported that the systems we have supplied for them have paid for themselves many times over within the first few months of installation. It’s not possible to prevent an accidental spill, but it’s now fairly straightforward to contain them and prevent an accident from becoming a disaster.”

It seems likely that the recent River Trent incident will become a new test case for pollution fines and attribution of costs. It will hopefully therefore prove to be a wake-up call to companies who adopt a ‘fingers crossed’ stance or simply attempt to tick a few Health and Safety boxes. These companies are treading a very dangerous path, and ignorance is not a defence. Fines may be low, but the remediation bills can be substantial, and the balance sheet of the polluter will not be taken into account when it comes to passing on the potentially vast costs for re-stocking rivers or returning land to its pre-spill condition. Furthermore, it’s unwise to assume that your existing insurance will cover it, in most cases it will not. Numerous companies have discovered, to their horror that their existing public liability insurance doesn’t always cover them for the cost of the cleaning up. In May 2003, a large fire at a relatively small chemicals packing company in East Yorkshire left the ‘insured’ company with a £700,000 environmental clean-up bill that its insurance company refused to cover.

Another major misconception is that it’s only companies who deal with toxic chemicals that need to worry. A cup full of diesel can contaminate a million gallons of water and a spillage of milk can have devastating consequences for fish and other wildlife as it strips oxygen from the water. Even benign materials can become dangerous pollutants in the event of a fire. The Fire Services are responsible for the extinguishing of a fire, but it’s the site owner who is solely answerable for any contamination caused as a result of the Firewater run-off. It’s also worth remembering that fire water contamination isn’t the exclusive result of Fire Service action, a faulty automatic sprinkler system can cause similar environmental damage.

It is inevitable that environmental pollution guidelines and laws will continue to tighten, on the 9th March 2010, the ECJ (the European Court of Justice) concluded that “it is only necessary for a member state to establish a weak link of causation between operators’ acts and the environmental damage in order to force payment.” The first serious test of how the ELD will be applied will come when the Hungarian ‘Red Sludge’ disaster goes to court. The devastating environmental catastrophe occurred in October 2010 when 700,000 cubic metres of caustic mud polluted the Danube.

The EU deadline for member states to transpose EU directive on [protection of the environment through criminal law](#) is 26th December 2010.

It's time to reinforce the message that environmental pollution is a crime not a health and safety infringement.

Timeline of Environmental Liability Directive

- **10 July 1976:** Toxic chemical release in [Seveso](#) suburb of Milan, Italy.
- **1982:** First '[Seveso Directive](#)' adopted, enforcing the 'need to know' principle, whereby residents should be warned as to the potential danger of industrial sites.
- **25 April 1998:** Dam containing toxic waste bursts at Aznalco allar in southern Spain, polluting fauna and crops.
- **12 Dec. 1999:** Erika tanker sinks off the coast of Brittany, France, spilling 20,000 tons of oil.
- **30 Jan. 2000:** 50-100 tonnes of cyanide waste escape dam in [Baia Mare](#), Romania, affecting water supply and fishing industry.
- **9 Feb. 2000:** Commission publishes White Paper on Prevention and Restoration of Significant Environmental Damage.
- **21 Sept. 2001:** AZF fertiliser plant explosion in Toulouse leads France to switch emphasis from "risk management" onto "risk prevention". At European level, the disaster will pave the way for the [REACH](#) chemicals regulation.
- **23 Jan. 2002:** Commission tables proposal for a [Directive on Environmental Liability](#).
- **30 April 2004:** [Environmental Liability Directive](#) adopted and published in Official Journal.
- **9 Feb. 2007:** Commission tables proposal for a directive on protection of environment through criminal law.
- **April 2007:** Deadline for member states to implement the ELD.
- **19 Nov. 2008:** [Directive on protection of environment through criminal law](#) adopted and published in Official Journal.
- **5 Oct. 2010:** 'Red sludge' disaster at alumina plant reservoir in Hungary sees 700,000 cubic metres of caustic mud [enter the Danube](#). This chemical spill, the largest since the Environmental Liability Directive (ELD) was passed, is seen as the first test case as to how it will be applied.
- **12 Oct. 2010:** Commission reports on implementation of Environmental Liability Directive (ELD) in the 27 EU member states. It advises against an EU-wide compulsory liability scheme.

- **26 Dec. 2010:** Deadline for member states to transpose EU directive on [protection of the environment through criminal law](#).
- **30 April 2013:** Member states to report to Commission on their experiences of applying 2004 Environmental Liability Directive.
- **30 April 2014:** Commission to propose amendments to 2004 Environmental Liability Directive and report on its complementarity with international environmental treaties. (Copyright & source www.euractiv.com)

FURTHER ESSENTIAL READING

ENVIRONMENTAL LIABILITY DIRECTIVE 2004/35/EC :

The Directive establishes a strong framework for environmental liability based on the "polluter pays" principle, with a view to preventing and remedying damage to animals, plants, natural habitats and water resources, and damage affecting the land. Where the polluter is at fault or negligent powers exist to ensure that the costs as well as any fines are allocated, in extreme cases prison sentences can be enforced.

Download full Directive www.europa.eu

The Full DEFRA Guidance on the New Environmental Civil Sanctions :

The EA intends to start to use these new powers on 4th January 2011.

“<http://www.defra.gov.uk/environment/policy/enforcement/pdf/defra-wag-guidance.pdf>”

PPG7 : Refuelling Facilities :

Advice on how to protect the environment through the safe delivery, storage and dispensing of fuels.

<http://publications.environment-agency.gov.uk/epages/eapublications.storefront>

PPG18 Managing Fire Water and Major Spillages

These guidance notes have been drawn up to assist in the identification of the equipment and techniques available to prevent and mitigate damage to the water environment caused by fires and major spillages.

Download full Guidance at

["http://publications.environment-agency.gov.uk/pdf/PMHO600BBUD-e-e.pdf"](http://publications.environment-agency.gov.uk/pdf/PMHO600BBUD-e-e.pdf)

PPG21 : Pollution - Incident Response :

Good practice guidance to produce incident response plans for dealing with accidents, spillages and fires, to help protect the environment.

<http://publications.environment-agency.gov.uk/epages/eapublications.storefront>

PPG22 : Incident Response – Dealing with Spills :

Advice on how to deal with spillages to avoid pollution.

<http://publications.environment-agency.gov.uk/epages/eapublications.storefront>

PPG26 : Safe Storage -

Drums and Intermediate Bulk Containers :

The regulations apply to: tanks (can be permanent or temporary); drums greater than 200 litres capacity; intermediate bulk containers (IBCs); mobile bowsers.

All above PPGs are available for download at

<http://www.environment-agency.gov.uk/business/topics/pollution/39083.aspx>

PPG28 Controlled Burn

This guidance will help you decide when and how to use a controlled burn as part of a fire fighting strategy to prevent or reduce damage to the environment. You should consider this guidance on a site by site basis when developing an incident response plan for your site.

Download full Guidance at

["http://publications.environment-agency.gov.uk/pdf/PMHO1005BJIT-e-e.pdf"](http://publications.environment-agency.gov.uk/pdf/PMHO1005BJIT-e-e.pdf)

Fire Service Manual

This Fire and Rescue Manual is the first manual within the Fire Service Operations series dedicated to the protection of the environment. This

publication provides information and guidance designed to support firefighters, Fire Brigade Service managers, and trainers in their work at operational incidents, training events, and during day-to-day activities.

Download full manual here

["http://www.communities.gov.uk/publications/fire/environmentprotectvol2"](http://www.communities.gov.uk/publications/fire/environmentprotectvol2)

IS YOUR SITE RIGHT?

Use this Environment Agency 10-point checklist to help you make sure

Storing and handling oils, chemicals and other risky materials

1. Are storage containers fit for purpose, regularly inspected and maintained?
2. Are storage areas and containers sited away from watercourses, drains and unsurfaced areas?
3. Do storage containers have secondary containment, such as a bund, to contain any leaks or spills?
4. Do you have procedures and training for safe delivery and handling of materials?

Waste management

5. Is your storage and handling of waste safe and does it comply with the law?
6. Do you know where your waste goes? Are you sure it's disposed of correctly?
7. Are you reducing and recycling your waste? Do it and save money.

Site Drainage

8. Do you have an up to date drainage plan of your site?

9. Is your site drained correctly?

- only clean water, such as roof drainage, to surface water drains.
- all contaminated water, such as sewage and trade effluent, to foul drain.

Dealing with pollution emergencies

10. Do you have a plan, equipment and training to deal with pollution emergencies?

If you answered 'no' to any question, or are unsure, use the Environment Agency's "Pollution Prevention Pays – getting your site right" guidance available from their website or call us for advice 0800 731 9313

**If you have any questions about how to
make your business safer for your staff
and the environment please call
0800 731 9313**

www.environmental-innovations.biz

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