

# WEBINARS

KEY LEARNING SUMMARY

## Environmental Risk Management

*featuring* **Valerie Fogleman, Christopher Robertson, and Pierre Sonigo**

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# Environmental Risk Management

## OVERVIEW

Doing business in the European Union means navigating the Environmental Liability Directive (ELD), a regulation that was adopted in June 2010. Under the ELD, operators must notify authorities and carry out preventive or remedial measures if threatened or real environmental damage occurs.

The ELD introduces new concepts related to environmental damage that are difficult for risk managers to understand. In addition, member states have used a wide variety of approaches to implement the directive, resulting in legal uncertainty. Given these issues, a recommended course of action for companies is to identify environmental risks and then mitigate them through insurance and other means.

## CONTEXT

The panel discussed the Environmental Liability Directive and how it affects risk management within organizations.

## KEY LEARNINGS

**The Environmental Liability Directive seeks to address environmental damage through the polluter pays principle.**

The Environmental Liability Directive (ELD) implements the polluter pays principle in cases of accidental pollution. It was transposed into the national law of European Union (EU) member states as of June 2010. The directive has three objectives:

1. To minimize the risk of environmental damage by motivating operators to adopt preventive measures.
2. To reduce the number of future contaminated sites by preventing and remediating environmental damage.
3. To decrease the loss of biodiversity by establishing liability for environmental damage done to species and natural habitats protected by the Birds and Habitats Directives.

The ELD defines liability for two categories of operators:

- Annex III operators have 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 operators have fault-based liability for preventing or remediating an imminent threat of and actual environmental damage to protected species and natural habitats.

## CONTRIBUTORS

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**Angelia Herrin (Moderator)**

Editor, Special Projects and  
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Exceptions to the ELD include environmental damage that occurs as a result of an act of war or terrorism. Although the ELD supplements existing laws in member states, countries cannot apply less stringent laws to ELD incidents.

Looking ahead, the ELD is up for review in 2014. From an industry perspective, regulatory changes would not be desirable. However, greater monitoring of ELD cases at the EU level and better definition of ELD concepts such as significant threshold and baseline construction would be helpful.

**When environmental damage occurs, operators must notify authorities and carry out remedial measures.**

The ELD applies to environmental incidents that occurred after April 30, 2007. The directive distinguishes between imminent threat and occurrence of environmental damage. In cases of imminent threat, operators must carry out preventive measures and notify authorities. When environmental damage actually occurs, however, operators must notify authorities and carry out remedial measures.

Examples of remedial measures include the following:

- **Land.** Contaminants must be removed, controlled, contained, or reduced so that land no longer poses a significant risk of an adverse effect on human health.
- **Water, protected species, and natural habitats.** Remedial measures for these natural resources fall into three categories:
  - Primary remediation. This covers remediation and restoration to “baseline” condition.
  - Complementary remediation. If the damaged site cannot be fully restored, a nearby site is restored and the damaged site is partially remediated.
  - Compensatory remediation. This covers losses between the time that environmental damage occurred and its full remediation. Compensatory remediation often provides, enhances, or improves the same or new resources at the damaged site or at alternative sites.

**Risk managers often struggle with new concepts introduced in the ELD.**

The ELD introduces new concepts related to environmental damage that are often difficult for risk managers to understand. For example:

- **The definition of environmental damage must be re-examined.** Under the ELD, environmental damage is not limited to pollution. For example, if a fire harms a protected species or habitat, it is considered environmental damage.
- **It is hard to know if the “significance threshold” has been met.** This determines whether an operator is liable under the ELD.

“The theory behind the ELD is that if operators know they will be held liable for environmental damage, then they will more likely to take measures to prevent it from occurring.”

—VALERIE FOGLEMAN

- **Operators must know how to define a “baseline.”** Baseline information is essential for remediation. Operators must decide how much monitoring is required for natural habitats near their facilities.
- **Calculation of compensatory and complementary damages is complicated.** Risk managers often find these calculations challenging to compute.

**The ELD also creates legal and insurance-related uncertainties that are challenging to navigate.**

The ELD has generated questions in the legal and insurance arenas. Mr. Sonigo identified eight issues that risk managers must consider:

1. **A shift from civil to administrative law.** The ELD represents a change from civil law to administrative law. This means that governmental authorities decide what actions must be taken in response to environmental threats and damage. The claim settlement process is unclear.
2. **There is huge variation in how member states have implemented and enforce the ELD.** Some countries have created new legislation, while some have taken existing legislation and changed it or added a new layer to it. In addition, some countries have adopted proportional liability, some have adopted joint and several liability, and others have embraced mandatory financial security.
3. **Exemption options are applied inconsistently.** Operators may be exempt from liability if they have a permit or use state-of-the-art technology. However, these exemptions are not applied uniformly from state to state.
4. **Government administrators and local authorities don't have significant experience yet with the ELD.** Across the EU, there are varying numbers of ELD cases from country to country. This suggests that the directive is not being enforced uniformly.
5. **From an insurance perspective, the definition of environmental damage is unclear.** Pollution, for example, isn't always an ELD infraction. In addition, ELD infractions aren't always pollution related.
6. **Several insurance policies may apply to ELD incidents.** An ELD incident may apply to the operator's property, liability (general and environmental liability), transport, or D&O policies.
7. **Insurance policy triggers and policy periods are often important.** Environmental damage can take years to get resolved. As a result, insurance policy periods may come into play.
8. **Some are advocating mandatory insurance schemes.** In response to the ELD, some believe that mandatory insurance schemes or a European Environmental Fund would be appropriate. However, the voluntary market appears to be working and ELD-related risks are too diverse to be covered by a single mandatory insurance scheme. An EU-wide fund would reduce incentives for desired behavior and would become a bureaucratic nightmare.

“The voluntary market is working for the ELD, so why move to a mandatory financial security scheme? Voluntary financial security must remain the rule.”

—PIERRE SONIGO

**Handling the ELD requires a combination of proactive risk assessment and prudent use of insurance products.**

Despite the uncertainties associated with the ELD, operators can't ignore this legislation. Every organization has its own appetite for risk. It is important for operators to identify environmental risks specific to them and then mitigate them through insurance policies and other means.

The panelists made the following recommendations:

- **Prioritize the organization's exposure to environmental risks.** It is a good practice to inventory all production sites, conduct environmental impact studies, and prioritize the risks facing the organization. Be sure to identify nearby **Natura 2000** zones.
- **Don't overlook cross-border risks.** Some operations span multiple member states. Organizations must be cognizant of these sites, as well as how the ELD has been implemented in the relevant countries.
- **Recognize the importance of stakeholder management.** Key constituents include shareholders, employees, regulators, neighbors, and society at large.
- **Pursue ISO 14001 certification.** This certification focuses on risk analysis and loss prevention measures.
- **Consider partnering with an insurer to transfer risk and protect stakeholders.** Policies can be crafted to address exposures for a wide range of countries, as well as to handle gaps in general/public liability policies.
- **Develop a comprehensive insurance program that offers flexible coverage.** Environmental insurance solutions often include coverage for costs related to clean-up, environmental damage, transportation loss, business interruption loss, contractors' operation loss, and bodily injury and property damage.

“Strong risk management creates a positive operating environment, but risk management resources aren't infinite. Balance is required to achieve success.”

—CHRISTOPHER ROBERTSON

## BIOGRAPHIES

**Valerie Fogleman**

*Consultant, Stevens & Bolton LLP and Professor, Cardiff University School of Law*

Valerie Fogleman received a Bachelor of Landscape Architecture and an MSc in Environmental Evaluation from Texas Tech University, a JD from Texas Tech Law School, and an LLM from the University of Illinois. Prior to returning to England in 1992, she was Natural Resources Law Fellow at the Lewis & Clark Law School in Portland, Oregon, a Fellow at the University of Illinois College of Law, and in private practice in Corpus Christi, Texas. Valerie's career since 1992 includes being a partner and Head of the Environment Group at Barlow Lyde & Gilbert and a Consultant at Lovells (now Hogan Lovells). She is currently a Consultant at Stevens & Bolton LLP. She is an Honorary Member of the Royal Institution for Chartered Surveyors, Vice Chair of the City of London Law Society Planning and Environment Committee, and a prior Council member of the United Kingdom Environmental Law Association. She is also a member of the Texas State Bar, the American Bar Association, and the Association of Insurance and Risk Managers. She is listed as a leading environmental lawyer in a number of publications. Valerie has written three books and over 200 articles on environmental and insurance law and is a well-known speaker at conferences on those topics.

**Christopher Robertson**

*Head of Environmental, Zurich*

Chris is the Head of Zurich's Environmental Liability Insurance practice in Europe where he is responsible for developing insurance solutions that meet the diverse needs of Zurich's corporate customer and middle market customer base. Chris has underwritten environmental liability risk for over a decade and helped to build Zurich in Canada to a leading environmental insurance carrier by growing their portfolio fourfold during his tenure. In addition to underwriting, establishing strategy, and developing underwriters, he has played a key role in building awareness of this emerging line of insurance through several articles and white papers and over 50 accredited broker training seminars in addition to speaking on numerous panels at industry conferences in Canada. He carries out his responsibilities with a passion for environmental risk management and finding solutions for his customers. In addition, he carries an honours B.Sc. in environmental science specialising in analytical chemistry, a Certificate in Risk Management alongside valuable industry experience from the environmental consulting field, chemical manufacturing industry, and various contracting services.

**Pierre Sonigo**

*Secretary General, FERMA*

Pierre Sonigo is currently FERMA (Federation of European Risk Management Associations) Secretary General particularly in charge of technical projects such as Solvency 2 and ELD.

He is a former VP of Environment and Risk Management for the Pechiney Group, a French multinational conglomerate involved in Aluminium and Packaging (Pechiney was acquired by Alcan in 2004).

He also held several positions in insurance (FM Global), brokerage (Marsh France) and risk management (Saint-Gobain and Pechiney).

He holds university degrees in engineering, economics, insurance, and risk management.

Pierre Sonigo received the "European Risk Manager of the Year" award, a "Lifetime Achievement Award in Risk Management" from *Strategic Risk* magazine, and the prestigious lifetime achievement award from the Institute of Risk Management (IRM) this year.

**Angelia Herrin (Moderator)**

*Editor for Research and Special Projects,*  
**Harvard Business Review**

Angelia Herrin is Editor for Research and Special Projects at *Harvard Business Review*. At *Harvard Business Review*, Herrin oversaw the re-launch of the management newsletter line and established the conference and virtual seminar division for *Harvard Business Review*. More recently, she created a new series to deliver customized programs and products to organizations and associations.

Prior to coming to *Harvard Business Review*, Herrin was the vice president for content at womenConnect.com, a website focused on women business owners and executives.

Herrin's journalism experience spans twenty years, primarily with Knight-Ridder newspapers and USA Today. At Knight-Ridder, she covered Congress, as well as the 1988 presidential elections. At USA Today, she worked as Washington editor, heading the 1996 election coverage. She won the John S. Knight Fellowship in Professional Journalism at Stanford University in 1989–90.

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