

**ENFORCEMENT OF EC ENVIRONMENTAL LAW**  
**ENVIRONMENTAL LIABILITY DIRECTIVE**

**ROBERT MCCRACKEN QC**

1. This has now been transposed into UK law for England through the Environmental Damage Regulations 2009.
2. The Regulations divide those affected called ‘operators’ into two categories. The first are those set out in Schedule 2, undertaking operations related to:
  - Activities governed by the Pollution Prevention and Control regime
  - Waste management
  - Mining waste
  - Authorised discharges into surface and ground water
  - Water abstraction and impoundment
  - Dangerous substances, pesticides and other plant protection and biocidal products
  - transport of dangerous or polluting goods
  - genetically modified organisms and microorganisms
  - transboundary shipment of waste
  - carbon capture and storage
3. Schedule 2 operators have a strictly liability to carry out preventive or remedial actions if their Schedule 2 activities cause  
An imminent threat of,  
Or actual environmental damage  
  
To land, water, SSSIs or species and sites protected under Birds or Habitats Directive
4. Non Schedule 2 operators must carry out preventive or remedial actions for environmental damage only
  - if the operator intended to cause damage or was negligent
  - And re SSSIs and protected species and habitats
5. The following are exempted:
  - Acts of terrorism
  - Exceptional natural phenomena provided the operator took all reasonable precautions to protect against such an event
  - Where the sole purpose is to protect from natural disasters
  - Activities covered by specified marine and nuclear conventions
  - Where the main purpose is national defence or national security
  - Lawful commercial fishing
  - Diffuse pollution if no proof of causal link proof
  - River basin plan modifications

6. The Regulations do not affect the ability to bring common law claims. They do not impose liability for bodily injury, property damage or economic loss. The liability is for the future. It is joint and several and subject to a 30 year limitation period.
7. The thresholds are :
  - Land: significant risk of adverse effect on human health
  - Water: significant effect on ecological, chemical or quantitative status and ecological potential (under WFD)
  - SSSIs: site integrity
  - Protected Species and Habitats: significant adverse effect on conservation status
8. **Preventive Action:** Where an operator has caused imminent threat of environmental damage or damage that reasonably foreseeably will become such must immediately
  - Take all practicable steps to prevent the damage
  - Notify the enforcing authority if measures fail to eliminate the threat
9. **Emergency Remedial Action:** Where an operator has caused such damage he must
  - Take all practicable steps to prevent further damages
  - Notify the enforcing authority
10. **Remedial Measures:**  
After determination by enforcement authority  
  
Land: Remove, control, contain or diminish contaminants so that  
It no longer poses a significant risk of adversely affecting human health  
If it is used for its current lawful use or one for which planning permission existed at  
time of damage  
  
Water and Wildlife:  
Primary: back to baseline, and removal of SRHH  
Complementary: if only partial remediation possible then alternative site remediation  
  
Compensatory: for period between damage and full remediation
11. **Enforcement:** The enforcing authorities have wide ranging powers of investigation. They can require the provision of information. They can issue Prevention, Liability and Remediation Notices. Liability notices require the recipient to offer remediation measures. They can select operators offered remedial measures.
12. **Appeals:** may be made against Liability and Remediation notices. A Remediation Notice is suspended unless the appeal authority decides otherwise. Costs orders 'as is fit'
  - Causation
  - Not reasonably held to be environmental damage
  - Fault of unrelated regulator's instruction

- Third party fault despite appropriate precautions
- No fault, and damage caused by expressly authorized action (Schedule 3 permits) or not foreseeably likely to cause environmental damage

**13. Costs:** Enforcing authority may recover, as charge on site, costs of

- Reasonable costs of carrying out works
- Administrative works
- Legal costs
- Enforcement costs
- General costs

**14. Penalties:** Summary: £5,000 or 3 months

Indictment: unlimited fine or 2 years

Directors, officers and managers liable if consent, connivance or neglect

**15. Insurance:** Cover needs to be examined carefully

**16. NGOs:** are given recognition and a role.

**NOTE:** This paper is general. It is intended to provide an introduction to the subject. It is not intended to form the basis for a particular decision. I and other members of Francis Taylor Building are, of course, always willing, if instructed, to advise in writing, person or otherwise as appropriate.

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