

Environmental Risk Management

Valerie Fogleman
Consultant, Stevens & Bolton LLP
Professor, Cardiff University School of Law

Pierre Sonigo
Secretary General
FERMA

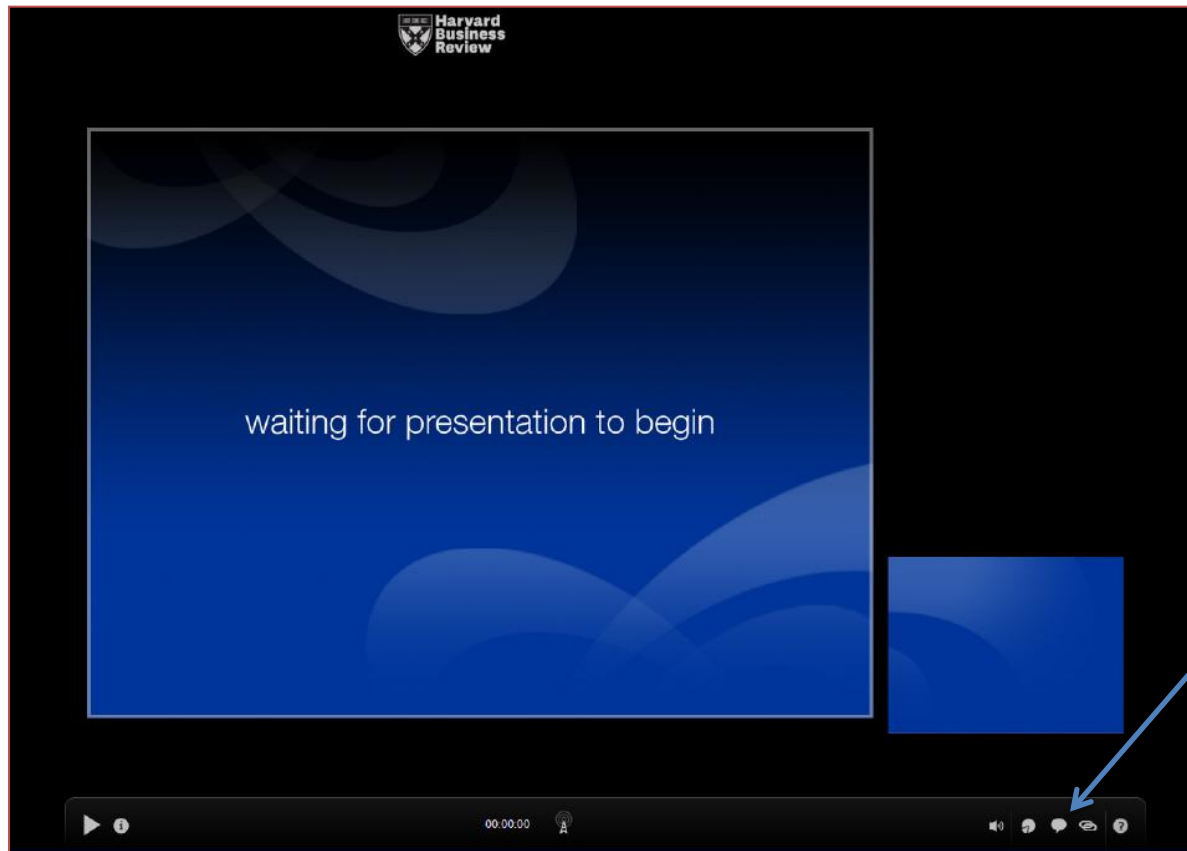
Christopher Robertson
Head of Environmental
Zurich

JUNE 26, 2013

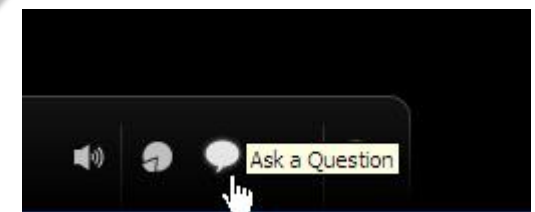
Sponsored by



Questions?



**To ask a question
... click on the
“question icon” in
the lower-right
corner of your
screen.**



Environmental Risk Management

Valerie Fogleman
Consultant, Stevens & Bolton LLP
Professor
Cardiff University School of Law



JUNE 26, 2013

Sponsored by

Environmental Risk Management

**Pierre Sonigo
Secretary General
FERMA**



JUNE 26, 2013

Sponsored by

Environmental Risk Management

**Christopher Robertson
Head of Environmental
Zurich**



JUNE 26, 2013

Sponsored by

Introduction to the ELD

Implementation and Enforcement Variations and the Future of the ELD

Valerie Fogleman

Consultant, Stevens & Bolton LLP

Professor, Cardiff University School of Law

Introduction to the Environmental Liability Directive

Key purposes

- to implement the polluter pays principle in respect of accidental pollution
 - “induce operators to adopt measures and develop practices to minimise the risks of environmental damage”
- to prevent and remediate environmental damage so as to lead to a reduction in the number of future contaminated sites
- to establish liability for environmental damage to species and natural habitats protected under the Birds and Habitats Directives in order to reduce the loss of biodiversity in the EU

Introduction to the Environmental Liability Directive

- Transposed into national law of all Member States (MS) by June 2010
- Two categories of “operators”
 - Annex III: strict liability for preventing or remediating an imminent threat of, and actual, environmental damage to protected species and natural habitats, water and land
 - Non-Annex III: fault-based liability for preventing or remediating an imminent threat of, and actual, environmental damage to protected species and natural habitats

Introduction to the Environmental Liability Directive

Imminent threat of environmental damage; operator must

- carry out preventive measures “without delay”
- notify competent authority “without delay” if measures fail to dispel threat of damage

Occurrence of environmental damage; operator must

- notify competent authority “without delay”
- “immediately” carry out emergency remedial actions
- carry out remedial measures agreed by competent authority

Introduction to the Environmental Liability Directive

Remedial measures: land

- removal, control, containment or diminution of contaminants so that land no longer poses a significant risk of an adverse effect on human health
- remediation standard: lawful current use or approved use

Introduction to the Environmental Liability Directive

Remedial measures: water, protected species and natural habitats

- *Primary remediation*: remediation and restoration to 'baseline' condition
- *Complementary remediation*: if damaged site cannot be fully restored, restoration of nearby site in addition to partial remediation of damaged site
- *Compensatory remediation*: losses between time that environmental damage occurred and its full remediation (providing, enhancing or improving same or new resources at damaged and/or alternative sites)

Introduction to the Environmental Liability Directive

- Applies to incidents after 30 April 2007
- Exceptions
- Rights of non-governmental organisations and other interested parties
- Optional provisions include
 - scope of liability
 - defences
 - mandatory financial security
- Supplements existing MS law; does not replace it, but MS cannot apply less stringent law to ELD incidents

Implementation and enforcement variations

- **Mandatory and optional defences (permit and state-of-the-art defences)**
- **Permit defence adopted (16 MS)**
 - Belgium (regional level), Cyprus, Czech Republic, Denmark, Estonia (except GMOs), Finland (limited), Greece, Italy, Latvia (except GMOs), Lithuania, Malta, Netherlands (limited), Portugal, Slovakia, Spain, UK (except GMOs in Scotland, Wales)
- **State-of-the-art defence adopted (14 MS)**
 - Belgium (regional level), Cyprus, Czech Republic, Estonia (except GMOs), France, Greece, Italy, Latvia (except GMOs), Malta, Netherlands (limited), Portugal, Slovakia, Spain, UK (except GMOs in Wales)

Implementation and enforcement variations

- **Joint and several / proportional liability**
 - Proportional liability adopted (modified liability in some MS)
 - Denmark, Finland, France, Italy, Slovakia
 - Joint and several liability adopted
 - All other MS
- **Mandatory financial security**
 - Bulgaria, Czech Republic, Greece, Hungary, Portugal, Romania, Slovakia and Spain
 - NB: not all brought in yet

Implementation and enforcement variations

- Transposition as stand-alone legislation or incorporation into pre-existing legislation
- Designation of one or more competent authorities
- Number of liability systems in a MS resulting from transposition
- Extension of strict liability for non-Annex III activities
- Adoption of more stringent provisions
- Threshold for water damage
- Defences adopted as defences to liability not costs

Future of the Environmental Liability Directive

- 30 April 2013: deadline for submission of reports from MS
- 30 April 2014: deadline for submission of report from European Commission
 - report to “include any appropriate proposals for amendment”



FERMATM

Federation of European
Risk Management Associations

Managing ELD Risks: Grey zones and Uncertainties

Pierre Sonigo
Secretary General FERMA

The Industry Perspective: Key and Emerging Risks regarding the ELD

1. New Concepts, difficult to apprehend
2. Legal Uncertainties
3. Insurance Coverage Uncertainties
4. What to do about it?
5. The Review of the ELD in 2014: major concerns for the industry

New Concepts, difficult to apprehend

- What is an Environmental Damage ?
- How do I know if the “significant threshold” is met?
- How do I define a « Base line » ?
- How will compensatory and complementary damages be calculated?

Legal Uncertainties

- Switch from civil law to administrative law
- Transposition of Directive by MS in different ways
 - New legislation
 - Changes of existing legislation
 - Additional layer on existing legislation
- Exemptions options applied differently
 - Permit exemption
 - State of the art exemption
- Inexperience of Administration and local authorities
 - Inconsistent number of ELD cases across the EU (from 80 cases to 0 cases in some countries)

Insurance Coverage Uncertainties

- Pollution is not ELD (and vice versa) !
- Several policies are applicable:
 - Property
 - Liability (General and ELP)
 - Transport
 - D&O
- Special issues to look for:
 - Policy trigger (occurrence or claims)
 - Policy period
- Threat of mandatory Insurance schemes and of European Environmental Fund

What to do about it?

- **Know your industrial sites & the Insurance products available**
 - Most “operators” already have Environmental protection policies and are subject to stringent regulations
 - Recommend development of ISO 14001 certification
- **Know your exposure:**
 - To Properly identify your risk exposures:
 - Inventory of all production sites and environmental impact studies conducted for each one.
 - Look for nearby Natura 2000 zones
- **Evaluate Cross Border risks**

The ELD Review in 2014: No Time for Regulatory Change

For the future, the Industry needs:

- More monitoring of the ELD cases at EU level
 - ❑ Through the use of register and database: Collect and compile, provide data on a public basis on the frequency, the costs, the average insurance pricing of ELD related incidents.
- Better definition of ELD concepts
 - ❑ Significant threshold, baseline construction
- On going cooperation between member states
 - ❑ After 3 year of implementation, Member States just start to discover the potential of the ELD.

**It's time to consolidate, not to introduce new changes.
Focus on what's working and strengthen best practices.**

The ELD Review in 2014: the Financial Security Issue

The voluntary financial security must remain the rule

- The voluntary market is working, why move to a mandatory financial security scheme?
- ELD-related risks are too diverse and their exposure is over a long period. It is against the polluter pays principle and annihilate all prevention efforts
- Financial security is secondary in the ELD. The important is to show that the company is managing properly its risks.

The ELD Review in 2014: No Industrial Fund at EU Level

- **An EU-wide fund is practically impossible**
 - Because of the moral hazard issue. A fund gives no incentives to behave properly. It's acting like a "tax".
 - Because the range and the scope of such a fund would need tremendous resources in terms of staff, budget and time for political agreement.
 - It will quickly turn into a "bureaucratic monster".



FERMATM

Federation of European
Risk Management Associations

Thank you for your attention!

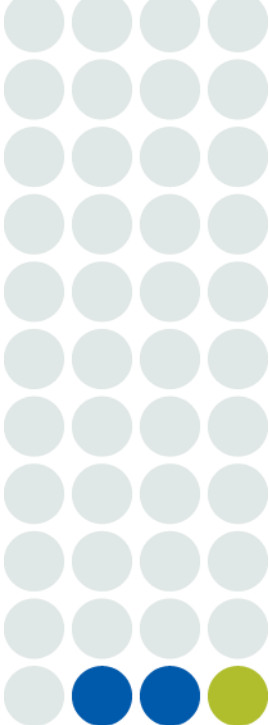
Pierre Sonigo
Secretary General FERMA
psonigo@gmail.com



ENVIRONMENTAL RISK MANAGEMENT AT THE HEART OF COMPLIANCE

Environmental Impairment Liability Insurance

Corporate customers



Environmental Risk Management



- Identifying risks that could result in environmental liability
- Assessment of potential impacts
- Prioritization of risk management measures
- Environmental Liability has changed under the Environmental Liability Directive



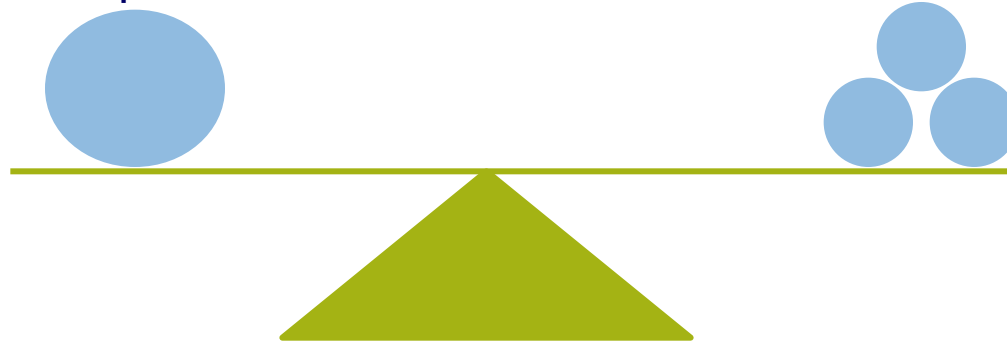
Challenges to be Overcome

- Changing regulatory landscape – in Europe and beyond
- Unknown risks during merger, acquisition, sale
- Demands of various stakeholders including:
 - Regulator
 - Employees
 - Shareholders
 - Public/society
 - Customers
- Economic malaise impacting:
 - Balance sheet
 - Resources
 - Capital expenditures



A Balancing Act

- Strong risk management creates positive operating environment
- but...
- Risk management resources are not infinite!
- And companies do not operate in a vacuum.
- Balance is required to achieve success



- And accidents do happen



Risk Management with Risk Transfer



- Environmental Liability Insurance market overview
- Broad appetite for insurable risk
- Policies crafted to address a variety of exposures for wide range of industries
- Addresses gaps in general/public liability policies
- Significant capacity
- Multi-year deals
- Alternative risk transfer and Captive risk management solutions
- Claims expertise & experience



Broad and relevant coverage in a separate Program



Flexible coverage for:

- Obligations in tort or statute
- On & off-site
- Pollution events and environmental damage
- Existing unknown or new pollution events or environmental damage.
- Loss prevention costs
- Defense and investigative costs
- Crisis management costs
- Regulatory reopeners

Addressing the challenges



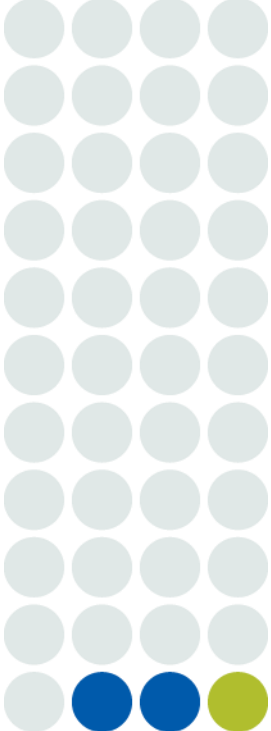
- Coverage afforded for changes in regulations that may impact insured
- Regulatory re-openers
- New and historical pollution event / environmental damage
- Key elements of ELD – beyond pollution events to environmental damage requiring:
 - Primary remediation
 - Complementary Remediation
 - Compensatory Remediation
 - Loss prevention costs
- Provides balance sheet protection which is in the interest of key stakeholders including senior management and board of directors



In summary...

- Risk management of environmental issues is essential to delivering for key stakeholders
- Challenges exist for both domestic and global companies, SME's and large corporations
- A balanced approach and prioritization is needed.
- Environmental insurance can be an important tool for protecting stakeholders
- The insurance market continues to evolve to address the risk management needs of customers
- Zurich has years of experience developing and providing environmental insurance solutions





THANK YOU

Corporate customers

Thank you for joining us!



ZURICH[®]



FERMA[™]

Federation of European
Risk Management Associations



JUNE 26, 2013

Zurich Insurance Group

The information in this presentation was compiled from sources believed to be reliable for informational purposes only. All sample policies and procedures herein should serve as a guideline, which you can use to create your own policies and procedures. We trust that you will customize these samples to reflect your own operations and believe that these samples may serve as a helpful platform for this endeavor. Any and all information contained herein is not intended to constitute legal advice and accordingly, you should consult with your own attorneys when developing programs and policies. We do not guarantee the accuracy of this information or any results and further assume no liability in connection with this publication and sample policies and procedures, including any information, methods or safety suggestions contained herein. Moreover, Zurich reminds you that this cannot be assumed to contain every acceptable safety and compliance procedure or that additional procedures might not be appropriate under the circumstances. The subject matter of this presentation is not tied to any specific insurance product nor will adopting these policies and procedures ensure coverage under any insurance policy.