

Environmental Liability Directive

The **Environmental Liability Directive** came into force in April 2004. It is aimed at preventing environmental damage by forcing industrial polluters ('operators') to pay prevention and remediation costs. The Directive is one of the most controversial, and potentially far-reaching, pieces of environmental legislation negotiated by the EU to date.

The Directive has been implemented through the **Environmental Damage (Prevention and Remediation) Regulations 2009** which became law on the 1st March 2009 in England. Similar regulations for other parts of the U.K. are likely to be introduced in the near future. The regulations are based on the 'polluters pay principle'; those that cause damage to the environment are required to prevent and repair any damage that they have caused. The damage must though have been caused by the operator of an economic activity. Economic activities constitute businesses, the public sector and charitable organisation. Solely domestic or recreational activities are not included within the definition.

For activities that are listed in Schedule 2 of the Regulations there is liability for damage with the need not to show any fault. In practice therefore an organisation would not need to be prosecuted for it to have responsibility for remediating damage. Such activities generally include those that require environmental permits, discharge to water/groundwater, water abstractions or impoundments, the use of dangerous substances (including biocides and pesticides) and using and releasing genetically modified organisms (GMOs). Liability also exist where an operators has caused damage to SSSIs or EU habits (e.g. Special Areas of Conservation) or species where there has been fault or negligence.

Under the Regulations environmental damage is classed as damage to water (both underground and surface), contamination of land (if there is a serious risk to health) and damage to natural habitats and species and sites that are protected (e.g. special areas of conservation). The Regulations only apply to damage after the Regulations came into force. Other exemptions include acts of terrorism, natural disasters, marine oil pollution, national defence and international security activities, radioactivity and nuclear, sea fishing, diffuse pollution and authorised damage to species and habitats.

The regulations lay responsibility on operators to prevent damage (or further damage from occurring) and to inform the relevant authority that damage has occurred. They must also submit proposals for remediation and pay costs claimed by the authority that is associated with environmental damage. The Competent Authorities have responsibilities to determine whether damage is 'environmental damage' and identify the responsible operator. A remediation notice must then be served that may incorporate measures stated by the operator. They may also require that the operator takes steps to prevent or remedy the damage or require information or actions from operators.

The regulatory responsibilities under the regulations are split between a number of bodies, each having authority for different types of environmental damage:

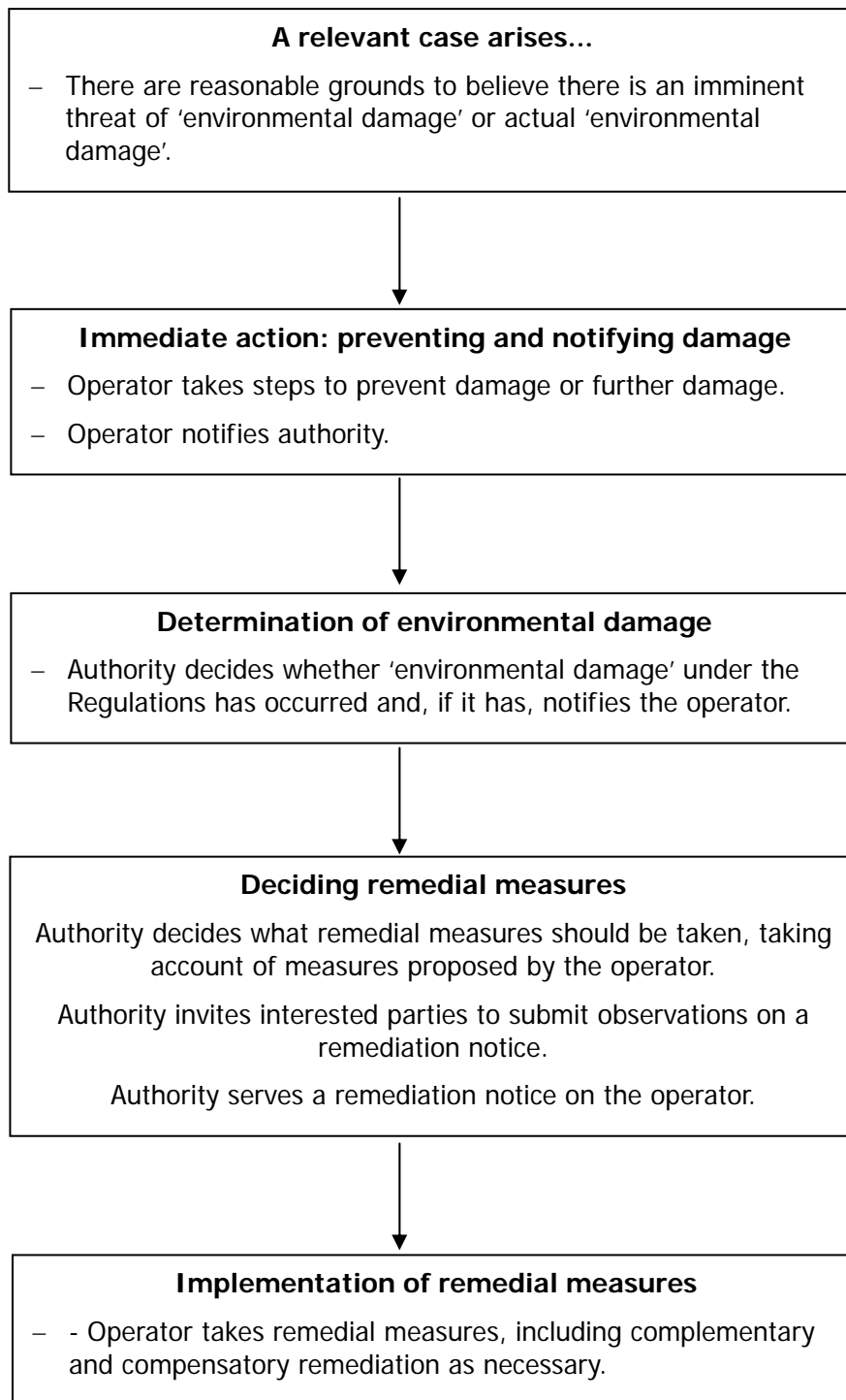
- Environment Agency – damage caused by EA regulated environmental permitted (EP) installations, damage to EU species and habitats in the sea caused by operations regulated by the EA, damage to water from EP activities regulated by local authorities and damage to water and species and habitats in water (not including the sea).
- Marine and Fisheries Agency – damage that has occurred to EU species and habitats at sea from activities not regulated by the EA.
- Natural England – Damage to EU habitats and species on land or damage to a SSSI (when source not covered by the EP Regulations either by the EA or local authority).
- Local Authorities – damage from local authority EP regulated industries and damage to land (other than to SSSI) from local authority EP regulated facilities.

The Regulations state comprehensive requirements for damage to EU species and habitats and SSSIs. These include primary remediation which involves measures to restore the actual damage that has occurred. Complementary remediation may be required when primary remediation does not fully restore the damage and may occur at another site. Compensatory remediation may occur when there has been loss of natural resources while the damage is restored. Where land has been damaged by contaminants that cause a significant risk to human health they must be removed or controlled.

An appeals process has been implemented as part of the regulations. When an authority notifies an operator that environmental damage has occurred the operator has 28 days to appeal. Grounds for appeal include that the activity was not the source of the damage, the authority has unreasonably determined that the damage is 'environmental damage' and that the damage occurred from an act of a third party. The operator may also appeal if they were not negligent or at fault and were operating to the standards stated in a permit or in compliance with current scientific knowledge. Operators also have leave to appeal against the requirements of a remediation notice if they feel that the contents are unreasonable.

Current legislation that consists of environmental liability requirements (e.g. contaminated land regulations) will remain in place. The requirements of existing regulations will often apply to cases that are outside the scope of environmental damage regulations and will sometimes apply in addition to their requirements.

In addition to the costs of cleaning up environmental damage, a person guilty of an offence under the regulations may receive a fine of up to £5,000 on summary conviction (magistrates court) and/or 3 months in prison. On indictment (crown court) an unlimited fine may be levied and/or up to 2 years in prison. Where the body corporate is guilty of an offence under the regulations and the offence has been proved to have been committed with the consent, connivance or to be attributable to any neglect by a director or senior manager, secretary etc., that person will also be guilty of the offence as well as the body corporate.



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