

Environmental Insurance

Environmental Damage Regulations – FAQ's

What are 'The Environmental Damage (Prevention & Remediation) Regulations 2009 (EDR)?

The EDR implements the European Directive on Environmental Liability. They are based upon the 'polluter pays principle' so those responsible prevent and remedy environmental damage, rather than the taxpayer paying.

What does the EDR deal with?

'Environmental damage' within the EDR has a specific meaning covering only the most serious cases including:

- Damage to land with significant risk for human health.
- Damage to protected species and their habitats including sites of Special Scientific Interest
- Damage to water (streams, rivers, ponds, lakes as well as underground water sources or groundwater)

Existing legislation with provisions for environmental liability remains in place.

Why is the EDR different to existing legislation?

The EDR introduces many new concepts including:

- **Primary remediation** – Meaning the repair of any environmental damage caused. This may see businesses having to use a wide range of techniques to remove contaminants, restock, replant, and manage the recovery of a damaged area.
- **Complementary remediation** – There may be occasions where a site may never recover. When this occurs businesses may need to provide equally beneficial improvements at the site or at another site to compensate for the fact that the primary remediation wasn't able to fully restore the natural resource or service within an acceptable timeframe.
- **Compensatory Remediation** – Damaged areas may take many years to recover. Businesses may have to provide compensation to the environment for interim losses from the date the damage occurred until primary remediation has achieved its full effect. This could see a business having to make extra improvements to the affected site or to another site altogether.

What are the implications for businesses that cause environmental damage?

The implications for businesses that cause environmental damage include:

- **The "Polluter Pays Principle"** – This means that a business causing environmental damage (or the imminent threat of damage) will be financially liable. This goes beyond merely cleaning up the pollution and means that businesses will be fully responsible for the environmental damage they cause.
- **Act immediately** – As soon as businesses become aware of this kind of damage (or imminent of damage) they must take steps to prevent further damage and inform the authorities.

- **Work with the authorities** – Businesses should submit remediation proposals to authorities to include plans for complementary and compensatory remediation before authorities issue a remediation notice.
- **Emergency costs** – In an emergency situation authorities may take immediate action to prevent further damage and recover these costs from the business responsible for causing the damage.
- **Offences** – According to the EDR failing to act immediately to prevent environmental damage is an offence. Fines are unlimited and in extreme cases prison sentences can be imposed. Where businesses have committed an offence, individuals who consented to them such as directors or managers may also be guilty.

What existing legislation is currently in place?

Some key pieces of existing legislation containing liability provisions include*:

- COMAH Regulations 1999
- Environmental Permitting Regulations 2007
- Part IIA of the Environmental Protection Act 1990
- Water Act 2003
- Water Resources Act 1991
- Wildlife and Countryside Act 1981

Who are the Enforcing Authorities?

There are a number of enforcing authorities including*:

- **Environment Agency** – For damage caused by operations regulated by the Environment Agency under the Environmental Permitting Regulations. Damage to EU species and habitats in the sea caused by operations regulated by the Environment Agency. Damage to water caused by activities regulated by Local Authorities under the Environmental Permitting Regulations (enforcing remediation requirements in Part 3 of the regulations only). Damage caused by other operations to water, species and habitats in water but not in the sea.
- **Marine & Fisheries Agency for England and Welsh Ministers for Wales** – For damage to EU species and habitats and Sites of Special Scientific Interest (SSSI) in the sea other than where the operation is regulated by the Environment Agency.
- **Countryside Council for Wales (in Wales) and Natural England (in England)** – For damage to EU species and habitats on land or to a SSSI (except where an operation is permitted under Environmental Permitting Regulations). Damage to EU species and habitats on land or to a SSSI caused by operations regulated by Local Authorities under the Environmental Permitting Regulations (enforcing remediation requirements in Part 3 of the regulations only).
- **Local Authorities** – For damage caused by operations regulated by Local Authorities under the Environmental Permitting Regulations (enforcing remediation requirements in Part 2 of the regulations). Damage to land caused by operations regulated by Local Authorities under the Environmental Permitting Regulations (enforcing remediation requirements in Part 3 of the regulations only). Damage to land other than SSSI's for activities other than those regulated under the Environmental Permitting Regulations.

Does our commercial insurance policy provide cover to meet these regulations?

In terms of how your current insurance programme may provide protection, case history has already proven that clean up costs of a pollution incident were deemed not to be covered by a firm's public liability policy (Bartoline v Royal & Sun Alliance – 2006).

In addition to this case, commercial insurance policies may exclude:

- Third party claims in respect of gradual pollution
- Own site clean up costs
- Own site mitigation expenses
- Sudden and gradual pollution restoration of damaged species, water or habitat

Can we insure against the consequences of any environmental damage caused?

The insurance market is adapting constantly to changes and trends in environmental legislation and these changes and trends are likely to increase over the coming years. There are a number of insurers who have specialist environmental policies to meet the demands and needs of UK business.

Where can I obtain further information?

If you have any additional questions then please contact Richard Davies on 01234 408619 or via email richard.davies@rkhis.com

* Source: Defra guide to 'The Environmental Damage Regulations' updated May 2009