



TYSERS

CLIENT BRIEFING

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Environmental Insurance Cover

Environmental Liability Directive (ELD)

Since 1820



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Introduction

Recent European environmental legislation such as the Environmental Liability Directive (ELD) is setting new standards on operations that may impact the environment. Third party awareness of the environment is increasing and corporate governance has brought the need to improve environmental risk management to the forefront of company operations.

Environmental Liability - Directive 2004/35/EC

The ELD regulations will apply in 2009 in the UK.

The ELD reinforces the “polluter pays” principle - making operators financially liable for threats of or actual damage.”

In summary, the ELD has distinct additional obligations to regulations (Environmental Protection Act (EPA) 1990, Water Resources Act (WRA) 1991 etc) that already apply, although these will still apply. If an activity results in damage to water resources, a protected species, natural habitat or land contamination which presents a threat to human health. Three types of remediation may apply.

- Primary remediation - restores the natural resource and services rendered to its baseline condition (before damage occurred). This exceeds the requirements under the existing regulations such as Part 2A of the Environmental Protection Act 1990.
- Complementary remediation is any remedial measure that is carried out to compensate for the inability to restore a natural resource to its baseline condition by providing a similar resource or service.
- Compensatory remediation to compensate for the interim loss of a natural resource, that results from the inability of a damaged natural resource to perform its ecological functions or provide services to other natural resources and the public until the primary and complementary measures have taken effect.

Many commercial and industrial operations present an ongoing risk of pollution or contamination (e.g. leakage from fuel storage tanks, manufacturing). Specialist cover is available to insure against ongoing pollution risks resulting from leakage or spillage and to fill any gaps in general liability policies. Specific policies can be put in place to cover liabilities presented by the ELD.

Clients often believe their operations are covered under standard policies, however pollution and contamination exclusions and restrictions on ‘sudden and accidental’ cover can mean that this is often **not** the case. The recent ‘Bartoline’ case highlights the need for expert advice on policy coverage.

Bartoline Case - UK

In the Bartoline case it was held that off-site clean up costs mandated or incurred by a claimant were not covered by their Public Liability Policy. The judgment in *Bartoline Limited (Bartoline) v (1) Royal Sun Alliance Insurance Plc ('RSA') (2) Heath Lambert Limited (2006)* confirms that such costs did not constitute a ‘legal liability for damages’ as required by the policy wording.



Bartoline manufactured and packaged chemicals. Following a fire, chemicals and fire fighting foam caused pollution to two local watercourses. Under its statutory powers the Environment Agency (EA) carried out emergency works and subsequently invoiced Bartoline for the costs of the emergency clean up. Bartoline sought to recover costs from its Public Liability Insurer (RSA) and the cost of clean up completed in accordance with the EA's requirements.

As with the majority of public liability policies the policy excluded losses from gradual pollution but covered incidents of a 'sudden and accidental' nature. However, the court judgment made sends a clear signal that the scope of 'damages' covered under a public liability policy should be limited to losses arising from a Third Party claim rather than a Statutory action by an enforcing authority.

Tysers Experience

Tysers experience in environmental and other insurance classes can provide the client with an insight into uninsured risks and aid in the production of a competitive insurance package.

It is possible to combine both operational and historic pollution cover into a single policy. This is available for sites that have either ongoing activities similar to the former site use or for sites that have new operations. Typically operational insurance can be provided for three to five years duration.

For property portfolios an annual policy is usually bought as a cost effective approach.

Information Required

For most enquiries the sites address, postcode and description of site operations and activities should be enough information to provide a quote for cost effective annual cover. If the site already has some form of environmental report or risk assessment completed this should be disclosed to the insurer.

Some sites and operations such as waste operations, mining, heavy engineering and petrol stations may require an initial environmental risk assessment to be completed. We can work with the client to discuss requirements on a site specific basis.

Please note that under English law it is your duty to disclose all material facts to Insurers prior to inception of the policy, and to keep them advised of any such facts or changes to such facts throughout the currency of the policy, and upon renewal of the policy. A material fact is a fact which may influence an Insurer's judgment in their assessment of a risk. If you are in any doubt as to whether a fact is material, we recommend that it be disclosed. Failure to disclose material facts may entitle Insurers to avoid the policy from inception

For any further information on Environmental Insurance please contact:

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