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Environmental Impairment Liabilities

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Implementation of the Environmental Liability Directive in the United Kingdom

Separate regulations for England, Wales,
Scotland, and Northern Ireland

This presentation focuses on English
Environmental Damage Regulations (EDR),
noting significant differences with other
regulations

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Liability

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Operators are liable for carrying out preventive or remedial actions if their activities cause an imminent threat of, or actual, environmental damage to natural resources

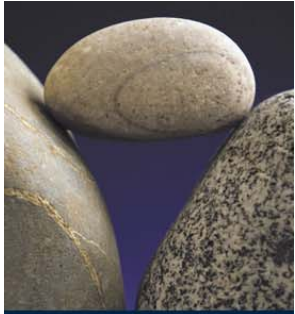
- two classes of operators

No liability for bodily injury, property damage or economic loss; EDR do not affect ability to bring common law claims

Liability is:

- prospective only
- joint and several
- subject to 30-year limitation period

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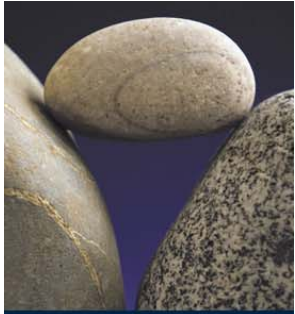
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Operators: Schedule 2

Strict liability for carrying out actions to prevent or remediate environmental damage to following natural resources:

- land
- water
- SSSIs
- protected species and natural habitats, ie, sites protected under Birds and Habitats Directives



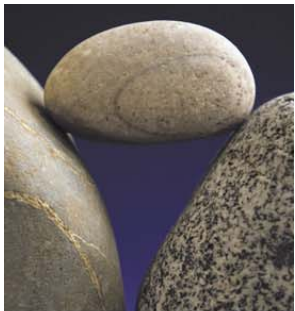
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Operators: Schedule 2

Schedule 2 legislation

- pollution prevention and control regime
- waste management operations
- mining waste
- authorised discharges into surface and ground water
- water abstraction and impoundment
- dangerous substances, pesticides and other plant protection products and biocidal products
- transport of dangerous or polluting goods
- genetically modified micro-organisms and organisms
- transboundary shipment of waste
- carbon capture and storage facilities



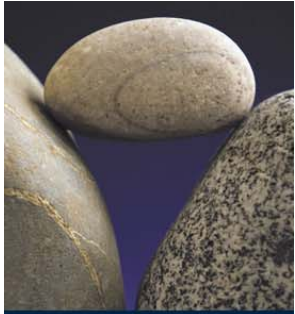
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Operators: Non Schedule 2

Liability for carrying out actions to prevent or remediate environmental damage to:

- SSSIs and protected species and natural habitats (NOT water or land)
- if operator intended to cause damage or was negligent

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Environmental Damage Thresholds

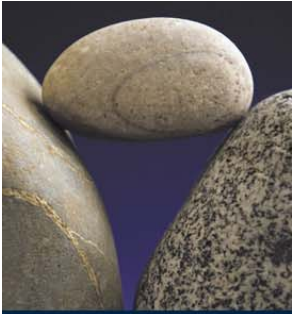
Land: significant risk of adverse effect on human health

Water: significant effect on ecological, chemical or quantitative status and ecological potential of waters (lowering of status under Water Framework Directive)

SSSIs: site integrity

Protected species and natural habitats:
significant adverse effect on conservation status of protected species and natural habitats

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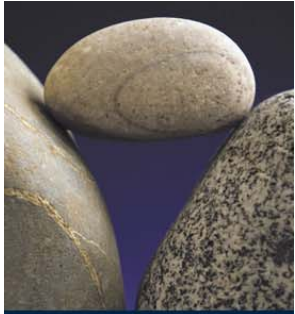
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Trigger for Preventive Actions

Operator whose activity has caused (1) imminent threat of environmental damage, or (2) imminent threat of damage that there are *reasonable grounds* to believe will become environmental damage must *immediately*

- take “all practicable steps to prevent the damage”, and
- if measures fail to eliminate imminent threat, notify enforcing authority

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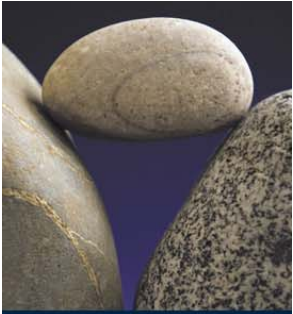
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Trigger for Emergency Remedial Actions

Operator whose activity has caused (1) environmental damage, or (2) damage that there are *reasonable grounds* to believe may be or will become environmental damage must *immediately*

- take all practicable steps to prevent further damage
- notify enforcing authority



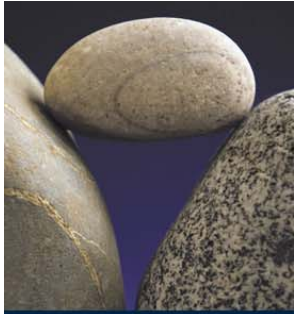
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Trigger for Remedial Measures

Determination by enforcing authority that environmental damage has been caused

Lengthy monitoring may be necessary to determine threshold

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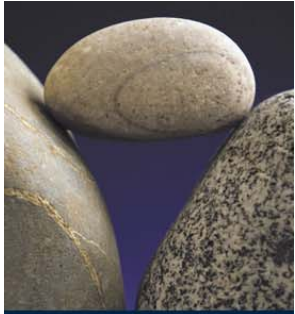
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Remedial Measures; Land

Removal, control, containment or diminution of contaminants so that land no longer poses any significant risk of adversely affecting human health

Remediation standard: lawful current use or use for which planning permission exists at time of damage

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Remedial Measures; Water, SSSIs, Protected Species and Natural Habitats

Primary remediation: remediation and restoration to “baseline” condition (state resource would have been in had damage not occurred not state resource was in) and removal of significant risk to human health

Complementary remediation: if damaged site cannot be fully restored, restoration of alternative site in addition to partial remediation of damaged site

Compensatory remediation: interim losses between time of occurrence of environmental damage and its full remediation (providing, enhancing or improving same or new resources at damaged and/or alternative sites)

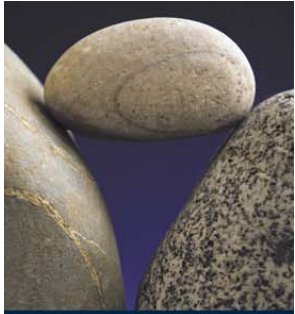


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Enforcing Authorities

- *Environment Agency*: EA-regulated sites; all water including water in respect of SSSIs and protected species and natural habitats, but not marine unless EA-authorized activity
- *Natural England*: land in respect of SSSIs and protected species and natural habitats
- *Local authorities*: land including preventive actions on land for LA-authorized activities
- *Secretary of State*: marine but not EA-authorized activities

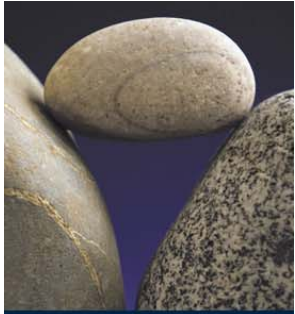


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Enforcement

- Wide-ranging investigative powers
- Order operator who fails to carry out preventive measures, emergency remedial actions or remedial measures to do so
- Order operator to provide additional information
- Assess significance of environmental damage
- Consider remedial measures proposed by operator and select measures to be carried out by operator

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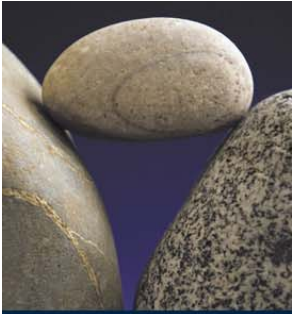


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Enforcement

- Invite comments on environmental damage from qualified NGOs and other qualified persons and owner of land to be remediated
- Carry out “reasonable works” if operator
 - cannot be identified
 - fails to comply with remediation notice
 - is not required to remediate under Regulations
- No duty on enforcing authority to carry out remedial measures

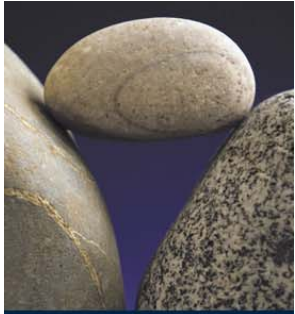


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Exemptions

- Act of terrorism
- Exceptional natural phenomenon provided operator took all reasonable precautions to protect against damage by such an event
- Activities, sole purpose of which is to protect from natural disasters
- Incident covered by specified marine and nuclear conventions
- Activities, main purpose of which is to serve national defence or international security

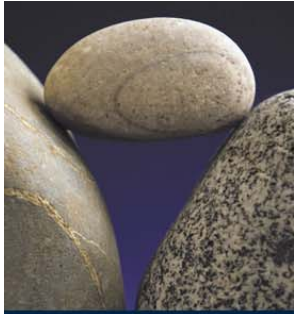


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Exemptions (cont'd)

- Damage caused by commercial sea fishing if operator complies with all legislation related to such fishing (ie, Common Fisheries Policy rules)
- Diffuse pollution if impossible to establish causal link between damage and specific activities
- Damage by specified modifications or alterations in river basin plans (subject to specified conditions)

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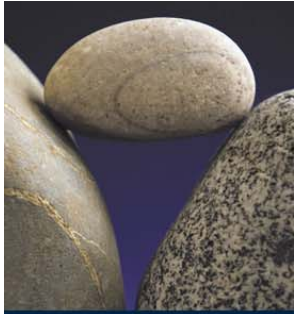
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Appeals Against Liability for Remedial Measures

Grounds for appeal against notification

- Operator's activity did not cause environmental damage
- Enforcing authority acted unreasonably in deciding damage is environmental damage
- Environmental damage resulted from compliance with public authority instruction not related to emission or incident caused by operator's own activities

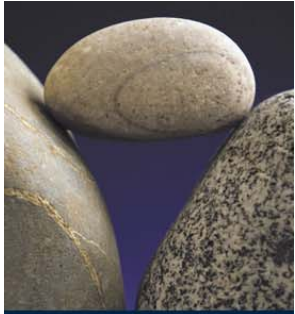


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Appeals Against Liability for Remedial Measures (cont'd)

- Operator was not at fault or negligent and environmental damage was caused by emission or event
 - expressly authorised by and fully in accordance with conditions of Schedule 3 permit
 - operator demonstrates that emission, event or manner of using product was not considered likely to cause environmental damage according to state of scientific and technical knowledge at time of emission or activity
- Environmental damage was result of third party's act and occurred despite operator's appropriate safety measures



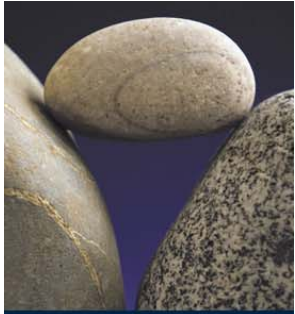
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Appeals Against Liability for Remedial Measures (cont'd)

Schedule 3 permits

- Environmental permits or registrations under pollution prevention and control and waste management regimes
- Licences for depositing substances and articles in the sea
- Water discharge consents
- Drought orders and permits
- Authorisations to discharge substances harmful to groundwater
- Water abstraction or impoundment licences
- Approvals or authorisations for specified pesticides or biocidal products
- Consents for deliberate releases of genetically modified organisms (but not in Wales)
- Authorisations for genetically modified food or feed products

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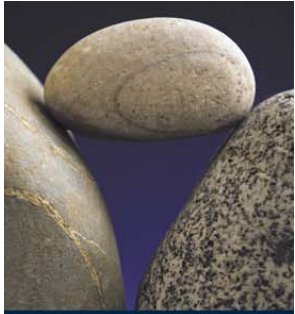
Appeals Against Liability for Remedial Measures (cont'd)

Grounds for appeal against remediation notice
– contents of notice are unreasonable

Remediation notice suspended during appeal
unless person hearing appeal directs otherwise

No appeal against liability for preventive
measures or emergency remedial actions to
prevent further damage

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Costs

Enforcing authorities may recover:

- reasonable costs of carrying out works
- administrative costs
- legal costs
- enforcement costs
- other general costs

May impose charge on operator's site



Penalties

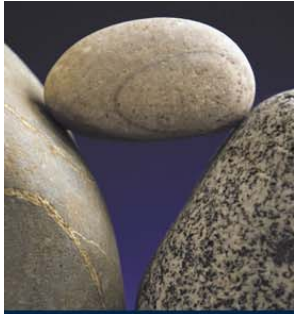
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Breach of regulations is criminal offence

- summary conviction, fine not exceeding £5,000, imprisonment not exceeding 3 months, or both
- conviction on indictment: unlimited fine, imprisonment not exceeding 2 years, or both

Directors, officers and managers may be convicted if company's offence is committed with their consent or connivance or is attributable to their neglect

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Non-Governmental Organisations

Qualified NGOs and others may

- provide comments to enforcing authority on environmental damage and imminent threat of environmental damage
- seek review of enforcing authority's decisions, acts or failure to act

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Financial Security

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No mandatory financial security

European Commission to submit report by 30
April 2010 and, if appropriate, proposal for system
of harmonised financial security

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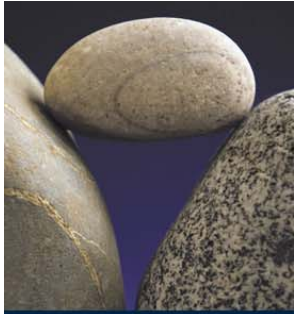


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Financial Security

Member States to “encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of enabling operators to use financial guarantees to cover their responsibilities under [the ELD]”

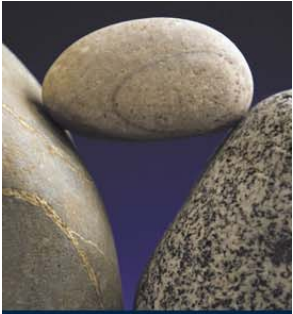


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Other Environmental Legislation

- EDR supplement rather than replace existing environmental legislation
- Enforcing authorities have duty to act under EDR but other legislation may impose liability beyond EDR, eg, Part 2A (threshold; historic pollution), Water Resources Act 1991 (threshold)
- Enforcing authorities may use other powers to prevent or remediate environmental damage
 - Environmental Permitting Regulations 2007

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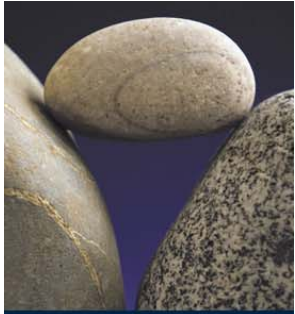
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Implications

Regulations create new liabilities under English law for operators to prevent and remedy environmental damage to SSSIs and protected species and natural habitats

Expand scope of required remediation to include complementary and compensatory remediation

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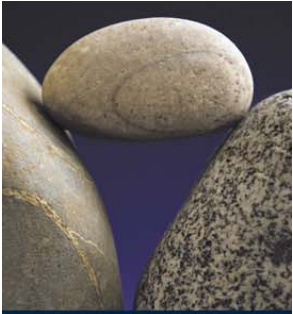


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Implications

Introduce criminal liability, among other things, for failure by operator immediately to take preventive measures or emergency remedial actions to prevent further damage when reasonable grounds exist that operator's activity has caused an imminent threat, or actual, environmental damage (that is, before involvement of enforcing authority)

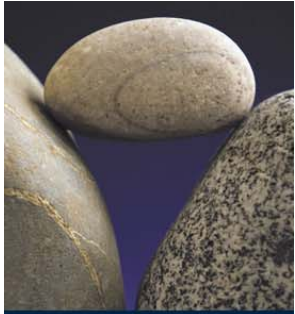


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Implications

Potential for NGOs and other persons to be quasi-enforcers

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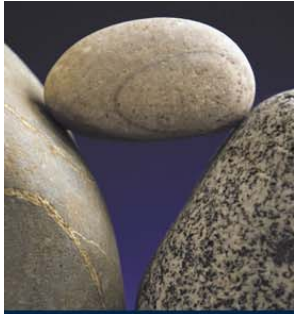
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Insurance Issues

Widens gap in cover for environmental liabilities in public liability policies

- preventive measures
- emergency remedial actions
- primary remediation – *Bartoline v. Royal & Sun Alliance Insurance and Heath Lambert*
- complementary remediation
- compensatory remediation



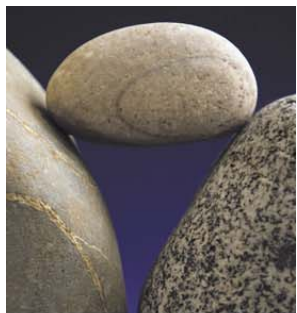
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Insurance Issues

Other public liability policy issues

- cover for “voluntary” remedial works
- cover for emergency remedial measures
- carrying out emergency remedial measures may be considered admission of liability
- pollution exclusions may not bar cover for non-pollution environmental damage



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Insurance Issues

Property policies

- land is unlikely to be “insured property”
- generally contain qualified or absolute pollution exclusion

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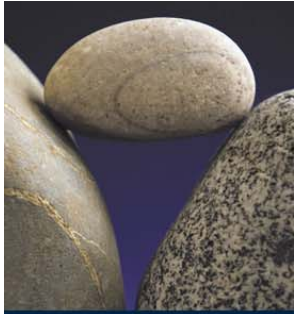
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Insurance Issues

Increase in number of insurers providing cover for environmental / ELD liabilities

- ACE Europe Group
- AIG Europe (UK) Ltd
- Allianz Global Corporate & Specialty
- AXA Corporate Solutions Assurance
- Chubb Insurance Company of Europe
- Liberty International Underwriters Europe Ltd
- XL Insurance Company Limited

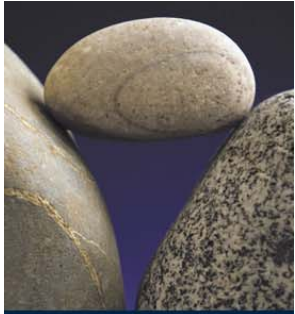


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Insurance Issues

ELD-only environmental insurance policies unlikely to provide adequate cover due to high likelihood that ELD incidents will trigger other environmental legislation



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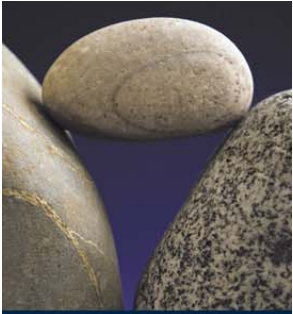
Insurance Issues

Potential that occurrence of ELD incidents in which operator

- has insufficient funding, or
- inadequate insurance

will result in taxpayers paying remediation costs, with corollary of increased potential for

- number of Member States that require financial security, and/or
- establishment of mandatory financial security on EU basis



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Conclusions

Regulations

- impose new liabilities
- expand scope of required remediation
- create criminal offences for failing to take preventive measures, emergency remedial actions or remedial measures

Most EDR liabilities are probably not covered by public liability policies but extent of gap depends on individual policies

Availability of environmental insurance policies to cover ELD (and other environmental) liabilities