

Environmental Law Bulletin

NEW ENVIRONMENTAL ISSUES FOR BUSINESS

www.rdj.ie

ENVIRONMENTAL LIABILITY DIRECTIVE – A HEADACHE FOR BUSINESS? OPPORTUNITY FOR INSURERS?

The Irish Government is currently consulting on the implementation of the new European Directive on liability for harm caused to the environment by businesses. (“ELD”). Draft regulations and an Environmental Liability Bill for Ireland were published in July.

What is Covered?

The ELD regime aims to ensure that businesses which cause environmental damage (biodiversity, water and land) are responsible for remediating the damage.

The regime does not cover environmental damage caused by acts of armed conflict, exceptional natural phenomenon, nuclear risk, national defence and international security activities and activities for the protection from natural disasters. Furthermore it does not cover damage caused by diffuse pollution such as air deposits or flood incidents, where a clear causal connection between the damage and the activity cannot be clearly established. Neither does it cover damage caused before the entry into force of the Directive (i.e. 30 April 2007).

Who is covered?

Basically anyone carries out industrial and other commercial activities with the potential to cause environmental damage to water; protected species/habitat or land affecting human health. Under the proposed Irish regulations, these persons (be they public or private) will be known as operators. Where an operator carries out certain activities (such as IPPC and waste activities, handling of dangerous substances and GMOs), it will be held strictly liable for environmental damage (actual or imminent), regardless of fault. For other activities causing

damage to species and habitats, the operator will only be liable for damage if at fault.

The operator has a number of defences for liability for the cost of remedying the damage (subject to certain conditions). These include:

- 3rd party causation
- damage resulting from compliance with CPO or instructions from public authorities
- permit defence (if opted for in Ireland)
- state of art defence (if opted for in Ireland)

Remedial Measures

For biodiversity and water damage, the operator must restore the water or habitat to its base line condition. If restoration will take a long period of time, businesses must implement compensatory measures for the loss of the environmental resource during this time, for example, by providing an alternative habitat. If the habitat cannot be restored then complementary remediation must be carried out. In respect of land damage, the remediation must be such that the land no longer poses a significant risk to human health.

In Ireland, the ELD regime is likely to overlap with existing legislation for the protection of biodiversity and water, and businesses may need to comply with more than one regime.

Role of the public

The Directive provides that the public have the power to notify the relevant regulatory authorities of environmental damage issues and request regulatory authorities to take action.

Things to watch out for

Operators (public & private) should remember, in particular, the following:-

- It has a positive duty to notify regulatory authorities if environmental damage is caused or there is an imminent threat of damage.

Notification procedures may need to be developed in this respect.

- Operator must take immediate short-term measures to control environmental damage.
- If remediation is necessary, a specific procedure must be followed.
- Current draft transposition instrument for Ireland, makes it an offence to breach the ELD regime, with fines up to a maximum of €500,000 and/or 3 years imprisonment.
- Perhaps one should consider getting environmental impairment insurance?

For further information, to receive a copy of our legal updates or to discuss any aspect of Environmental Law please contact

Finola McCarthy -Partner

Email:

Finola.McCarthy@rdj.ie



Aoife Shields- Solicitor

Ph.D. (Contaminated Land)

Email: Aoife.Shields@rdj.ie

**Cork Office: 12 South Mall,
Cork. Telephone: 021
4802700**



www.rdj.ie