

# Environmental Liability Legislation in Europe - What's New for FY16?

Phil Crowcroft

© Copyright 2015 by ERM Worldwide Limited and/or its affiliates ('ERM'). All Rights Reserved. No part of this work may be reproduced or transmitted in any form or by any means, without prior written permission of ERM.

*The world's leading sustainability consultancy*



# Summary

---

- Environmental Liability Directive (ELD) – update and application
- Extension of ELD to off-shore structures
- Implementation of the Industrial Emissions Directive (IED)
- Where is Soil going?



# ELD update and application

---

- Extension to off-shore structures – licensee is financially liable for the prevention and remediation of environmental damage caused by offshore oil and gas operations
- Third Stakeholder Workshop November 2014 provided some case studies
- EU Report will be issued 2015 considering possible changes to ELD in light of experience:
  - Consideration of withdrawal of Statutory defences (state of the art and permit)
  - Reaction to feedback on the 2014 BIOIS Report – concerns re apparent absence of inclusion of private sector views
- Not just pollution:
  - Forest fire damage to biodiversity
  - Renovation of bridge in Poland – damage to nesting birds
  - Changes in water level damaging freshwater mussels

# ELD – Huge variation in application

---

- Whilst the ELD has been transposed into all Member State legislation, its use has varied considerably. Based on MS reports up to end of 2012, use was as follows:

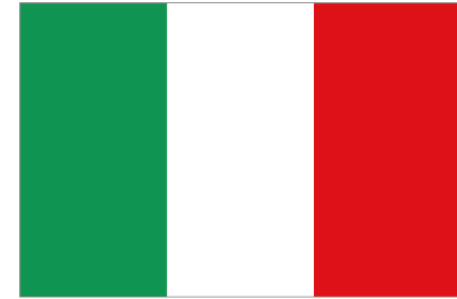
No of sites where remediation cases have occurred up to 2012	No of countries
0	10
1-10	9
11-20	4
21-100	2
100-500	0
500+	2

- Ten countries (mainly small, but include Denmark and Czech Republic) had no remediation cases at all
- Two countries (Poland and Hungary) had over 500

# Italy - Regulatory Framework (1)

---

- Used existing 1986 legal framework first – but non-compliant
- New law introduced in 2013 to achieve compliance



Based upon data reported in Italy for period 2007-2012

- About 5000 notifications in 6 years.
- 45% (about 2000) underwent specific technical assessment.
- Half of them (about 1000) were completed and in 15% of cases (about 150) an imminent threat of damage or an environmental damage was identified

# Italy – Experience in application of ELD (2)

---

## Instances of Liabilities

- In most cases related to big petrochemical sites, the Ministry (MoE) claimed very high values of environmental damages, mostly based upon costs for removal and disposal of soil/sediment
- In 2008, MoE bought a claim against Syndial for €250 million of environmental damages, primarily related to the export of material. This case went before the ECJ and rumbles on without agreement
- MoE requests have reached more than € 3,000 million for a specific case , bringing it to litigation

# ELD – reasons for variable implementation

---

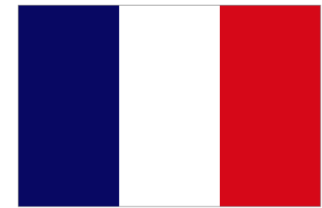
The following issues have slowed MS engagement with ELD

- Duplication of existing legislation in some MS - regulators prefer to stay with the legislation they know
- Unclear definitions:
  - What is meant by “significant” damage?
  - No baseline data? How do you judge level of clean-up?
  - How do you evaluate complementary and compensatory remediation?
- ELD has much greater remediation powers than most existing environmental legislation. Formal application can deter co-operation from polluters.
- For two countries where use has been high (Hungary and Poland), they repealed most existing environmental legislation and now rely on ELD

# ELD – Examples of enforcement so far

---

- **France** – ELD drove €20m remediation of major oil spill in Rhone delta area
- **Germany** – Growing enforcement, but very few court cases as remedial works typically performed by Operators. Insurance widely taken up.
- **Hungary** – \$600M fine imposed on Operator under ELD, on top of >\$100M clean-up costs, following catastrophic release of bauxite residues in October 2010. However, company potentially made insolvent and had to be nationalised to save jobs, and there is no mechanism to pay fine.
- **UK** – Limited cases to date, fuel spills, fresh water mussels





# IED – Implications for Permitted Sites

---

- Baseline report on initial soil & groundwater conditions required
- Many countries seeking new baselines (in 2015) to be established at permitted sites to include soil, and to monitor soil during lifetime of permit
- Remediation required at permit surrender to return site to a satisfactory state – taken to be to baseline conditions (unless technically impractical) or to mitigate unacceptable risk
- Implement & regularly monitor / maintain pollution prevention measures



# IED – Implications for Permitted Sites

---

- Monitoring required by Directive at following minimum frequency:
  - every 5 years for groundwater
  - every 10 years for soil
- EC Guidance on how to conduct baseline studies has recently been issued (May 2014) – some practical difficulties to implement
- UK – requests for new baseline reports issued by Regulators discussions on-going re scope and value of soil sampling
- France - Request by the DREAL (Regulator) for preliminary baseline report (historical and bibliographical part) in compliance with the LNE France accreditation. Phase 2 soil and groundwater assessment for the time being are unlikely.

# Soil Policy Document (1)

---

- Plan to publish a “Land as a Resource” communication by November 2015 – not a Directive
- Protect conserve and enhance natural capital
- Assessment of how policies impact land use directly and indirectly
- Keen on indicators – soil sealing, degradation etc
- Reduce land use, increase recycling
- Likely to be support brownfield re-use

# Soil Policy Document (2)

---

- DG ENV letting contract to gather and analyse information from MS on national policies and legislation on soil protection
- Output will be gap analysis to identify any areas where EU action could add value
- 4-6 months to let a contract, so consultation is likely to be after the Summer
- Contaminated land may come out as a gap so that further action is likely to be proposed – but whether this will be legislative or not is anyone's guess!

# *Questions... at end of session*

---

