Are we ready? Implementation of the Environmental Liability Directive within the UK and its implication on oil spill liability and cleanup

The Environmental Liability Directive (ELD) is Europe’s first legislation implementing the “polluter pays” principle and establishes a framework aimed at preventing and remediying environmental damage. The ELD was adopted by the European Commission (EC) in April 2004 with a deadline for implementation by Member States no later than then end of April 2007.

This paper focuses on the implications of the ELD and its related Regulations in oil spill scenarios for England, and also the differing levels of protection and remediation afforded to the environment compared to the existing domestic legislation. Additionally it will look at the implementation progress within the UK.

Implementation
Implementation, as with many European Directives, is slower in some countries than others. At time of developing the paper abstract, the UK draft guidelines for the implementation of the ELD were still out for public consultation. The UK had been referred to the European Court of Justice, along with 8 other Member States, for non-communication, which is failing to fully transpose the Directive into domestic legislation by the 2007 deadline.

Within the UK, there are four separate devolved authorities, England, Northern Ireland, Scotland and Wales. Each is required to implement their own separate set of regulations. In March this year, England brought into force the ‘Environmental Damage (Prevention and Remediation) Regulations 2009’ (EDR) as their way of implementing the ELD which leaves Northern Ireland, Scotland and Wales to implement the ELD. This means that as a Member State, the UK has not fully implemented the ELD and therefore the court case for non-communication will still proceed until this has been rectified in all five devolved authorities.

What is ‘environmental damage’?
The scope of the ELD covers damage to, and protection and remediation of the aquatic environment, land and protected species and habitats. Under the EDR ‘environmental damage’ to the aquatic environment is geographically restricted to anything that is defined as a water body under the Water Framework Directive 2000 up to one nautical mile seaward of the English baseline. This includes both surface water and ground water. The Water Framework Directive 2000 was designed to improve and integrate the way water bodies are managed throughout Europe. One of the first actions of this Directive was for competent authorities within each Member

2 Low water mark
State to classify every water body under their jurisdiction with respect to
characteristics such as biological quality, levels of specific chemicals and/or
physicochemical quality. The EDR state that for ‘environmental damage’ to have
occurred to surface water, its characteristics will have to be lowered sufficiently in
quality compared to its original status under the Water Framework Directive 2000 to
reduce its status. The change in status of water quality does not in fact have to be
reclassified before the EDR are brought into force. Damage to ground water is
similar but also includes a lowering of status brought about by increased pollutant
levels in accordance with the Pollutants Directive 2006\(^3\). This means that any
waterborne oil spill which causes ‘environmental damage’ within the prescribed
geographical limits could conceivably activate the provisions under the EDR. It is
worth noting that the incident itself does not have to take place within the
geographical limits, only the damage itself. For example, if a release of oil from an
offshore installation drifted into the one nautical mile zone and affected the
characteristics of the water quality such that the status under the Water Framework
Directive 2000 was lowered, then this would have caused ‘environmental damage’
under the EDR.

‘Environmental damage’ to land under the EDR means the contamination of land
which results in the significant risk of adverse effects on human health. The use of
the land will be taken into consideration when both assessing if any damage has
occurred and for remedial measures. For example, if a diesel storage tank was
leaking and contaminating the ground both underneath it and under the adjacent
plot; if that adjacent plot was residential land, then it would require stricter remedial
measures than if it was a land fill site. The geographical limits for ‘environmental
damage’ to land are restricted to above the English baseline.

The ELD provides for ‘environmental damage’ to protected species and natural
habitats as defined in the Birds Directive\(^4\) and the Habitats Directive\(^5\). There was
scope under the implementation instructions for a Member State to increase the level
of protection afforded by the Directive. This would allow the thresholds that activate
the ELD to be effectively lowered, thus allowing the Directive to be potentially
applicable to more incidents. DEFRA\(^6\), having conducted a risk assessment during
the consultation phase, has opted for minimum implementation with additional
protection for Sites of Special Scientific Interest (SSSI)\(^7\) within England. Therefore,
for the purposes of the EDR, protected species and natural habitats include those
defined in the Birds and Habitats Directives, and as SSSIs. All sites under these
classifications or those awaiting approval will have been thoroughly surveyed in
order to collect the data to obtain classification. In the case of SSSIs, ‘environmental
damage’ to these sites must come in the form of impact to either the species or
habitats such that the integrity of the site is affected and its conservation status is at
risk. ‘Environmental damage’ to protected species and natural habitats under the
Birds and Habitats Directives is defined as that which has a significant adverse effect
on reaching or maintaining the favourable conservation status. The geographical
limits for ‘environmental damage’ to SSSIs are above the English baseline. For

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\(^3\) Pollutants Directive 2006/118/EC Of L372 27/12/2006 p19
\(^6\) Department for Environment, Food and Rural Affairs
\(^7\) Designated and protected under Wildlife and Countryside Act 1981
‘environmental damage’ to protected species and habitats of the Birds and Habitats Directives, the geographical limits are all the land of England above the baseline, and, the seabed of the continental shelf and anywhere other than the seabed in the renewable energy zone. This could have an impact on the way exploration and production activities are carried out in order to minimise damage to the protected species or habitats. It could also have implications during the decommissioning stages of offshore installations if drill cuttings, having previously been allowed to be disposed of on the seabed, were disturbed and then impacted protected species or habitats in the area when parts of the rigs are removed. Again, it is only the damage which needs to occur within the geographical limits. Seabirds are particularly vulnerable to oil spills due to their dependence on the sea for food. Protected colonies which live on the coast of England could not only be directly affected by being oiled, but alternatively affected indirectly by tainted or absent food sources thus also invoking the EDR.

Who is liable for ‘environmental damage’?
Liability is strict for those economic activities which are considered dangerous and the operator is held to be liable. These activities are detailed in Schedule 2 of the EDR and include, among others, the operation of IPPC, permitted installations, waste management operations, discharges requiring authorisation and the transport of oil. The EDR also applies for any operations not listed in Schedule 2, that the enforcing authority considers to have caused ‘environmental damage’ to protected species, habitats or SSSIs.

The ‘operator’ is defined under the EDR as ‘the person who operates or controls such an economic activity, including the holder of a permit or authorisation relating to that activity, or the person registering or notifying such an activity’. For offshore installations around the UK it would be the company holding the operating licence, not any contractors performing the day-to-day operations. For a ship carrying a cargo of non-persistent oil, following the precedent of ships carrying persistent oil under CLC, the operator would be classed as the owner of the ship. However, in practicality, the ship owner is not necessarily the person who would be pursued for liability claims if another person, such as the ship’s management company, holds the liability insurance. This is not clearly defined in the EDR and it will rely on precedence being set in the event of an actual incident of this nature and the resulting legal proceedings.

For a freight train or road tanker, the operator would probably be the company responsible for ensuring the tankers are properly maintained. This could be the day to day operator or the owners but it is unlikely to be the owner of the cargo as owning cargo is not considered to be a ‘dangerous activity’ under the EDR but transporting it is. This conclusion is also drawn from the case of Moses v Midland

8 Directive 2008/1/EC concerning integrated pollution prevention and control
10 Regulation 2 Environmental Damage (Protection and Remediation) Regulations 2009
11 International Convention on Civil Liability of Oil Pollution Damage 1992
Railway Co\textsuperscript{12} in which the operators of the train were found not guilty of causing water pollution from a leaking creosote tanker as that tanker did not belong to them and they had no knowledge or means of knowledge of the defective valve. Again, this is not clearly defined in the EDR and will not be until such an incident actually occurs.

Exemptions
The most obvious exemption is that if any ‘environmental damage’ took place before the coming into force (CIF) date, or was caused by an incident that took place before the CIF, then the EDR do not apply. There are also other general exemptions, such as acts of terrorism, national defence activities, exceptional natural phenomenon (provided the operator has taken due precaution) and activities that have the sole purpose to protect operations from natural disasters.

England opted to provide additional exemptions within the EDR which are in full compliance with the ELD. In the impact assessment carried out during the consultation phase by DEFRA, it was identified that if exemptions such as the permit defence were taken out, the extra pressure put onto businesses would outweigh the benefits. There was also concern that since most of the other EU countries were including these defences then it would create an unlevel playing field on the international market. Installations, such as refineries, are assigned emission limits in permits by relevant authorities, and the permit defence means that any ‘environmental damage’ caused by emissions under these limits would not activate the EDR. Therefore the operator would not be liable for any costs associated with prevention or remediation of the damage. These costs would then fall to the permitting authority which is at fault for setting the limits on the permit too high and thus allowing the ‘environmental damage’ to occur. However, if damage is caused by emissions via any media (water, air, soil, etc.) in excess of the permit, the operator will be responsible for prevention of further damage and remediation under the EDR.

Any incident in which, in respect of liability or compensation, falls within the scope of CLC, Fund\textsuperscript{13}, or Bunkers Convention\textsuperscript{14} is also exempt from requirements of the EDR. Therefore ‘environmental damage’ caused by or potentially caused by bunker fuel or maritime casualties involving ships carrying persistent oil would require prevention and remediation in accordance with CLC, Fund or Bunkers Convention but not the EDR. During the draft consultation phase of the EDR it was noted that the Bunkers Convention was not mentioned which would have meant that prevention and remediation of oil spills covered by the Convention, would be governed by the EDR. Although this may have lead to higher financial costs it would have greatly benefited the environment due to higher remediation standards. However, there is no economic loss compensation under the EDR whereas there is under the Bunkers Convention. There are provisions in the ELD for similar exemptions to be given to the HNS Convention\textsuperscript{15} and CRTD Convention\textsuperscript{16}, however until these two

\textsuperscript{12} Moses v Midland Railway Co [1915] TLR 440
\textsuperscript{13} International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992
\textsuperscript{14} International Convention on Civil Liability for Bunker Oil Pollution Damage 2001
\textsuperscript{15} International Convention on Liability and Compensation for Damage in Connection of Carriage of Hazardous and Noxious Substances by Sea 1996
Conventions actually come into force and are implemented in the UK, incidents that would be covered by these liability Conventions will be covered by the EDR for the interim.

**Oil spills under the EDR**

Ship-sourced oil spill incidents where the CLC, Fund and Bunkers Convention are not applicable could fall under the EDR. When a German tanker, *Tarpenbek*, laden with lubricating oil collided with another ship off the South coast of England the IOPC fund declined to pay the claims\(^\text{17}\). The reason given by the IOPC Fund was that the ship was carrying non-persistent oil. If this spill occurred after the EDR CIF and had caused ‘environmental damage’, the Regulations would have dictated the prevention and remedial measures, not the CLC, Fund or Bunkers.

Several times in 2008 there were reports of oil from an installation situated relatively close to the coast of the UK. The oil ended up in a highly ecologically sensitive area where the entire estuary is classified as a Special Protection Area (SPA)\(^\text{18}\) with additional areas within the estuary classified as a Special Area of Conservation (SAC)\(^\text{19}\) and a SSSI. If this had caused ‘environmental damage’ and had happened post-CIF, provisions under the EDR would have been activated and cleanup operations would have to be conducted in accordance with the Regulations.

Liability for transport of oil by anything other than marine vessels, such as rail and road tankers or pipelines is provided for under the EDR. Transport of oil is considered to be a ‘dangerous activity’ and therefore listed in Schedule 2 of the EDR and strict liability applies. For example, if there was a derailment of a train carrying a cargo of oil, there could be a significant impact on the surrounding area. This happened recently in Scotland where a train derailed and the oil it contained entered a neighbouring stream and then a river killing a large amount of wildlife living in the vicinity. If such an incident occurred in England, then the EDR would apply.

Within Europe, 135 billion tonnes per km of oil was transported by pipeline in 2006\(^\text{20}\) and a large proportion of this is in the North Sea. Although this pipeline network is well maintained there is still a possibility that a leak could occur and cause ‘environmental damage’ with the operator being liable under the EDR. Within England there are various terrestrial pipeline networks carrying oil, for example those feeding airports from refineries. Despite numerous risk-reduction measures, it is possible that an incident, perhaps caused by unregulated excavation, could result in ‘environmental damage’ being caused with the excavator being liable.

Waste disposal is also classed as a ‘dangerous activity’ under the EDR therefore leaching oil from solid waste sent to landfill after cleanup operations from a oil spill could activate provisions under EDR if it was to cause ‘environmental damage’. The responsibility of remediation from any ‘environmental damage caused by the

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\(^{16}\) Convention on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels 1989


\(^{18}\) Designated and protected under the Birds Directive 1979

\(^{19}\) Designated and protected under the Habitats Directive 1992

\(^{20}\) Transport for South Hampshire Freight Strategy Consultation Draft: Annex 1 (July 2008)
mismanagement of waste disposal would lay with the site management, not the operator from where the waste originated.

**Responding to oil spills under the EDR**

When responding to an oil spill under the EDR, cleanup and remediation operations would have to be conducted in accordance with the Regulations. It is worth noting that unlike the CLC\(^2\), there is no provision for contractor immunity. This could have serious implications on the way response organisations operate. For example, there has been an oil spill where none of the EDR exemptions are applicable in a protected area, such as a marsh classified as a SSSI. The spill might not have caused enough damage to be classed as ‘environmental damage’ but the damage could escalate as a result of the cleanup choices made by the contractor. The contractor as the ‘operator’ could be held liable for any ‘environmental damage’ and therefore be responsible for remediation costs. If a cleanup contractor was directed to perform a particular response strategy, for example, spray dispersant offshore, by a government authority, the contractor would not be held liable for any resulting ‘environmental damage’. There is still the question as to who would be held responsible, the spiller or the contractor, for damage done from an order given by anyone other than a government authority. This will undoubtedly be a question for the lawyers when, or if, this type of incident arises.

Responsibility for waste management could also have implications for cleanup contractors. Transportation and storage of waste are classified as dangerous actives and strict liability applies. Therefore it can be assumed that as soon as a waste contractor signs for the waste to take it away, they are then the ‘operator’ and they will be liable for any ensuing ‘environmental damage’. However, there is a short period of time between the product being recovered and the waste contractor signing for the waste. While there is no specific contractor immunity included in the EDR, it can be assumed that a cleanup organisation would be responsible for the waste they collect up to a time which it can be signed onto a waste contractor. This could affect the way in which contracts for cleanup are drawn up, with cleanup contractors attempting to abdicate their potential responsibility for waste back to the spiller. During the Sea Empress spill (1996), the waste contractors created secondary contamination on the roads by transferring oil on their truck wheels from the beaches. If this had happened now and was not covered by CLC and the land was contaminated such that it constituted a hazard to human health it could have activated remediation provisions under the EDR, with the waster contractors being liable.

**Enforcement and penalties**

The Environment Agency (EA) is, in the large part, responsible for the enforcement of these regulations. However, if the ‘environmental damage’ is to protected species or habitats, including SSSIs then Natural England will be responsible if it is on land and the Secretary of State for DEFRA if it is elsewhere and the damage is not due to an activity authorised by the EA. The offences under the EDR include; failure to prevent damage or further damage, failure to notify the appropriate authority, failure to provide information and undertake preventative and remedial measures as

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\(^2\) Article 4 of CLC 1992
required by the authority, and failure to pay costs claimed by the authority in relation to the environmental damage.

The penalties for an offence under the EDR include both fines and a jail term of up to two years if a person is found guilty. Fines are limited to the statutory maximum allowable. Additionally, where a company is guilty of an offence under the EDR, and that offence is proved to have been committed with the consent of, or have been attributable to neglect of a senior person with in the company, such as a director, manager or secretary, that person is also guilty of the offence.

Liability can still be limited in accordance with LLMC\textsuperscript{22} which means that if the damage originates from a sea-going vessel not covered by CLC, Fund or Bunkers Conventions that their liability will be limited to the value of that vessel. It can only be assumed that if liability has been limited that the enforcing authority would have to fund the remainder of the remediation if it was valued above the limit.

If an incident causes ‘environmental damage’, it does not matter where the incident occurred, only where the damage occurs. In theory if a transboundary pollution event, such as catastrophic well failure of an installation in another part of the North Sea, cause ‘environmental damage’, provisions under the EDR could be activated. Under Article 15 of the EDL there are provisions to ensure that Member States cooperate, including information exchange for potential ‘environmental damage’ in another Member State’s territory. If a Member State identifies ‘environmental damage’ within its borders, which has been caused by an incident from without its borders, a report can be made to the Commission. This report may contain recommendations for the adoption of preventative or remedial measures and seek to recover the costs incurred. However, there are no provisions in the EDR or the ELD for enforcing or cost recovery for measures taken towards ‘environmental damage’ from a transboundary pollution event which takes place in the territory of a non-Member State, such as Norway.

If multiple types of ‘environmental damage’ are caused by an incident, such as contamination of land, water and destruction of protected site, the EDR has made provisions for enforcing authorities to work together. There is no limit to this statement so it could equally apply to incidents involving different countries with different Regulations i.e. England and Scotland, as it could for incidents causing different types of damage. Under the EDR an enforcing authority can even appoint another authority to act on its behalf, thereby simplifying the process by cutting the number of people involved.

Prevention
It is worth noting that prevention, of either the incident itself or further damage, is the preferable option compared to remediating damage, and it is generally the more cost-effective option. Under the EDR, prevention or damage limitation is first in a chain of actions, along with notifying the relevant authority (see Figure 1). In the event of an offshore oil spill, this would be mobilisation of emergency response measures such as containment and recovery or dispersant spraying. Bulk oil removal, either at sea or on a shoreline would most likely be classed as preventative.

\textsuperscript{22} Convention on Limitation of Liability for Maritime Claims 1976
measures as this will prevent the damage from becoming worse. The EDR places a duty on the operator to take preventative measures, which means that operators have to be proactive, rather than waiting to be told what to do. The authority can take preventative action on behalf of the operator, with the costs being charged back to the operator.

Figure 1 – Operation of the Environmental Damage (Prevention and Remediation) Regulations 2009
(Source: DEFRA, Environmental Damage Regulations Guidance – February 2009)

Remediation

‘Environmental damage’, as defined in the EDR, has to have been determined to have occurred before remediation is required to be undertaken by the operator. Figure 2 depicts how the authority makes the decision that ‘environmental damage’ has occurred. The authority will determine if the damage has been caused by an operator of economic activities, if any of the exemptions apply under the EDR, if the activity in question is listed in Schedule 2 as a potentially dangerous activity or if the activity has caused ‘environmental damage’ to a protected species or habitat, and whether the operator is at fault or negligent. Once it has been determined that remediation needs to be undertaken, the operator will submit a proposal for remediation to the enforcing authority. The final responsibility for deciding which remedial measures will be undertaken will then lie with the enforcing authority. Again, if an operator fails to comply with this, the authority can take actions on their behalf and charge the costs back to operator.
There are three types of remediation available for consideration by the operator; primary, complementary and compensatory. It is likely that all three in varying proportions could be used in a single incident. Primary remediation is any remedial measure which returns the damaged natural resources to, or towards, the state that would have existed if the damage had not occurred. In appropriate cases, natural recovery is permitted as a form of primary remediation. If there was an oil spill in the Thames Estuary which impacted a SPA and severely damaged a resident population of protected birds, such as avocets (*Recurvirostra avosetta*), and activated remedial measures under the EDR, primary remediation would require that the population was returned to its pre-incident levels. These levels would be known due to the research required as part of the assignation process for protected sites and continual monitoring programmes.

Complementary remediation goes hand in hand with primary remediation. It is any remedial measure taken to compensate for the fact that the primary remediation is not going to result in the full restoration of the site. This remediation should ideally take place on a site that is geographically linked to the damaged site. If, in the hypothetical Thames Estuary spill, the primary remedial measures were not going to be successful because the bird’s habitat or feeding grounds had been too severely damaged to recover, complementary remedial measures would need to be taken. These could include providing or developing another site that could be used by birds like the avocets for feeding and breeding.
In addition, compensatory remediation must be provided to compensate for the interim loss of natural resources or services that occur from the date of the damage until the site is restored. It is worth noting that compensatory remediation, unlike compensation under the CLC, Fund or Bunkers Conventions, does not include financial compensation. Therefore any incident that brings about action under the EDR will not include compensation for financial loss. To look at an example; if oil was released into a reservoir that was used for supplying water to consumers and it was considered that ‘environmental damage’ under the EDR had been caused, the water company could not be financially compensated for any economical loss but the operators who were found liable for causing the spill would have to provide alternative means for the water company to continue to provide a service to their customers until the water quality in the reservoir had been restored.

When the operators take complementary and compensatory remediation, a number of factors have to be taken into account. If possible, the remedial measures must provide the same type, quality and quantity of those resource or services which were damaged. Where this is not possible, similar resources can be substituted. If neither of these options are viable, then different resources can be provided but the remedial measure must have the same ‘value’ as the lost resources. This could prove to be a stumbling block for this legislation as almost everyone values everything differently. There are many questions that will be raised if this option is activated, such as who gets to decide how many birds of one species it would take to replace a populations of another? What method are they going to decide these ‘values’? Will this resort in England, or indeed Europe, ending up with a system which resembles the US system where each organism has a price per head?

Financial arrangements
The operator is responsible for the costs of all preventative measures, and all administrative costs concerning the preparation of prevention and remediation notices, and ensuring compliance with them. For example, if an offshore installation had a release of oil and caused ‘environmental damage’ to a stretch of coastline, they would be responsible for the costs associated with prevention and remediation of the damage. This would include stopping the release, emergency response to try to prevent the oil from reaching the shoreline, the removal of oil from the beaches23, the monitoring costs, alternative measures that may need to be put in place to compensate for a temporary lost of services and administrative costs associated with the spill by the enforcing authority.

If the operator is absent, or fails to comply in a timely or correct manner then preventative and remedial measures can be taken on their behalf and all costs charged back to the operator. There is an appeals process where an operator can dispute their liability towards ‘environmental damage’ or the content of remediation notice of the enforcing authority. There are no provisions under the EDR for an appeals process against a prevention notice. If there turns out to be no ‘environmental damage’, the authority will have to absorb these costs themselves including the investigations into the incident carried out to date.

23 Geographical limits for ‘environmental damage’ to land is above the low water mark
In the first draft of the ELD, compulsory environmental liability insurance would have been enforced on all operators of dangerous activities. This was lobbied against and removed from the ELD as it was considered that the environmental liability insurance market was not mature enough to provide a product in which the benefits would outweigh the financial impact it would have on, in particular, small businesses.

**Interface with other regimes**

This legislation overlaps with five other pieces of UK legislation and, other than those specified in the exemptions such as the CLC, the EDR take precedence. The EDR state that they are without prejudice to any other enactment concerning damage to the environment. This means that where the regulations do overlap, the other legislation will continue to be effective. This overlapping may encourage a review of pollution legislation, such as Part II A of the Environment Protection Act (EPA) 1990 and the Water Resources Act 1991, to streamline with relation to the new EDR.

Under the EDR there are several differences to the legislation it takes precedence over. The EDR have removed the ‘if possible’ clause from the instructions regarding the remediation of a site back to its original status. Unlike the EDR, legislation like the EPA 1990 and the Water Resources Act 1991 apply to all sites. Where damage happens to sites where the status is not known, the ‘if possible’ clause is included to remediate back to a reasonable standard whilst balancing it against the costs.

The operator has a duty to take preventative and remedial measures under the EDR which were previously only available via prosecution or lengthy procedures through other legislation. This is to work on the principle that prevention is better than a cure and that the quicker a solution is applied, the less damage is done and the more effective the remedial measures could be. However, if a remediation notice were to be contested under the appeals process provided in the EDR this could become a lengthy process and delay the start of the remediation. This would reduce the advantages the EDR has over other pollution legislation, whereby it is supposed to ensure timely remediation without the need for prior prosecution.

Fewer activities are covered by the EDR than previous legislation and more damage is required to activate the greater remedial measures. Existing pollution legislation used to apply to all water and land pollution, where as the EDR only applies to ‘environmental damage’ caused by the operation of dangerous activities listed in Schedule 2. On the plus side, strict liability has been applied to all dangerous activities listed in Schedule 2, including the transport of oil and operation of production platforms, which means again, a prosecution is not needed before preventative and remedial measures are to take place.

**Conclusion**

On submission of the abstract for this paper in 2008, there was grave doubt that England was ready for the ELD. However since then there has been a great deal of progress made, with the finalisation of the consultation process and the implementation of the EDR.

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The CLC, Fund and Bunkers Conventions assume precedence of the large majority of ship-sourced oil pollution cases. The operation of these Conventions will not be effected by the implementation of the ELD. The Conventions differ in operation from the EDR in a number of ways. Most noticeably, the EDR are implemented for the benefit of the environment, whilst the CLC, Fund and Bunkers Conventions are primarily implemented to compensate people. Additionally, the EDR impose a duty on the operator to prevent and remediate but there is no financial compensation for economic loss.

Other water based oil spills which cause ‘environmental damage’ will be more costly than before as remediation will have to be paid for in addition to fines. Land based cases of ‘environmental damage’ will be likely to end up being hugely costly due to the increased remediation standards. Prevention and remediation are a duty of the operator under the EDR. It will mean that not only some pollution events avoided but that they may also be remediated quicker as they will not have to go through to courts.

Unlike the CLC there are no provisions in the EDR for the immunity of contactors. This means that if a contractor is carrying out cleanup operations on behalf of the spiller, the contractor will become the ‘operator’ for these activities and therefore be liable for any ‘environmental damage’ that may occur. This follows liability for health and safety where contractors are responsible for their own health and safety, even when contracted to someone else. Along with the Bunkers Convention, which also does not specify contractor immunity, this exposure to liability could change the way response organisations carry out their operations.