

The Environmental Liability Directive (ELD) should have been applied in the UK from the end of April 2007. In fact, it won't be - because the details of regulation have still not been agreed, despite a lengthy consultation process.

Essentially, the ELD applies the 'polluter pays' principle, and expands the scope of damages from people and property to natural resources. It also expands the scope of what's required in the case of pollution from immediate clean-up to reinstatement of the original condition of the environment - which could be

the regulators, where the regulator does not own the watercourse, and hence strictly the policy will not respond. Such potential claims are also strictly excluded since recovery of such costs is not considered to be compensation or damages, but rather a statutory charge or debt - which is not recoverable under the majority of public liability policies.

Lack of coverage of remediation was not so important in the past. But remediation is likely to become considerably more costly once the ELD has been brought in. That may

practice might be reviewed.

Again, that makes specialised environmental liability insurance look more attractive compared to general lines. Marcus Drew, assistant vice-president at AIG, says that it's the Bartoline decision, rather than the ELD, that is the main driver of business enquiries at the moment. "We look at the Bartoline judgment as a clear opportunity for us to grow," he says.

So what environmental liabilities policies are available? There are still only a small number of insurers involved in this market - the big

Easy being green?

costly - and makes provisions for compensatory remediation where the polluted area can't be reinstated.

One thing is clear; general insurance - property or liability - is unlikely to be enough. Jon Prowse, head of liability for Allianz in the UK, points out that while liability insurance covers some pollution claims, its definitions are very tightly drawn. PLI will cover liabilities only if they arise from an event within the policy period, and only so long as the pollution arises from "a sudden, unexpected, unintended, and unforeseen event".

That excludes pollution arising over a long time from regular operations - even if the pollution itself isn't discovered until later.

Alan Dobson, director of the environmental division at loss adjuster QuestGates, says that a strict interpretation of cover provided by general insurers often excludes remediation arising from pollution or contamination, where either the incident giving rise to the loss/damage has arisen over a period of time or where there has been no accidental loss of or damage to property - which is usually defined as material property in the ownership or possession of the claimant third party. Often, claims for loss or damage are pursued by

While the industry awaits the Environmental Liability Directive, we consider its effect on coverage and premiums. [Andrea Kirkby](#) reports

well make general insurance cover far less attractive to companies with a significant environmental risk to cover.

A recent court case, *Bartoline v Royal Sun Alliance*, has established that insurers do not have to pay for clean-up costs required by the Environment Agency. When action to fight a fire caused chemicals to spread from Bartoline's premises on to neighbouring land, RSA refused to pay the £770,000 clean-up costs - though it did pay out on other claims under the same policy. It was held that the recovery of costs by the regulator constituted a statutory charge or debt and was therefore not the subject of indemnity under the relevant public liability policy.

Alan Dobson points out that some insurers have, so far, been paying out on claims for environmental liabilities. He suspects that following the Bartoline judgment, and the likely increase in claim costs following implementation of the ELD, this

names are XL, ACE, AIG and Chubb. The major global brokers - Aon, Marsh, and Willis - all have specialised environmental teams, and there are a few smaller brokers with significant expertise in this area - notably Bridge and Tysers. But it remains a small market - and many general brokers have little awareness of environmental liabilities or knowledge of the details of cover.

David Barr of Willis points out that the specialist environmental insurers have been quick to act on ELD - they have all now either produced new wordings, or created new products, aimed at the changes coming in with ELD. But it remains to be seen what the general liability market will do.

Obviously the changes being made, and in particular the likelihood of much larger damages being payable by polluters, represent an opportunity for the market. But it's still difficult to guess which way the market will develop.

Prowse points out that several

European countries have well established pooling arrangements, and in those countries, environmental liabilities may follow that route. But the UK has never had a history of pooling, so it seems more likely that the specialist market will take off here, as it did originally in the US.

“Premiums have dramatically reduced over the last four or five years; they are now probably half what they were at the start of that period”

The US is much further ahead, though even there, environmental liability is not a mature market compared to other types of liability. Premiums in the US are estimated at US\$2bn or more every year, according to figures from Willis. Germany, with just 250 million in annual premium spend, is only one tenth the size, while the total environmental liability market written through London accounts for only £60m - just three percent of the US market's size.

There is more litigation in the US, of course, and regulatory controls have been tighter up till now. But as litigation increases in the UK, and European environmental regulation tightens up, the London market for specialised environmental insurance looks set to grow.

Of course it is possible that general insurers will compete to offer environmental cover. Dobson doesn't think so. His guess is that underwriting and claim interpretation will become stricter, and this in turn will assist the specialist environmental providers to grow their business. New companies may also join the fray - Prowse points out that though Allianz is now involved in specialist environmental insurance, it is actively monitoring the market.

Take-up of environmental policies

has been relatively low so far, with many corporates still relying on their general policies, according to Barr. Traditionally the environmental market was mainly focused on single premium policies insuring against historic liabilities on the acquisition of a business or property - acquisitions were the key driver for policy uptake.

Now, more companies are looking to insure their operations against environmental liabilities on a regular basis. In fact the number of policies sold to cover operations is probably now equal to or more than the number of acquisition-driven long term policies - but because of the larger size of the latter they still account for the majority of the value in the market.

Drew says that while the property transaction / M&A business is still strong, it is dropping as a percentage of total business.

“From our point of view,” he states, “we are writing far more business now for operational cover.” Water utilities, waste management companies, and contractors are all looking for cover, and diversifying the range of markets in which AIG is involved.

Already, the increased number of companies providing cover has led to a reduction in premiums. Barr says that over the last four or five years, premiums have dramatically reduced; they are now probably half what they were at the start of that period.

The development of more standardised policies to replace heavily bespoke products has helped reduce administration costs - that's particularly the case where insurers are offering environmental insurance as an 'add on' to general policies, for instance at ACE. Low cost products with lower premiums have also increased the attraction of this type of insurance for companies outside the top tier, so increasing the potential size of the market.

While this market is relatively new, claims are now being handled and as Barr says, “We're now seeing a maturing claims

experience in Europe, and that is helping underwriters.” It also demonstrates to clients that the environmental products do pay out on claims, sometimes in multi-million pound amounts.

But there's still one fly in the ointment. Until the full details of the ELD's implementation in the UK - and other jurisdictions - are worked out, both insurers and risk managers lack the information they need to assess potential liabilities. Dobson warns that because of these issues, it's still impossible to predict how the market will develop.

Underwriters do not have access to the information they need - for instance, the likely scope of remediation and compensation, and the possible cost of compensation payments. Barr asks “How on earth can underwriters evaluate the risk?”

Unfortunately the answer to that question doesn't lie in the insurance industry's hands.

TOXIC MOULD

Stachybotrys chartarum is a mould that grows on materials with high cellulose content when they are damp - for instance in hotel bathrooms or where pipes drip on to ceiling tiles. Individuals have made successful claims in the US for damages where the mould has aggravated their asthma or led to breathing problems.

Over 9,000 lawsuits have been filed in the US and Canada - almost half of them against insurers who did not ensure earlier water damage was correctly remediated, allowing toxic mould to penetrate the fabric of the building.

Toxic mould is now a standard exclusion, even from environmental liabilities contracts. However, David Barr of Willis says that cover may be available on a case by case basis, for non-US risks. In this, it's similar to asbestos coverage.

Whether it's needed in the UK is debatable. So far, the UK hasn't seen the same levels of litigation as the US, and it may be that different building methods together with the differences in climate make toxic mould less of a problem in this country. For instance, the Environmental Claims Division at QuestGates Loss Adjusters has not to date recorded a single incident where mould damage has triggered a response under a public liability based policy.