



European
Commission

ENVIRONMENTAL LIABILITY DIRECTIVE

What is the Environmental Liability Directive?

The natural environment sustains human health, happiness, and economic activity. To safeguard the environment for use and enjoyment today and for future generations and to halt the decline in biodiversity, prevent deterioration in water quality or quantity and to protect the soil, the European Union Member States are committed to prevent damage; and when there is damage, to remedy it.

Consequently, in 2004, the Environmental Liability Directive (ELD) was adopted to establish a common framework for the prevention and remediation of environmental damage (e.g. uniform definition of environmental damage, more consistent approach to how it should be remedied, etc.). The ELD is based on the 'polluter-pays principle' which makes the polluters that caused the damage liable for implementing the necessary preventive and remediation actions and paying for their costs. Remediation that brings the damaged environment back to the state it would have been in if the damage had not occurred is the general principle. The ELD provides a framework for such assessment of damage and remediation.

Thus, by considering the cost of remediation, the ELD aims to create awareness and an incentive for further investments in prevention measures and better environmental practice. All operators who carry out an activity posing environmental risks covered by the ELD are encouraged to assess and take the necessary steps to reduce such risks.

How does the ELD work?

The application of the ELD is triggered by occupational activities that cause damage, or an imminent threat¹ of damage, to the natural resources covered by the ELD.

If you are the operator of an occupational activity (for profit or not), and if your activity is an activity that:

- Requires an Integrated Pollution Prevention and Control (IPPC) permit
- Requires a waste licence/permit
- Discharges to waters
- Uses or transports dangerous substances like chemicals
- Relates to water abstractions
- Uses, processes, releases etc. dangerous substances or preparations, plant protection products or biocidal products
- Deliberately discharges Genetically Modified Organisms into the environment
- Transports waste
- Manages mining waste
- Involves carbon capture and storage,

then you have **strict liability** for the damage, or the imminent threat of damage, that your activity causes to water, land and protected animal and plant species and their natural habitats. This means, even without having to establish your fault or negligence, you would be liable to take preventive and remedial measures and to bear the costs thereof.

¹ Imminent threat means that there is a sufficient likelihood that environmental damage will occur in the near future. 'Sufficient likelihood' and 'near future' are case-specific.

If your occupational activity does not fall within the above list, you will still have a **fault-based** liability but only for damage to protected species and habitats. This means that fault or negligence needs to be established for you to be liable.

The ELD distinguishes between the following types of natural resources that might be subject to damage or imminent threat of damage:

Protected Species and Natural Habitats

Damage or imminent threat that significantly adversely affects the favourable conservation status of protected species or habitats.

Protected species or habitats as defined in the Habitats and Wild Birds Directives, and in some Member States also nationally protected species and habitats

Water

Damage or imminent threat that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential of the waters concerned.

Waters as defined in the Water Framework Directive, that is, surface (inland, transitional, coastal, territorial) waters and groundwater

Land

Contamination or imminent threat that creates a significant risk to human health as a result of the direct or indirect introduction of hazardous substances, preparations and/or (micro)-organisms in, on, or under land.

When does the ELD apply?

An incident is covered by the ELD if it causes significant damage to any one of water, land and protected species and habitats as described above.

The power to determine the significance of damage is given to the competent authority(ies) in each Member State. However, the ELD provides some basic guidance. For example, in cases where damage to the environment impacts on human health, it is considered significant. On the other hand, if the damage caused to the environment is less than that of typical natural variations (e.g. in population numbers of species), or if the natural resource is capable of a full recovery in a short timeframe, damage is not considered significant.

Any natural or legal person who is affected or likely to be affected by environmental damage, or otherwise has an interest, may notify the competent authority of any environmental damage (or imminent threat) by submitting relevant information supporting the observation and have the right to challenge the decision by the competent authority before a court or another independent and impartial public body to ensure it is acting in the public interest of environmental remediation. Such persons could include non-governmental organisations promoting environmental protection, residents, birdwatchers, rambles, recreational fishermen, those whose health is at risk from contaminants, or those responsible for children, or elderly persons whose health is at risk.



Types of Incidents That May Cause Damage to:

Habitats and Species

- Direct removal or destruction of protected habitats and species
- Physical damage, chemical pollution or significant disturbance (including noise and vibration)
- Microbial pollution to protected habitats and species from, for example, poor agricultural practices
- Conscious killing of protected species (for example through illegal hunting of birds)

Water

- Abstraction of water that causes a change of water body quantitative status
- Discharge from an industrial site storing - or a truck or railway tanker carrying -chemicals (e.g. due to an accident)
- Damming of surface water causing significant change in ecological water potential
- Chemical, petroleum, or waste spills from underground and above ground storage, handling and transport facilities resulting in damage to groundwater and surface water (chemical status)

Land

- A waste incineration plant's smoke purification system failing, resulting in pollution by heavy metals of surface soil in a nearby residential area with heavy metals
- Accidental chemical release from storage, handling and production areas, and migration of chemicals to soil and groundwater
- Deliberate, unpermitted waste disposal onto or into the ground, resulting in gas (hazardous chemicals) generation and migration to nearby residential properties
- Decommissioning of a plant resulting in accidental leakage of hazardous substances to soil and groundwater

When does the ELD not apply?

Regardless of your occupational activity, as an operator you are not liable if the damage is caused by:

- An act of armed conflict, hostilities, civil war or insurrection
- An extraordinary natural phenomenon (of exceptional, irresistible and inevitable character)
- Activities conducted mainly in the service of national defence or international security or to protect against natural disasters, or
- An unidentifiable activity, for example in the case of diffuse pollution, if causality cannot be established between the activity and the damage.

Additionally, the ELD does not apply to:

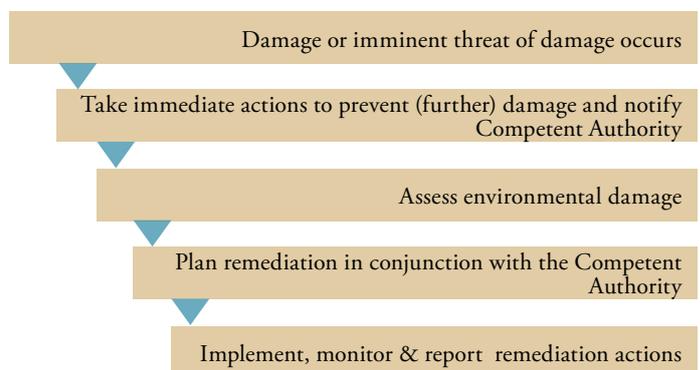
- Emissions, events, or incidents (and the underlying activity) that occurred before 30 April 2007
- Damage, if more than 30 years have passed since the emission, event or incident, resulting in the damage, occurred,
- Oil pollution at sea, transport of dangerous goods, nuclear activities etc. as regulated by International Conventions, and
- If it can be proven by the operator that damage is caused by a third party and occurred despite appropriate safety measures in place or upon an order/instruction given by a public authority (defence to costs).

Depending on the national law, as an operator you may also bring up a defence if:

- You complied fully with the permit and all its conditions for an emission or event which caused the damage, or
- The emission or event was not considered likely to cause damage according to the state of scientific and technical knowledge at the time the emission was released to the environment or the activity took place.

What to do when damage occurs or is imminent?

This figure shows the actions that must be taken by different actors when damage or an imminent threat occurs and it is established that ELD applies, and also illustrates their possible sequence.



In the event of environmental damage or imminent threat, operators must

- Take immediate action to prevent damage from occurring or worsening;
- Notify the competent authority as soon as possible of the incident and the preventive actions taken, and
- Remedy the damage according to their remediation plan and the steps outlined by the competent authority.

Once notified, competent authorities implementing the ELD in a given Member State must

- Determine whether the damage case falls within the scope of the ELD;
- Identify the responsible operator(s), and
- Require the responsible operator(s) to take the necessary immediate and longer term remediation action.

Competent authorities may also put in place remedial actions themselves. In this case they have to claim the remediation, assessment, administrative and other appropriate costs from the operator that caused the damage.

How to remedy the damage?

Remedies for environmental damage or imminent threat to water or protected species and natural habitats may take three forms: primary remediation at the site; complementary remediation; or compensatory remediation.

• Primary remediation:

- Immediate actions designed to stop the incident, minimise, contain, prevent further damage, and clean-up the damage. These are also referred to as emergency (or immediate) remedial measures (and are mostly preceding the actual primary remediation), and
- More medium to long-term remediation actions on the damaged site that are designed to return the damaged environment to the baseline state it would have been in if the damage or threat had not occurred (“restoration in kind”).

• **Complementary remediation:** If primary remediation is not sufficient to bring the environment back to the state it would have been in if the damage had not occurred (so called “baseline condition”), further improvements can be made to the damaged site. If this is not feasible or too costly, such remediation can take place in another site. For example, if primary remediation of a damaged fishery can only succeed in restoring 50% of the fishery at the damaged site, complementary remediation may be undertaken at another location to provide the remaining 50% improvement such that fishery resources, measured across both sites, will be equivalent to 100%.

• **Compensatory remediation:** If primary remediation (and complementary remediation if required) takes some time to remedy the damage to nature, compensatory remediation must be implemented to account for the losses incurred over time (interim losses).

For land damage, primary remediation to the extent that the removed, controlled, contained or diminished relevant contaminants no longer pose a significant risk of adversely affecting human health, is the minimum requirement under the ELD (no complementary or compensatory remediation required).

Further reading

Environmental Liability Directive – the official text:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:143:0056:0075:en:PDF>

European Commission web page on the Environmental Liability Directive:

<http://ec.europa.eu/environment/legal/liability/index.htm>

Examples of remediation actions:

• Primary remediation:

- Clean-up (emergency or immediate remediation)
- Create barriers to stop pollution spreading further (emergency or immediate remediation)
- Re-grade, re-contour, and re-vegetate the damaged site with native species to accelerate natural recovery after disturbance related to primary remediation actions
- Introduce species such as components of the food web that support fish and wildlife, such as invertebrate communities essential to insectivorous fish and wildlife, and small mammal communities essential for raptors and carnivorous mammals
- Re-establish access to the recreational services and commercial activities formerly provided by the damaged site
- Natural recovery of the damaged resources could also be considered as part of primary remediation

• Complementary and compensatory remediation:

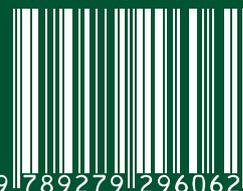
- Re-establish functioning habitat in areas of its historical range, such as re-establishment of wetlands in drained farmlands
- Increase reproductive success of species, such as protecting bird nesting sites from predators or human disturbance
- Opening up additional habitat areas for fish by removing barriers to migration
- Increasing the natural status of habitats through removal of invasive species
- Protecting groundwater from future contamination
- Protect against the loss of habitat that may occur due to development
- Increase the amount or quality of recreation available at a site
- Cleaning up an “orphan” site that was contaminated by an operator that has gone out of business



Publications Office

doi: 10.2779/2178

ISBN 978-92-79-29606-2



9 789279 296062