

If the polluter can't pay, should the creditors?

**A review of the interaction of the
environmental and insolvency law
regimes in England and Wales**

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Environmental Protection Regimes

- Contaminated Land Regime
 - Part IIA Environmental Protection Act 1990
- Environmental Permitting Regime
 - Environmental Permitting (England and Wales) Regulations 2016
- Water Pollution Regime
 - Water Resources Act 1991

Contaminated Land

- If Local Authority identifies contaminated land
 - serves remediation notice
 - requiring remediation within specified period
 - on each appropriate person
- Appropriate person
 - Class A: caused / knowingly permitted contamination
 - Class B: current owner / occupier
- Failure to comply
 - Criminal offence – liable to a fine
 - Local Authority can carry out work and recover costs, including a Charging Notice

Environmental Permitting

- An operator of a regulated facility requires an environmental permit (unless exempt)
- Contravention of permit terms:
 - Enforcement Notice – remedy contravention
 - Suspension Notice (whole or part of permit)
 - Revocation Notice (whole or part of permit)
- Offences – punishable by fine / imprisonment:
 - Operate / knowingly permit operation without a permit
 - Failure to comply with or contravene permit conditions
 - Failure to comply with or contravene notices
- Corporate officers can be liable

- If any poisonous, noxious, polluting or waste matter is, has been or is likely to be present in controlled waters, the Environment Agency can:
 - serve a works notice
 - requiring remediation or prevention of pollution
 - on any responsible person
- Responsible person
 - Any person who caused or knowingly permitted:
 - Polluting matter to be present or likely to enter water
 - Harm or source of potential harm to exist
- Failure to comply
 - Criminal offence – liable to a fine / imprisonment
 - Environment Agency can carry out work and recover costs
 - Can extend to corporate officers / third parties

The impact of insolvency

Compliance with Remediation Orders

- Contaminated land
 - IPs expressly excluded from liability for:
 - remediation of contaminated land; and
 - compliance with remediation orders, provided not a result of their actions in office
- Any link to acts or omissions in office?
- Costs will rank as an unsecured claim
 - Re Nortel GmbH (in administration); Re Lehman Brothers International Europe (in administration) (Nos 1 and 2) [2013] UKSC 52
- Ability to disclaim onerous property in liquidation

Costs of remediation

- Remediation undertaken by relevant authority
 - In an emergency
 - Inaction of relevant person
 - Inability to identify relevant person
- No preferential status - costs would rank as an unsecured claim in insolvency
 - see e.g. Lawrence Recycling and Waste Management Limited (in Liquidation)
- Charging notice to secure costs
 - Possible challenge under anti-avoidance measures

Compliance with permits

- IPs required to comply with terms of Environmental Permits and any notices
- Disclaimer of Permits or associated land
 - Onerous property per s.178 IA 1986
- Waste Management Licences
 - From July 2001 requirement for funds to cover closure and clean up for 30 years for landfill sites
 - Importance of drafting provisions

Disclaimer:

Possible Developments

- Conflict of laws
- A more restrictive approach?
- An expansive approach?

Alternative approaches: Influencing behaviour

- Liability of corporate officers
- Interaction with directors' duties
- The threat of disqualification and compensation orders
- Benefiting from the proceeds of crime

Thank you

Any questions?