

# England & Wales

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## 1 Environmental Policy and its Enforcement

### 1.1 What is the basis of environmental policy in England & Wales and which agencies/bodies administer and enforce environmental law?

Historically environmental policy in England and Wales has tended to be informal, reactive and often voluntary, based on a “command and control” approach. Consequently, legislation in this area has developed piecemeal. In the 1990s, this moved on to an integrated approach, typified by the introduction of the Environmental Protection Act 1990 (EPA 1990), the concept of sustainable development was embraced and new environmental policy instruments (NEPIs) emerged, e.g. the climate change levy (see question 1.2 below) offering greater flexibility to command and control regulation. The overall policy for England and Wales over the last decade or so has been very much shaped and influenced by EU legislative developments.

The Department of the Environment, Food and Rural Affairs (Defra) is the principal government department responsible for developing environmental policy and the drafting of statutory environmental law. The new Department of Energy and Climate Change deals with climate change policy.

The Environment Agency is mainly responsible for enforcement and administration of environmental law. For example, it is the designated regulator for Part A(1) installations permitted under the environmental permitting (EP) regime (see question 2.1 below); waste management (including producer responsibility initiatives) (see further question 3.1 below); special sites designated under the contaminated land regime contained in Part IIA of the EPA 1990 (see question 5.1 below); flood defence; and emissions trading (see question 9.1 below). Local authorities also have an important role to play: they are responsible for the regulation of Part A(2) and Part B activities under EP; the administration and enforcement of the contaminated land regime; the statutory nuisance provisions contained in Part III of the EPA 1990; and the hazardous substances regime contained in the Planning (Hazardous Substances) Act 1990.

The civil and criminal courts of England and Wales are also involved in the making and enforcement of environmental law. The civil courts handle tortious claims (see further question 4.1 below), and the criminal courts deal with the prosecution of polluters for environmental offences (also see question 4.1 below).

Other agencies, such as Natural England, the Health and Safety Executive and the Food Standards Agency have an important role to play in ensuring the protection of the environment, including human health.

### 1.2 What approach do such agencies/bodies take to the enforcement of environmental law?

The Environment Agency publishes its enforcement and prosecution policy, which sets out four key principles of enforcement, namely proportionality, consistency, transparency, and targeting. Prosecutions are an important part of the Agency’s enforcement policy and aim to punish wrongdoing, avoid recurrence and act as a deterrent to others. The Environment Agency is required to have regard to and take account of the provisions contained in the Regulators’ Compliance Code made under the Legislative and Regulatory Reform Act 2006, part of the government’s better regulation drive, when devising and implementing regulatory policies. The Code is designed to promote efficient and effective approaches to regulatory inspection and enforcement without imposing unnecessary burdens on business.

Following the passing of the Regulatory Enforcement and Sanctions Act 2008, the Local Better Regulation Office has been established to improve the way in which the local authorities deal with enforcement issues, and particularly to ensure more consistent and co-ordinated regulatory enforcement by them with a view to easing the regulatory burden on national businesses. The Act also provides for the introduction of a new and expanded framework for regulatory sanctions, by enabling Ministers to confer new administrative sanctioning powers on regulators. These powers could include the imposition of fixed and variable monetary penalties, compliance notices, restoration notices, stop notices and enforcement undertakings. The Environment Agency and Natural England are set to become the first regulators to be given the new sentencing powers following the publication of draft secondary legislation. Public consultation on how the agencies would apply the new powers is required before they can be used; the Environment Agency has begun this process and hopes to be in a position to use its new powers later this year.

The Magistrates’ Association has published sentencing guidelines for environmental and health and safety offences. The guidelines encourage Magistrates to consider the means of companies and the seriousness of offences when they set financial penalties.

Environmental regulation is supplemented by other regulatory controls to a greater or lesser extent depending on the area of law being considered. In the context of energy regulation, the existence of mechanisms such as the climate change levy (essentially a tax on the use of energy from fossil fuel sources by industry and the public sector) and the renewables obligation (a non-statutory target that by 2010, 10% of the UK’s electricity sales should come from renewable energy sources) seek to influence more sustainable energy use and reduce emissions of greenhouse gases.

### 1.3 To what extent are public authorities required to provide environment-related information to interested persons (including members of the public)?

An access to environmental information regime has been in place in England and Wales since 1992. This regime is now founded upon the Environmental Information Regulations 2004 (the EIRs), which came into force on 1 January 2005 at the same time as the Freedom of Information Act 2000 (the FOIA). Environmental information is effectively excluded from the ambit of the access to information regime established by the FOIA, which provides that requests for such information are dealt with under the EIRs.

The EIRs implement EC Directive 2003/4/EC on public access to environmental information, and are also aimed at enabling the UK to fulfil its obligations under the Aarhus Convention (the UNECE Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters). As such, the EIRs have a different legislative background and focus to the FOIA and, on the whole, they provide for wider disclosure than is available under the FOIA.

The EIRs require relevant public authorities to do the following (among other things):

- proactively disseminate any environmental information held by the public authority;
- make environmental information held by or on behalf of the public authority available to anyone (meaning any person or any organisation from anywhere in the world) on request – in most cases within 20 working days (and only to refuse such requests in limited circumstances, for example where exceptions to the duty to disclose apply and non-disclosure is in the public interest); and
- organise any environmental information held by the public authority so as to enable it to perform the first two duties mentioned above.

The definition of what constitutes ‘environmental information’ in the EIRs is widely cast, and covers not only information on environmental elements and substances, but also information on measures and activities likely to affect them. This can include any information (in written, visual, aural, electronic or any other material form) on, among other things, the state of the environment and factors that impact upon it, reports on the implementation of environmental legislation, and cost-benefit and other economic analyses used in environmental decision-making.

The definition of a ‘public authority’ for the purposes of the EIRs is also very broad. Any public authority subject to the FOIA will also be subject to the EIRs, as will any body or person under the control of another relevant public authority and which (among other things) exercises functions of a public nature or provides public services in relation to the environment. Guidance issued by the Government indicates that ‘control’ in this context could include a relationship constituted by legislation, rights, licence or contract. Also, a public authority under the EIRs includes any other body or person “that carries out functions of public administration” (regardless of whether these functions relate to the environment). Accordingly, private companies or public private partnerships with environmental functions, such as public utilities involved in the supply of public services, have been argued to be caught by the EIRs in certain circumstances.

## 2 Environmental Permits

### 2.1 When is an environmental permit required, and may environmental permits be transferred from one person to another?

In England and Wales, environmental permits are required for a wide range of business and commercial activities, with emissions from domestic premises in the main exempt. Permits are generally granted either by the Environment Agency or the relevant local authority for the area in question.

Council Directive 96/61/EC on integrated pollution prevention and control (IPPC) required Member States to introduce a regime to prevent or reduce pollution from a range of specified industrial activities, including activities covered by the Landfill Directive (Council Directive 99/457/EC). The regime is based on the principle of an integrated permitting process to prevent or, where that is not practicable, reduce emissions in order to achieve a high level of protection of the environment taken as a whole. The high level of protection is achieved by employing best available techniques, i.e. the most cost effective way, or ways, for the industry to prevent or minimise emissions. The IPPC Directive was implemented in England and Wales by the passing of the Pollution Prevention and Control Act 1999 and the Pollution Prevention and Control (England and Wales) Regulations 2000 (PPC Regulations).

The PPC Regulations set up three distinct regimes:

- Part A(1) installations, regarded as sites where potentially more polluting activities are carried out, with emissions to air, land and water from these installations being regulated by the Environment Agency;
- Part A(2) installations, which are sites where activities regarded as having a lesser potential to pollute are conducted but which are still considered to have impacts on all environmental media, with regulation being the responsibility of the local authority in whose area the installation is, or will be, situated; and
- Part B installations, which are sites with activities for which only emissions to air are regulated under IPPC, such installations being the responsibility of the local authority.

A waste management licence has, since the introduction of the 1990 Environmental Protection Act, been required for the keeping, treating or disposing of controlled waste on non-domestic premises, including by means of mobile plant, albeit the majority of landfilling activities were more recently covered by the requirements of the PPC regime. From the 6 April 2008, the Environmental Permitting (England and Wales) Regulations 2007 (the EP Regulations) introduced a single, streamlined regime (EP regime) for environmental permits by amalgamating the existing waste management licensing and the PPC regimes with the aim of reducing the administrative burden of regulation for operators. For existing operations, current permits automatically became environmental permits when the EP Regulations came into force. From 6 April 2008, new facilities have required an environmental permit before operations can commence.

Following further consultations, Defra is set to launch the second phase of the EP regime from April 2010. This will cover discharges to controlled waters (defined in the Water Resources Act 1991 to include almost all inland and coastal waters and all territorial waters out to a prescribed distance), groundwater authorisations, and radioactive substances regulation.

Operators of installations subject to the EU Emissions Trading Directive, implemented in England and Wales by the Greenhouse Gas Emissions Trading Scheme Regulations 2005, have been required to hold a greenhouse gas emissions permit in order to make carbon

dioxide emissions since the start of the first phase of the EU emissions trading scheme on 1 January 2005 (also see question 9.1 below).

Discharges of trade effluent to public sewers are controlled by the grant of a trade effluent consent, granted by the relevant sewerage undertaker for the area in which the discharge takes place. The presence of a hazardous substance on land may also require a hazardous substances consent under the Planning (Hazardous Substances) Act 1990. The system is operated by hazardous substances authorities, which are mostly the London boroughs and district councils.

In all the above cases the competent authority granting the licence has the discretion to attach such conditions as it thinks necessary and appropriate to ensure that no harm to human health or the environment occurs beyond accepted limits.

It is generally a legal requirement that the operator of the installation that is making the emission or discharge or undertaking the prescribed activity hold the permit authorising this. The definition of the term “operator” varies between the different environmental permitting regimes but is usually the person (natural or legal) who is in control of the installation. Environmental permits can usually be transferred from one person to another provided the requirements of the particular legislation governing the grant of the permit are met. By way of example, the provisions relating to transfer of an environmental permit granted under the EP Regulations require the current operator and the proposed recipient of the permit to make a joint application to the regulator containing certain specified details; the regulator is required to effect the transfer unless it considers that the proposed recipient will not have control over the installation after the transfer is effected, or it will not ensure compliance with the conditions of the transferred permit.

## **2.2 What rights are there to appeal against the decision of an environmental regulator not to grant an environmental permit or in respect of the conditions contained in an environmental permit?**

All of the above permitting regimes include provisions for appeal in certain circumstances. In general, the right of appeal is to the Secretary of State for the Environment, Food and Rural Affairs.

Appeals can be conducted by way of written representations or by holding a hearing, and interested third parties have rights to be involved in such appeals, including rights to address the inspector at any public hearing. The Secretary of State may affirm or quash the regulator’s decision, quash all or any of the conditions imposed in the permit by the regulator, or direct the granting or variation of a permit where one has been refused subject to such conditions as he/she feels fit. The time limit for appeals varies depending on the nature of the permit.

## **2.3 Is it necessary to conduct environmental audits or environmental impact assessments for particularly polluting industries or other installations/projects?**

Various measures are incorporated within the EP regime to prevent pollution during design and operation of the installation and, subsequently, upon decommissioning, to ensure that the site was returned to a satisfactory state and posed no pollution risks.

In submitting an application for an EP permit to operate a Part A activity, the operator is required to submit a site report identifying the condition of the site prior to the commencement of the regulated activity. Ongoing monitoring and reporting requirements are aimed at identifying significant pollution occurring during operation of the installation and ensuring that it is attended to immediately either by

voluntary action by the operator or through the undertaking of an enforcement action by the regulator.

Where the operator plans to leave or close the site, the EP Regulations require the operator to provide evidence, i.e. a site report, to the regulator on the condition of the site and giving details of any contamination discovered. The regulator will only accept the surrender of the environmental permit when the site is put in a condition where it represents no pollution risk and is in a satisfactory state.

The Environmental Impact Assessment (EIA) Directive (Directive EC/85/337 as amended by Directive EC/97/11) requires an environmental assessment to be made on the effect of certain public and private projects, including e.g. construction of integrated chemical installations and other chemical plants, paper and board plants, plants manufacturing certain foodstuffs and certain infrastructure projects. Projects are defined according to whether they require an environmental statement to be provided in all cases (Schedule 1 development) or only where the development proposed is likely to have a significant effect on the environment (Schedule 2 development). The secondary legislation which implements the EIA Directive in England and Wales requires Schedule 2 projects to be subject to a formal screening process in order to determine whether they will have a significant effect before an application for planning permission is granted. The grant of planning permission is prevented where a development requires an environmental assessment until consideration of the relevant environmental information.

The implementation of the Environmental Liability Directive (Directive 2004/35/EC) into English law pursuant to the Environmental Damage (Prevention and Remediation) Regulations 2009 (Environmental Damage Regulations), which took effect from 1 March 2009, may also have caused some operators to undertake assessments of baseline condition in order to avoid liability for historic pollution arising. The Environmental Liability Directive establishes a framework of environmental liability requiring the prevention and, where that fails, remediation of various categories of environmental damage. It has no retrospective effect, and accordingly does not apply to damage caused by an emission, event or incident that took place before 30 April 2007. The UK regulations, however, confer no retrospective effect before 1 March 2009, an anomaly caused by the late implementation of the Directive. In the absence of a baseline condition report there may be evidential difficulties in proving that particular damage was caused by an emission, event or incident predating this date.

## **2.4 What enforcement powers do environmental regulators have in connection with the violation of permits?**

In general, legislation requiring the grant of a permit or authorisation for the carrying on of an activity or a discharge to the environment makes it a criminal offence to carry on the activity, or make the discharge, other than pursuant to a permit and in accordance with any conditions that may be attached to it. These are typically strict liability offences with no requirement to prove intention or negligence in the commission of the offence.

In addition to their powers of prosecution, regulators also have the power to issue notices to vary the terms and conditions of any permit granted or, in very serious cases of non-compliance, to revoke or suspend the operation of a permit.

The Regulatory Enforcement and Sanctions Act 2008 (see question 1.2 above), provides for the possibility of the introduction of a wide range of administrative penalties, as an alternative to criminal prosecution.

Civil liability may also flow from a failure to hold a permit or to

comply with a condition attached to it. For example, where a breach of a waste management licence occurs and a third party suffers damage as a result, that person is entitled to claim for the damage, subject to certain exceptions.

### 3 Waste

#### 3.1 How is waste defined and do certain categories of waste involve additional duties or controls?

The definition of “waste” that currently applies in England and Wales is set out in the Waste Framework Directive. This is essentially any substance or object falling within certain categories listed in the EU Waste List that the producer, or any other person in possession of it, discards or intends or is required to discard. The last category in the list consists of “any materials, substances or products which are not contained in the above categories” and this “catch-all” category means that any material, substance or product that the holder discards or intends or is required to discard is waste for the purposes of English law. The definition will change marginally when the UK comes to implement the new Waste Framework Directive (Directive 2008/98/EC), in that reference to the EU waste list will be dropped. Implementation of the new Directive is required by 12 December 2010; Defra have already carried out the first of two consultations on how it plans to implement the new Directive.

So-called “hazardous waste” is defined in the Hazardous Waste Directive (Directive 91/689/EEC) and requires additional duties and controls. The new Waste Framework Directive sweeps up these provisions, subject to some changes, and repeals the Hazardous Waste Directive from 12 December 2010.

Additional controls also apply in the context of transboundary shipment of waste, and radioactive waste is subject to different legislative requirements than waste generally.

(See also question 3.4 below.)

#### 3.2 To what extent is a producer of waste allowed to store and/or dispose of it on the site where it was produced?

Part II of the EPA 1990 introduces the concept of the waste “duty of care”, which requires producers of waste to ensure (among other things) that waste is managed so as to avoid its escape. If the intention is to undertake some treatment activity on the premises or to take in third parties’ waste for storage pending consignment for end disposal, then this requires an environmental permit under the EP Regulations.

Activities involving the actual disposal of waste always require a permit under the EP Regulations. Planning permission will also be required for such activities. Applications for disposal of waste under both the planning and environmental permitting systems require the disposer to demonstrate that operation of the disposal site poses no harm to human health or the environment, and that the person is qualified to operate the site and can offer appropriate financial guarantees relating to adoption of appropriate environmental control measures both during and following closure of the site.

#### 3.3 Do producers of waste retain any residual liability in respect of the waste where they have transferred it to another person for disposal/treatment off-site (e.g. if the transferee/ultimate disposer goes bankrupt/disappears)?

As mentioned above, in English law all waste is subject to a statutory waste duty of care, which is a cradle to grave responsibility. The waste duty of care requires the person subject to the duty to take reasonable steps to prevent any other person committing a waste

management offence; to prevent the escape of waste from his control or that of any other person; to ensure that upon the transfer of waste such transfer is only to an authorised person or to a person for authorised transport purposes, and when waste is transferred to ensure that there is also transferred a written description of the waste sufficient to enable each person receiving it to avoid committing a waste offence; and to comply with the duty of care. It has been common practice for sometime for the Environment Agency to insist that operators provide a financial guarantee or bond, in order to ensure that funds are available to undertake any clean up works required during the operation of a landfill site or following its closure and these provisions are carried over to the EP regime.

In order to effectively pass on the burden of obligations with respect to the safe handling and disposal of waste after it leaves this site, the waste producer must ensure that the person receiving his waste (e.g. as a registered waste carrier) knowingly assumes responsibility for it under a contract with the waste producer.

#### 3.4 To what extent do waste producers have obligations regarding the take-back and recovery of their waste?

As a separate category, packaging waste is subject to producer responsibility obligations for its re-use, recovery and recycling. Companies with a turnover of over £2 million handling over 50 tonnes of packaging annually are required to recover and recycle a proportion of their packaging waste. Packaging includes cardboard, glass, plastics and metals together with wood and other packaging products. In practice, most obligated companies discharge these requirements by joining registered compliance schemes, although those choosing to follow the individual route will usually make arrangements to take back their waste.

Other categories of waste that are subject to take-back and recovery obligations include:

- waste electrical and electronic equipment (WEEE). EU Directive 2002/96/EC makes producers of WEEE responsible for financing the collection, treatment, and recovery of it, and obligates distributors to allow consumers to return their waste equipment free of charge through setting up collection systems. The Directive was implemented in the UK in the WEEE Regulations 2006;
- end of life vehicles (ELV). The ELV Directive (2000/53/EC) aims to prevent waste from ELVs and promote the collection, re-use and recycling of their components to protect the environment. The ELV Directive requires Member States to ensure that ELVs are only scrapped (“treated”) by authorised dismantlers or shredders, who must comply with specified environmental standards. Most of the requirements of the ELV Directive were implemented in England and Wales by the passing of the ELV Regulations 2003, and the producer responsibility requirements were implemented by the ELV (Producer Responsibility) Regulations 2005; and
- batteries. The Batteries Directive (Directive 2006/66/EC) includes producer responsibility provisions regarding the setting up of battery collection and take back systems to be paid for by producers and importers of batteries. These provisions were implemented in the UK by the passing of the Waste Batteries and Accumulators Regulations 2009.

### 4 Liabilities

#### 4.1 What types of liabilities can arise where there is a breach of environmental laws and/or permits, and what defences are typically available?

Breach of environmental law can give rise to both criminal and civil

liabilities. Criminal offences arise as a result of polluting an environmental medium which is the subject of protection without holding an environmental permit in relation to the activity undertaken or the discharge or emissions made, or failing to comply with notices that the regulator has served in respect of the activity or pollution. The available defences depend upon the particular environmental legislation regulating the conduct of potential polluters. See also questions 1.2 and 2.4 above on the effect of the Regulatory Enforcement and Sanctions Act 2008.

Civil liability may also arise for breach of tort law. The tort of particular relevance to environmental protection is that of nuisance, which gives rise to remedies of damages and/or an injunction where pollution results in an unlawful interference with a third party's right of ownership or enjoyment of land.

The rule in the case of *Rylands v Fletcher* establishes the principle of strict liability for damage caused by a dangerous accumulation of a substance escaping from land, provided the damage is foreseeable.

The tort of negligence may also be relevant. To succeed, a claimant must show that the defendant owes a duty of care to him, that there has been a breach of that duty and the damage of which he complains is a foreseeable consequence of the breach. Unlike nuisance, the claimant does not need to establish an interest in land in order to succeed. Difficulties in establishing duties of care may exist where environmental harm results, and it is common for negligence to be pleaded as an alternative to nuisance.

The tort of trespass has also been pleaded in environmental cases, but to succeed the claimant must show that the defendant's unlawful act has caused a direct physical interference with the land. Proving direct interference has proved difficult as, for example, pollution caused by the discharge of polluting materials discharged into water and carried by the current before reaching the claimant's property has been held not to amount to a direct interference.

Officers and employees as well as the undertaking concerned can in certain circumstances incur personal civil liability if responsible for the event that gives rise to damage (see also question 4.3).

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#### **4.2 Can an operator be liable for environmental damage notwithstanding that the polluting activity is operated within permit limits?**

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An operator can be liable for environmental damage caused to a third party, notwithstanding that the polluting activity is operated within permit limits.

Furthermore, it is possible under the EP regime for operators to be found liable for any environmental harm caused, notwithstanding compliance with a permit. Some form of failure to properly manage staff and/or manage or maintain equipment usually forms the basis of such alleged breaches. These provisions are carried over from predecessor regimes.

In the context of the Environmental Liability Directive, a permit defence is specifically provided for and Defra adopted the defence in the Environmental Damage Regulations (see question 2.3 above). The availability of the defence means that operators will not be liable to bear the costs of any remedial action that may be required provided they are not at fault or negligent, but only insofar as additional liability arises under the Directive beyond that currently provided for in national legislation. The principal additional liability requirements are, according to Defra, those relating to complementary and compensatory remediation (see question 5.1 below).

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#### **4.3 Can directors and officers of corporations attract personal liabilities for environmental wrongdoing, and to what extent may they get insurance or rely on other indemnity protection in respect of such liabilities?**

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Personal liability for directors and officers of companies can be imposed for breaches of environmental law if, as a result of their own acts or omissions, they can be said to have created the circumstances giving rise to the commissioning of the offence.

Personal liability can also be imposed for breaches of environmental law where the offence committed by a company is proved to have been attributable to the consent or connivance of any director or officer or other person acting in a similar capacity, or is attributable to any act or neglect on the part of any such person. In such cases both the company and the director may be guilty of an offence.

Subject to the provisions of sections 232 to 234 of the Companies Act 2006 companies can purchase insurance to protect their directors and officers from personal liability for environmental wrongdoing or provide indemnities directly to them; however, as a matter of public policy, it would not be possible to obtain insurance to indemnify a director or officer for criminal fines or penalties imposed on him/her, and the courts might not enforce an indemnity by a company for these matters.

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#### **4.4 What are the different implications from an environmental liability perspective of a share sale on the one hand and an asset purchase on the other?**

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The fundamental distinction is that when one buys the shares of a company, one effectively inherits all environmental liabilities associated with the corporate entity concerned, whether relating to the business/sites that the company currently operates, or those it has historically operated; whereas in an asset purchase the purchaser does not automatically take on liability for any current and ongoing failure of another entity to comply with environmental law. A key risk for the purchaser in an asset purchase is that if the purchaser is aware of a breach of environmental law and/or an environmental condition in relation to the asset acquired and has the ability to prevent the breach continuing or otherwise to remedy the environmental condition, then the person concerned might be said to be a knowing permitter, if not a causer of an ongoing environmental problem that can result in liability. In certain circumstances the purchaser could also become liable merely as a result of being an owner or in occupation.

In the case of a share sale, the seller should (in the absence of any agreement to the contrary) escape any liability that subsequently crystallises in terms of action pursued by the regulator against the company that is sold.

The availability of a wide range of contractual and other mechanisms for transferring and otherwise allocating environmental risk means that in many practical respects the differences between a share and asset purchase are minimal.

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#### **4.5 To what extent may lenders be liable for environmental wrongdoing and/or remediation costs?**

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Lenders under, for example, a mortgage deed are unlikely to pick up liabilities for environmental wrongdoing, in the absence of any real ability to control the application of the monies lent to the borrower to prevent pollution occurring. If, however, a lender enforces its security by taking possession of a property then it may, potentially, become liable for undertaking or paying for remediation of contamination of the property. It is conceivable, for example, that a lender could incur liability as a Class A person under the provisions of Part IIA of the EPA 1990 if it can be said to have caused or

knowingly permitted the presence of contamination on the property. Also, in the absence of the regulator being able to establish an appropriate Class A person, a lender in possession could be liable as a Class B person on the basis that it is then the owner of the site.

Aside from what can be described as a direct risk of liability, lenders may also face risks to reputation as a consequence of lending on what are perceived to be environmentally sensitive infrastructure projects and to companies undertaking controversial activities. As a consequence, many leading UK banks have signed up to the Equator Principles, a set of voluntary guidelines for financial institutions based on the safeguard policies and guidelines of the World Bank and the IFC (the private-sector investment arm of the World Bank). The Equator Principles are specifically designed to promote responsible environmental and social practices in project financing and apply to all industry sectors and to all loans for projects with a capital cost of US\$10 million or more.

## 5 Contaminated Land

### 5.1 What is the approach to liability for contamination (including historic contamination) of soil or groundwater?

The approach of the regulator to liability for historic contamination depends very much upon the circumstances that apply.

Where it is proposed to redevelop a contaminated site, the usual approach is for the planning permission to be subject to conditions requiring investigation and clean up of the site to a standard where it becomes fit for its intended purpose. Usually the developer will pay for the cost of remediation, which will normally be factored into the costs of the project and recoupable as a consequence of the sale or lease of the resulting development.

Where it is not intended to redevelop historically contaminated land in the short-term, whether remedial action is required depends on the level of contamination. Part IIA of the EPA 1990 sets out a statutory regime for dealing with the most seriously contaminated land, including land contaminated by radioactivity from nuclear licensed sites. The regime also covers the situation where land contamination is causing pollution of controlled waters. Under the regime local authorities are required to consider whether any land in their areas should be classified as contaminated land (which involves considering source-pathway-target relationships and risk assessment). There is no general requirement on an owner or occupier to notify the local authority of the existence of contamination (except in circumstances where development requiring planning permission is to be undertaken). If a finding is made that land satisfies the definition of contaminated land, then a statutory requirement arises on the part of the local authority as regulator (or the Environment Agency, in the case of certain so-called "special sites") to consider whether there is a need for remediation, and exactly what form that remediation should take.

The regime is based on a "suitable for use" approach, and cost and reasonableness considerations are relevant in determining the extent of remediation. Liability to undertake or, in the event that it is not done voluntarily, pay for remediation lies with the appropriate person, namely the person who caused or knowingly permitted the presence of the substance that caused the contamination, or, where such a person cannot be found, the owner or occupier for the time being.

The regime is complex and includes detailed provisions on exclusion from liability and allocation of liability on various grounds between groups of polluters (see below), as well as the apportionment of the costs of remediation between such persons.

Liability for historic contamination of soil or groundwater may also give rise to the ability of a third party to bring proceedings in order

to claim remedies where pollution has migrated onto its land. This is a civil liability that arises under the law of torts, and that most commonly pleaded is the tort of nuisance. The remedies include the grant of a prohibitory injunction and/or damages for the harm caused. Ultimately, clean up may be required to avoid further claims arising, or for breach of any injunction ordered by the court.

Implementation of the Environmental Liability Directive will also have an impact on how new instances of contamination are managed. The Environmental Damage Regulations require operators not only to take preventative action to avoid environmental damage occurring in the first place, but also to own up to regulators to having caused environmental damage should it occur. Three categories of environmental damage are covered, namely:

- damage which has significant adverse effects on reaching or maintaining favourable conservation status of species and natural habitats protected under EC legislation or the integrity of a site of special scientific interest (SSSI) (biodiversity damage);
- damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential of waters covered by the Water Framework Directive (Directive 2000/60/EC) (water damage); and
- land contamination which creates a significant risk of human health being adversely affected.

For occupational activities listed in Schedule 2 of the Regulations, comprising a wide range of activities regulated by EC legislation which are potentially damaging to the environment (for example the IPPC Directive), liability for all three categories of environmental damage is covered and strict liability applies. Operators of other occupational activities may be liable for biodiversity damage, but only if they are at fault or have been negligent.

Where biodiversity or water damage occurs, it is required to be remedied by returning the environment to its baseline condition; in the case of damage to land the risk to human health must be removed. If the harm to biodiversity or protected waters cannot be reversed, then 'complementary remediation' by improvement of a similar resource or service may be required to be undertaken to the extent the original resource cannot be fully restored. 'Compensatory remediation' may also be required to compensate society for the loss of the use or enjoyment of the resource or service. Both of these are new concepts for English Law. The Environmental Liability Directive is expected to be implemented in Wales during the course of this year.

### 5.2 How is liability allocated where more than one person is responsible for the contamination?

Statutory guidance under the Part IIA EPA 1990 contaminated land regime sets out the rules that apply where more than one person is deemed to be responsible for contamination. The rules differ depending upon whether the liability group comprises so-called Class A persons, that is persons who have caused or knowingly permitted the presence of the pollutants, or Class B persons, being owners and/or occupiers for the time being where no Class A persons have been found after reasonable enquiry.

The exclusion tests and subsequent apportionment tests are designed to ensure that it is fair for members of the liability group to bear responsibility for remediation. In relation to Class A groups, the regulator is required to first consider whether any of the tests for exclusion from liability apply. There are six tests in total, and judgments in relation to whether or not the tests apply are taken on a balance of probabilities, after considering the relevant information that has been obtained. The exclusion tests must be applied in the sequence in which they are set out. They must not be applied to exclude every member of the liability group. This means

essentially that the person responsible for bearing the cost of remediation may well therefore be the last one or ones left.

Having applied the exclusion tests, the regulator is then required to apportion liability between members of the Class A liability group so as to reflect the relative responsibility of each of those members for creating or continuing the risk now being caused. If no information is available to make an assessment of relative responsibility, the statutory guidance advises regulators to apportion liability in equal shares.

In relation to Class B liability groups, the only exclusion test applicable is to exclude those who do not have an interest in the capital value of land. Again the test is not to be applied if it would result in the exclusion of all the members of the liability group.

In terms of apportionment between members of a Class B liability group, the guidance indicates that where remediation is referable to a particular area of land, liability should be apportioned to members who own or occupy that particular area of land. Otherwise apportionment should be made on the basis of the capital value of the land in question.

A recent determination of an appeal against the service of a remediation notice illustrates how this complex regime works in practice. This involved Redland Minerals Limited (Redland) and Crest Nicholson Residential plc (Crest), who were both found to be Class A appropriate persons and liable to remediate contaminated land at a former chemical works at Sandridge, Hertfordshire. Redland had formerly owned the site and Crest had developed it for housing. Chemicals from the site were found to have seeped into the underlying chalk aquifer, leading to closure of a number of water abstraction boreholes and threatening the potable water supply. Both Redland and Crest were found to have caused the contamination to be on, in and under the Site; whilst Crest had not brought the chemicals onto the site, the Secretary of State found that as a result of its action and inaction during its ownership in the way it dealt with the site it too had caused the contamination. The Secretary of State particularly pointed to the fact that Crest had demolished hardstandings, leaving contaminated soil exposed to rainfall leaching for some two years before the new houses were built, despite it being aware of the presence of contamination on the site. This had caused contaminants that would otherwise have been removed to remain and to leach deeper and faster into the ground.

In terms of apportionment, the Secretary of State apportioned liability between Redland and Crest as 85:15 for one contaminant and 45:55 for another. In the case of the second contaminant, Redland had provided a limited amount of information on its presence but not sufficient to enable Crest to have been aware of the presence of it in the aquifer. Liability on the basis of the “sold with information” test was therefore only partly reduced. No information had been provided on contamination of the site by the first contaminant.

In terms of civil liability for contaminated land, liability is joint and several. Accordingly, if one of the torts of nuisance, negligence, trespass or breach of statutory duty is made out, then if breaches by different persons caused the claimant to suffer loss, injury or damage he is entitled to sue all or any of them for the full amount of his loss. This is particularly pertinent in the case of the tort of nuisance, as subsequent owners or occupiers can be said to adopt a continuing nuisance caused by predecessor in certain circumstances. Until 1978, the general rule of common law was that one concurrent tortfeasor, even if he had satisfied the claimant’s judgment in full, could not recover an indemnity or a contribution towards his liability from any other tortfeasor that was liable; however, the passing of the Civil Liability (Contribution) Act in 1978 changed this general rule, enabling a tortfeasor to claim contribution from other tortfeasors responsible for the same loss or damage. In the example given above, in addition to the costs of the

works required in the remediation notice, Redland and Crest may also face a civil law claim for the clean-up costs incurred by the local water companies, which had to close some of their water abstraction boreholes and undertake additional monitoring and remediation as a result of the contamination.

In the context of implementation of the Environmental Liability Directive, Defra has opted for the following approach in the Environmental Damage Regulations where multi party causation arises. Where more than one activity contributes to an incident, the operator of any of the activities can be required to remediate and where environmental damage is caused by the actions of a small number of identifiable operators, the regulator may notify more than one operator and serve a remediation notice on each one. In the latter case, guidance accompanying the implementing regulations indicates that operators should endeavour to agree between themselves the shares in which they should bear the costs of the measures to be carried out. If remedial action is not carried out, the authority may carry out necessary work and reclaim the costs against any or all of the operators concerned – with operators able to claim contribution from any other operator who is also responsible for the damage (see further question 5.4).

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### **5.3 If a programme of environmental remediation is ‘agreed’ with an environmental regulator can the regulator come back and require additional works or can a third party challenge the agreement?**

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The nature of contaminated land is such that it is not always possible to determine at the outset of a remediation programme exactly what will be required to be done to remediate it. Consequently, and subject to procedural safeguards such as the concept of the regulator acting reasonably and the requirement for appropriate and proportionate regulation, a regulator can require additional works to be carried out even though a programme of environmental remediation has been “agreed”, such as when the regulator becomes dissatisfied with the progress of the remediation works or considers that the works will not achieve the remediation objectives which had been agreed.

In terms of third party challenges it is conceivable that where an agreement is reached between a party and a regulator with regard to remediation works to be carried out on the party’s land, a third party could challenge the agreement by way of judicial review in the Administrative Court on the basis of the agreement representing a decision by the regulator. However, in order to successfully challenge the agreement, the third party would be required to show grounds for bringing judicial review, by demonstrating that the decision-maker reached its decision on the basis of illegality, irrationality or procedural impropriety.

Third parties may complain to the Local Government Ombudsman if they feel that a local authority’s behaviour has resulted in injustice as a result of maladministration. The Ombudsman will investigate the complaint and make findings including rulings for compensation in the event that the complaint is upheld. The Parliamentary Ombudsman investigates complaints concerning such issues where the Environment Agency is involved.

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### **5.4 Does a person have a private right of action to seek contribution from a previous owner or occupier of contaminated land when that owner caused, in whole or in part, contamination; and to what extent is it possible for a polluter to transfer the risk of contaminated land liability to a purchaser?**

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Whilst it is a general principle of environmental law that the polluter should pay for any pollution he causes, this conflicts with

the general rule in relation to property transactions of “*caveat emptor*” or buyer beware. Accordingly, a potential buyer or tenant must satisfy itself as to the state and condition of the property to be acquired or leased, subject however to the seller or landlord’s obligation to disclose matters about which the other party expressly seeks information (other than where the seller makes no representation other than to insist upon the buyer relying on its own inspections). Private rights of action may arise where there has been a failure to make such disclosure or as a result of a breach of contract for misdescription, misrepresentation or fraudulent concealment. Representing that a property is free from contamination when it is, in fact, heavily contaminated may give rise to a remedy. Misrepresentation requires there to be a misrepresentation of a material fact in relation to the property, which may arise for example where answers to preliminary inquiries are false or misleading, and gives rise to a right of action for damages and/or rescission of the contract depending on the nature of the misrepresentation. Similar remedies apply in relation to fraudulent concealment, which involves the seller actively concealing some defect in the property.

Liability in environmental law for contamination is typically predicated on the basis of “causing” or “knowingly permitting”, and subsequent owners or occupiers may be liable for contamination which pre-dates their ownership or occupation of a site, where they have both the knowledge of the presence of the substance causing pollution and the power to prevent the substance being there or escaping from their site. As a consequence, a private right of action to recover against the original polluter may also arise where the subsequent owner or occupier has been found joint and severally liable at common law for contamination. The Civil Liability (Contribution) Act 1978 allows any person liable in respect of any damage suffered by another to recover a contribution from any other person liable in respect of the same damage (whether jointly or otherwise). A person is liable under the provisions of the Act whether the basis of his liability is in tort, breach of contract, breach of trust or otherwise. The amount of contribution that can be ordered is such as may be found by the court to be just and equitable having regard to the extent of the person’s responsibility for the damage in question. The court’s powers are however subject to the overriding principle that one defendant cannot be found liable to pay a greater sum than can be recovered from him by the claimant.

The statutory guidance under Part IIA EPA 1990 also provides mechanisms whereby a seller of land can effectively transfer the liability risks associated with contamination to a purchaser, for example where a seller has provided knowledge of contamination to a purchaser and it is reasonable that the purchaser (who is a member of the same Class A liability group) should bear liability for its remediation.

### 5.5 Does the government have authority to obtain from a polluter monetary damages for aesthetic harms to public assets, e.g., rivers?

The power to obtain monetary damages for aesthetic harm to public assets is limited. Under the Environmental Damage Regulations aesthetic harm to public assets could, for example, be covered by the definition of biodiversity damage (see question 5.1 above) provided the other triggers specified apply e.g. the site affected is a SSSI. Where biodiversity damage is caused, public authorities are, from 1 March 2009, able to claim damages for aesthetic harms, in the sense of requiring the operator to remediate the harm caused by returning the habitat to its baseline condition or, where this is not possible, to provide complementary or compensatory remediation, see question 5.1 above.

## 6 Powers of Regulators

### 6.1 What powers do environmental regulators have to require production of documents, take samples, conduct site inspections, interview employees, etc.?

Environmental regulators have wide powers to obtain information to enable them to discharge their functions. The nature of these powers depends on the circumstances. For example, under paragraph 4 of Schedule 5 of the EP Regulations applicants for an environmental permit must provide such further information as is reasonably required by the regulator in order to determine the application. Regulation 60(2) also provides that the relevant regulatory authority may by written notice require any person to furnish the authority with such information as the authority reasonably considers it needs to discharge its functions under the EP Regulations, in such form and within such period as is specified in the notice; it is an offence to fail, without reasonable excuse, to comply with any requirement of such a notice.

Moreover, various general and specific powers of enforcing agencies and persons authorised by them are set out in section 108 of the Environment Act 1995, including powers to require any person whom an authorised person has reasonable cause to believe to be able to give any information relevant to any examination or investigation to answer such questions as the authorised person thinks fit to ask and to sign a declaration of the truth of his answers.

In addition to information-gathering powers contained in environmental legislation, regulatory authorities also have powers where criminal offences have been committed to obtain information about the commission of the offences pursuant to powers under the Police and Criminal Evidence Act. These include powers to search premises, conduct sampling and interview persons (including employees) in the course of investigating whether an offence has been committed.

## 7 Reporting / Disclosure Obligations

### 7.1 If pollution is found on a site, or discovered to be migrating off-site, must it be disclosed to an environmental regulator or potentially affected third parties?

In England and Wales, there is no general legal duty to inform and involve the regulatory authorities upon becoming aware of an environmental problem. However, there may be reporting obligations in permits. For example, a permit authorising the operation of a Part A installation under the UK IPPC/EP regime must include a condition requiring the operator to supply the regulator regularly with the results of the monitoring of emissions and to inform the regulator, without delay, of any incident or accident which is causing or may cause significant pollution. Monitoring and reporting obligations are also typically included in water discharge and abstraction licences.

Since March 2009, there is now, however, a duty to report the discovery of “environmental damage” to the relevant regulator (see question 5.1 above).

A ‘duty to warn’ may arise in certain circumstances under common law, such as where a person responsible for a dangerous incident or state of affairs is aware that it poses a danger to third parties.

Also, in circumstances where the person responsible for pollution has committed a criminal offence (e.g. by illegally causing waste to be deposited or polluting matter to enter controlled waters), the proactive disclosure of information concerning the existence of pollution or its

migration may provide mitigating facts which would be taken into account when a court is assessing the penalties for the offence.

### 7.2 When and under what circumstances does a person have an affirmative obligation to investigate land for contamination?

A person does have an affirmative obligation to investigate land for contamination in certain circumstances. For example, it is a requirement that a site condition report be submitted to the enforcing authority where the (proposed) operator of a Part A EP activity is contemplating making an environmental permit application. Site investigations may also be necessary where they are stipulated in a remediation notice served under the contaminated land provisions of Part IIA of the EPA 1990 or a works notice served under section 161A of the Water Resources Act 1991. They may also be required as a condition to a planning consent, given that the issue of whether any given land is contaminated to an extent that requires remediation in order for a proposed development to proceed is a material consideration in the planning process.

### 7.3 To what extent is it necessary to disclose environmental problems, e.g. by a seller to a prospective purchaser in the context of merger and/or takeover transactions?

The basic position in England and Wales is *caveat emptor* or “let the buyer beware”, and pursuant to this principle, with limited exceptions (such as where there is a misrepresentation by the vendor including a false representation by conduct, or where conduct by the seller might constitute a tort of deceit), sellers are not required under the law to disclose environmental problems to a purchaser in the context of merger and takeover transactions. However, environmental representations and warranties are often required by prospective purchasers as a contractual mechanism effectively requiring disclosure of information by the seller. This is because merger and acquisition transactions are normally documented so that a purchaser cannot sue for breach of a representation or warranty to the extent that the seller has (prior to giving the representation or warranty) fairly disclosed information about the matter that would otherwise be a breach of the representation or warranty. Sellers can however be sued for breach where they provide insufficient information to amount to fair disclosure of the matter concerned. Sellers should always be careful when giving replies to enquiries raised by prospective purchasers concerning environmental matters, as providing a false or misleading response could be actionable.

In hostile takeover transactions prospective purchasers are normally reliant on whatever information they can glean about the target’s environmental problems from publicly available sources, although in the context of friendly takeovers such information may well be provided by agreement of the target.

## 8 General

### 8.1 Is it possible to use an environmental indemnity to limit exposure for actual or potential environment-related liabilities, and does making a payment to another person under an indemnity in respect of a matter (e.g. remediation) discharge the indemnifier’s potential liability for that matter?

Environmental indemnities provide important contractual mechanisms for allocating environmental risks in transactions. It is possible to use an environmental indemnity to limit exposure for

actual or potential environment-related liabilities as well as to effectively transfer risk for such liabilities to another person, and the use of such indemnities is a common way of allocating environmental liabilities as between a seller and purchaser. Following the implementation of the contaminated land provisions of Part IIA of the EPA 1990, the contractual allocation of environmental risks has assumed increased importance. For example, the Statutory Guidance under Part IIA specifically provides for agreements on liabilities to be entered into between persons who are responsible for the costs of a remediation action concerning land that meets the definition of contaminated land under Part IIA, and that the enforcing authority should generally make determinations on the exclusion, apportionment and attribution of liability in order to give effect to such agreements.

Typically environmental indemnities contain detailed provisions as to the scope of the indemnities and the events that trigger claims under them. The indemnities normally contain a range of financial and other limitations to govern the relationship between the parties. For example, financial limitations may include *de minimis*, aggregate thresholds and respective caps for claims; there are normally also other limitations limiting the purchaser’s ability to claim where the claim arises as a result of post-completion actions by the purchaser. Conduct and dispute resolution provisions are also typically included.

### 8.2 Is it possible to shelter environmental liabilities off balance sheet, and can a company be dissolved in order to escape environmental liabilities?

There is nothing to prevent a company establishing English incorporated companies with limited liability to own and occupy property that may incur *future* liabilities to third parties. It is essential, however, that such ownership is made known to third parties and that steps are taken to minimise the risk of third parties believing the company in question is acting as agent or that another company is the owner or occupier. This is an ongoing process, as an agency can arise at any time by conduct. By transferring properties that have contamination issues (which may result in future liabilities) into such vehicles, it may be possible to isolate the liabilities arising from site-specific environmental problems to the company that has been created to hold the relevant properties.

An exception arises where the liability results from acts or omissions of persons (other than the special purpose company established to hold the relevant properties) who caused or knowingly permitted the environmental problems. If, for example, those persons remain companies within the Group, it is difficult to see how they would escape liability unless they are wound up (the rules for which would be governed by insolvency law – see below).

Another exception concerns situations where the liability in question is an existing one. Where this is the case, the courts would examine the facts and circumstances carefully to determine whether it was in fact the intention of a party to evade the obligation, as the courts have demonstrated a lack of sympathy for use of the corporate form as a device for evading existing liabilities.

Even where this type of special purpose company is created and run properly in holding contaminated properties that may give rise to environmental liabilities, it could well be that the financial amount of liabilities stated in the special purpose company’s balance sheet would need to be consolidated with the Group’s accounts.

If a company is insolvent either as a result of environmental liabilities or otherwise, subject to the directors doing all they can to minimise losses to creditors, liquidation will be inevitable. The liquidation process requires the appointed liquidator to realise all available assets of the company and to distribute their value to

creditors according to statutory priority. At the end of the liquidation process the company will be dissolved. Any creditors (including environmental creditors) remaining unpaid or partly unpaid will then be highly unlikely to receive any further payment.

This may seem a rather drastic “solution” to the problem of an environmental liability arising, particularly if the company owns valuable assets and/or has an otherwise healthy business. Such a company may instead consider effecting a transfer of its business and assets to a “clean” corporate vehicle leaving behind some or all of its liabilities (including environmental liabilities). However, the company must receive fair consideration for such a transfer. If it does not, the appointed liquidator may use statutory powers to challenge the transaction as being at an undervalue, provided that it occurred no more than two years before the entry into liquidation (there is no time limit if it can be shown that the transaction was effected in order to put assets beyond creditors’ reach). If the challenge is successful, the court has power to make a wide range of orders for the purpose of restoring the company to the position it would have been in had the transaction not occurred. Directors’ duties issues may also arise.

In certain circumstances, where a regulatory authority itself incurs costs it may be entitled to serve a charging notice specifying the amount which the authority claims is recoverable from the company concerned. An example of such a provision is section 78P of the EPA 1990, concerning costs incurred by the enforcing authority in cleaning up contaminated land. Where a charging notice has been validly served (and subject to any rights of appeal against the notice), the cost becomes a charge on the premises and is registerable as such, taking priority over non-statutory creditors.

### **8.3 Can a person who holds shares in a company be held liable for breaches of environmental law and/or pollution caused by the company, and can a parent company be sued in its national court for pollution caused by a foreign subsidiary/affiliate?**

It was long ago established under the law of England and Wales that, as a general principle, a company’s acts are not the acts of its shareholders, nor are its liabilities the liabilities of its shareholders. The liability of shareholders in a limited liability company is usually limited to paying up the unpaid amount of the nominal value of their shares. With limited exceptions, the courts strictly apply this principle whenever it is sought to attribute the rights or liabilities of a company to its shareholders, or to regard the property of a company as belonging to its shareholders. By way of exceptions to this general rule: (A) if a company acts as agent for its shareholders then, on normal agency principles its shareholders may be liable for its acts. The conduct of the parties will be looked at closely and each situation will turn on its facts; (B) a company’s shareholders may have given direct contractual ‘comfort’ to third parties (e.g. guarantees or indemnities); and (C) the courts will not allow shareholders to “hide behind” a limited company in order to facilitate fraud or use such a company as a device or “sham” to evade its own existing obligations.

If the directors of a company are (or become) accustomed to acting on the directions or instructions of the shareholders, those shareholders in certain circumstances, typically involving fraudulent or wrongful trading, could be personally liable as “shadow directors” for the liabilities of the company. Even if a company is “wholly owned” by a parent, that is not of itself sufficient to give rise to an agency relationship. However, a subsidiary could, on the facts, be the “puppet” of the parent and, as such, be found to act as its agent. In that case, the parent could be liable as principal for the express (or implied) authorised acts of its agent subsidiary.

Statute also intervenes in certain cases. The EPA 1990 and the Water Resources Act 1991 contain provisions which can make a company’s shareholders liable “where the affairs of a body corporate are managed by its members”: see for example section 157 of the EPA 1990. Under that section a member of a company may be prosecuted as though he is a director (or other person acting in a managerial capacity) where an offence is committed by the company and is proved to have been attributable to any neglect on the part of the member in question. This gives rise to a criminal as opposed to a civil liability, although it is likely that, were a prosecution to succeed, the prosecuting authority would also seek an order for recovery of its costs which may include the clean up costs it had incurred.

Under the common law English courts have jurisdiction to hear cases involving incidents occurring abroad where the defendant company is ‘domiciled’ within England and Wales. In *Lubbe v Cape plc* ([2000] 4 All ER 268), South African claimants were entitled to bring proceedings ‘as of right’ in the English courts – meaning that they invoked the traditional territorial jurisdiction of the English Court over a corporate defendant who is ‘domiciled’ in England or Wales.

A defendant may apply to stay the proceedings on grounds of *forum non conveniens*. In deciding whether to do this, the court will apply a two-stage test: (1) has the English parent company shown that the courts of another jurisdiction are clearly or distinctly the more appropriate forum for the issues raised in the action, having regard to the ends of justice?; and (2) if so, can the claimant show that there are factors and circumstances which the interests of justice require that the action be heard in England, notwithstanding that the action has its closest connection with another country? If either the defendant fails the first limb or succeeds on the first limb but fails on the second, then the action can proceed before the English courts. If the plaintiff fails on the second limb, then the proceedings will be stayed.

### **8.4 Are there any laws to protect “whistle-blowers” who report environmental violations/matters?**

Until relatively recently in England and Wales, the only defence an employee had to an allegation of a breach of the duty of confidentiality owed to an employer was a vague common law defence relating to disclosure of information in the public interest. Due to concerns over the treatment of “whistle-blowers” and the use of wide confidentiality clauses in employment contracts, statutory protection was enacted. Sections 43A to 43L of the Employment Rights Act 1996 (as inserted by the Public Interest Disclosure Act 1998) have the effect of rendering an employee’s contractual duty of confidentiality towards their employer void to the extent that those duties would prevent the employee from making a “protected disclosure”. Protected disclosures are allowed where (in the reasonable belief of the person disclosing) they tend to show one or more of a number of matters stipulated in section 43B of the Employment Rights Act 1996, which include the committing of a criminal offence, the endangering of the health and safety of any individual, or damage to the environment.

The disclosure must be made in good faith and cannot be regarded as a “protected disclosure” if the person disclosing commits a criminal offence in doing so, for instance a disclosure which would fall under section 1 of the Official Secrets Act 1989. If an employee is dismissed on the basis of a “protected disclosure” the dismissal is automatically unfair.

Section 43F also allows an employee to make a disclosure to a “prescribed person” if they reasonably believe that a “relevant failure” has occurred or is occurring and that information they are disclosing is true or substantially true. Both defined terms refer to

the Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2003, and includes disclosure to bodies such as the Civil Aviation Authority, the Environment Agency, the Health and Safety Executive, and the Food Standards Agency.

### 8.5 Are group or “class” actions available for pursuing environmental claims, and are penal or exemplary damages available?

US-style “class actions” are not currently available in the UK. Claims can be brought by groups of claimants, but all members of the group must be identified at the start of the litigation or at a point in the pre-trial procedure laid down by the Court. Although the action may be mounted by way of collective or “generic” pleadings, ultimately, each member of the group must prove that their particular injury or loss was attributable to the causative agent or event of which they complain. Group actions of this sort are normally brought in respect of the same occurrence where they are connected by common facts and events.

In addition, US-style “inventory” settlements – where the plaintiff’s attorney brings a class action in respect of a mixed list of plaintiffs, some of whom are suffering serious illness and some of whom merely fear the onset of such disease, and forces a settlement by threatening to litigate each individual action separately – are not available in the UK.

Damages awards in the UK are set by professional judges, not juries, and do not generally contain any punitive element. They therefore have tended to be lower than in the US.

## 9 Emissions Trading and Climate Change

### 9.1 What emissions trading schemes are in operation in England & Wales and how is the emissions trading market developing there?

Directive 2003/87/EC came into force on 25 October 2003 and established a scheme for GHG emissions allowance trading within the Community which began operation on 1 January 2005. The scheme has no subset clause but two phases, 2005-2007 and 2008-2012 (the latter corresponds to the first Commitment Period under the Kyoto Protocol) were initially provided for. A third phase of the scheme will run from 2012-2020 following political agreement on a Directive to revise the current Directive.

Only CO<sub>2</sub> emissions were covered under the initial operation of the EU emissions trading scheme (EU ETS); coverage will be extended to include other GHG emissions from the start of the third phase. Participants are currently energy-intensive industries (e.g. production/processing of ferrous metals, mineral products, and pulp and paper) and large combustion installations (those with a 20 megawatt or greater thermal capacity). From 2013, CO<sub>2</sub> emissions from petrochemicals, ammonia and aluminium production will be brought into the scheme, as will nitrous oxide emissions from nitric, adipic and glyoxylic acid production and perfluorocarbons from the aluminium sector; the capture, transport and geological storage of greenhouse gas emissions will also be covered.

From January 2005, all installations covered by the scheme needed a GHG emissions permit (non-tradable) to enable the installation to emit GHG. Each Member State was required to draw up a national allocation plan (NAP) for each phase of the EU ETS, stating the total quantity of allowances it intended to allocate and how it proposed to allocate them to the installations covered. From 2013, the European Commission will set a single EU-wide cap, which will aim to achieve a 21 per cent reduction in emissions from EU

ETS installations as against 2005 emissions by 2020, and allocation of allowances will be on the basis of fully harmonised rules. NAPs will no longer be required.

Operators of installations are required to report emissions from their installation during each calendar year and must surrender a number of allowances equal to the total emissions from that installation during the preceding calendar year, which are then cancelled. The penalty for non-compliance is now 100 Euro/tonne CO<sub>2</sub>.

The UK legislation for implementing the EU ETS sets out rules for the issuing, transfer and surrender of permits and penalties for non-compliance.

The EU ETS also recognises trading in credits generated under Clean Development Mechanism (CDM) and Joint Implementation (JI) projects approved under the Kyoto Protocol.

CO<sub>2</sub> emissions from aircraft will be brought within the EU ETS from 2012.

From April 2010, a new national emissions trading scheme tackling GHG emissions from large non-energy intensive organisations is to be introduced. Organisations will be included in the scheme – to be called the Carbon Reduction Commitment Energy Reduction Scheme – if they have at least one meter settled on the half-hourly market and total half-hourly metered electricity use is greater than 6,000 megawatt-hours (MWh) between 1 January 2008 and 31 December 2008.

## 10 Asbestos

### 10.1 Is England & Wales likely to follow the experience of the US in terms of asbestos litigation?

Asbestos litigation in England and Wales is of relatively recent origin. Whereas the first US cases were brought as early as the 1930s, it was not until 1950 that the first asbestos-related claim was settled in the UK and not until the early 1970s that a series of cases against the Central Asbestos Co. Ltd. resulted in an award of damages by the English courts. A number of factors may explain the relatively slow growth of litigation in the UK: (1) the historical existence of compensation schemes and insurance obligations relating to occupational asbestos exposure – the first UK scheme was established in 1932, and since 1972 employers have been legally obliged to purchase employer’s liability insurance to meet claims for work-related injuries or illness suffered by their employees; (2) the difficulties in litigating for asbestos-related injury in the UK – litigants have faced a number of difficulties in proving that they should be covered by the asbestos-control legislation in question, that their employer could reasonably have protected them from harm, that their claims are not statute-barred and, where they worked for more than one employer, that they should be able to recover damages for “non-cumulative” diseases (such as mesothelioma). The long period between asbestos exposure and the development of symptoms is also a source of difficulties for claimants; and (3) personal injury litigation in the UK is generally less attractive than in the US – the availability of “class actions”, contingency fee arrangements and punitive damages all serve to make the US litigation process more appealing to a litigant.

In recent years civil litigation procedure in England and Wales has undergone substantial reform, aimed at ensuring uniform access to justice for claimants and increasing the efficiency and speed of the litigation process. A Practice Note published by the Senior Master of the English High Court has created a special “fast-track” claims-handling procedure for mesothelioma cases. Also, the availability of after-the-event insurance for legal costs and judicial erosion of the

prohibition on US-style conditional fee arrangements means that funding is now more readily available for asbestos disease claims.

The UK courts have shown willingness to adopt a more pro-claimant approach. For example, *Lubbe* (mentioned above) established that the UK courts may grant jurisdiction to a foreign claimant wishing to bring a personal injuries action against a UK-based defendant, even where he or she lives overseas and the disease occurred outside England. Also, in *Fairchild*, a previous decision was overturned that had effectively barred claimants exposed to asbestos dust by more than one employer from recovering damages for mesothelioma on the grounds that the claimant could not prove which of the employers was responsible. The Compensation Act 2006 confirmed that all employers of a claimant who has developed mesothelioma are potentially “on the hook” for the full amount of his or her loss. The UK courts have, however, taken a less claimant friendly approach to the question of the availability of compensation for persons suffering from pleural plaques who, though they have not yet contracted the symptoms of an asbestos-related disease, are nonetheless worried that they may do so in future.

## 10.2 What are the duties of owners/occupiers of premises in relation to asbestos on site?

The Control of Asbestos Regulations 2006 (“the Asbestos Regulations”) impose an express duty to “manage the risk” from Asbestos-Containing Materials (ACMs) and require employers and other duty holders to ensure that as far as is reasonably practicable, no one can come to any harm from asbestos on their premises.

If ACMs are in good condition, not likely to be damaged and not likely to be worked on or disturbed, the Asbestos Regulations provide that it is better to leave them in place (rather than disturb the ACMs by attempting removal) and implement a system of management, and therefore they impose a duty to manage the risk of those ACMs. In such circumstances, appropriate steps to be taken might include: (a) noting the presence of ACMs and maintaining a register of location and condition; (b) labelling such locations with an asbestos warning sign; and (c) introducing an on-site “permit to work” system (to ensure that anyone who comes to carry out work on the premises does not start before they are presented with the relevant information on asbestos risks, and to record the use of any protective measures or equipment required).

ACMs in poor condition must be repaired under the Regulations (e.g. by sealing or enclosing the ACMs to prevent further damage) or removed.

More generally, the Asbestos Regulations oblige duty holders to: (a) find out whether there is asbestos in or on their premises, its amount and what condition it is in (presuming that materials contain asbestos unless there is strong evidence that they do not). This will generally involve engaging a suitably trained person to conduct a survey of the premises; (b) make and maintain records of the location and condition of ACMs or presumed ACMs on the premises; (c) assess the risk from the material, seeking specialist advice, if necessary, from an asbestos surveyor, a laboratory or a licensed contractor; (d) prepare a detailed plan setting out how the risk from the material will be managed; (e) implement the plan and review it periodically; and (f) provide information on the location and condition of the material to anyone who is liable to work on or disturb it.

The basic position in the UK is that employers have a degree of latitude in deciding on the means to control site asbestos exposures against the background of a duty to carry out continuous risk assessment.

## 11 Environmental Insurance Liabilities

### 11.1 What types of environmental insurance are available in the market, and how big a role does environmental risks insurance play in England/Wales?

The environmental insurance market in the UK is developing. The market so far has reported lower levels of uptake for its products than in the US. Notwithstanding that, historically, environmental insurance has not been widely purchased in the UK, there remains continuing interest in the market and the implementation of the Environmental Liability Directive, along with current market conditions, may help to stimulate its development further.

It is possible, for example, to obtain cover for remediation liabilities, with the relevant policies written on a claims-made, site-specific basis. Typical policy periods are 10 years for ‘pre-existing conditions’ (i.e. environmental conditions existing before policy inception but manifesting during the policy period) and one to five years for ‘new conditions’ (i.e. incidents/pollution that first exist after policy inception). The scope of cover would typically include enforced regulatory clean-up costs for on-site contamination and cover for off-site third party injury and asset damage. It is also possible to obtain remediation ‘stop loss’ or ‘cost cap’ cover, against the risk that remediation costs will exceed those budgeted (where there are fully-costed remediation plans).

Many large companies have historically covered themselves primarily through the use of captive insurers, but some companies are looking either to reinsure their captive environmental liabilities or to purchase direct environmental insurance to plug gaps in the cover provided by the captive.

Environmental insurance is seldom used in practice as a method of allocating environmental risk as part of M&A transactions, and is not likely to supplant traditional risk allocation tools such as warranties and indemnities. However, there is a growing awareness of the role that insurance can play as a transaction solution, both pre and post-disposal particularly as lenders have become more risk adverse given current market conditions. There are also a number of innovative insurance-backed environmental risk transfer products coming onto the UK market. For example, some environmental consultants are now offering perpetual indemnities against a range of environmental risks on a site-specific or portfolio basis in return for lucrative and exclusive remediation contracts.

### 11.2 What is the environmental insurance claims experience in England/Wales?

It is difficult to obtain environmental insurance claims figures, as insurers carefully guard such information.

However, there appears to have been very little significant claims experience to date in respect of the relatively new products described above. This is not surprising, as these products have not been written in any volume until very recently and tend to be relatively “long-tail” in nature (offering cover of up to 10 years or more in some cases) so one would not necessarily expect to see substantial claims coming through before now in any event.

## 12 Updates

### 12.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in Environment Law in England & Wales.

Whilst a General Election looms this year, climate change is expected to continue to dominate the legislative agenda. The registration requirements of the Carbon Reduction Commitment Energy Reduction Scheme will start to bite from April. Further progress may also be made in relation to delivering the new energy infrastructure that will be required to move to a low carbon economy with the finalisation of the various draft national policy statements for nationally significant energy projects expected later this year. The current government is also looking at the related issues of incentivising the delivery of renewable energy projects, having published its renewable energy strategy last summer, as well as the issue of grid connection and the deployment of smart grid technology.

On the contaminated land front, Defra has recently signalled that it will review the statutory guidance underpinning Part 2A of the EPA 1990 with the aim of formally consulting on proposals to amend the guidance later this year.

2009 saw the delivery of new marine legislation in the form of the Marine and Coastal Access Act 2009. The Act introduces a new system of marine management, including planning processes to implement the government's strategic objectives for the marine environment, changes to the licensing of marine activities and provides for the designation of marine conservation areas, amongst other matters. The new Marine Management Organisation is expected to take over responsibility for managing, regulating and controlling activity in the marine environment from 1 April 2010.

Finally, the trend towards increased regulatory intervention aimed at achieving environment-related policy objectives continues with the Environment Agency expected to take up the power to impose civil sanctions under the Regulatory Enforcement and Sanctions Act 2008 in the second half of 2010. The new powers available to it will allow them to impose both fixed and variable monetary penalties, compliance and restoration notices and other sanctions in lieu of pursuing the traditional enforcement option of bringing a criminal prosecution against the wrongdoer. In the meantime, we have seen increased use of civil sanctions in new environmental legislation in any event e.g. in the Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2009.

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Daniel Lawrence is environmental counsel in the Freshfields Bruckhaus Deringer EPR group. He is recognised as a leading environmental lawyer in the UK and has extensive experience of negotiating and documenting and allocating environmental risk and liabilities in corporate, finance and property transactions, including mergers and acquisitions, de-mergers, flotations, privatisations and re-financings. Daniel has advised on environmental and regulatory issues affecting a wide range of industry sectors, including water and sewerage, chemicals, engineering, power, oil and gas, telecommunications, biotechnology and nuclear. He also has substantial experience of conducting complex litigation involving pollution. Daniel is a former Chairman of the United Kingdom Environmental Law Association (UKELA).

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Jonathan Isted is a London-based partner in our dispute resolution practice and head of the firm's environment, planning and regulatory (EPR) group. He specialises in environmental, health and safety and product liability litigation, as well as general commercial cases.

He has extensive experience in the defence of environmental, 'toxic tort' litigation, including the defence of the Sellafield childhood leukaemia claims for BNFL and claims brought against the UK electricity supply and mobile phone industries regarding alleged health effects of electromagnetic fields.

He is advising on the Buncefield oil depot explosions and a number of other health and safety related investigations. He also works in the healthcare and biotechnology sectors.

Jonathan is a member of the firm's cross-practice climate change group.

He has acted in a wide range of cases in which regulatory and planning permits have been challenged by way of judicial review. Jonathan has an LLM in Advanced Litigation from Nottingham Trent University and is a CEDR Accredited mediator.

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Freshfields Bruckhaus Deringer LLP is an international law firm with over 2,500 lawyers in 18 countries across Europe, Asia and the US. We have a wealth of expertise in our chosen practice areas. Our Environment Planning and Regulatory (EPR) group provides an integrated pan-European industrial risk management service in response to the increasing demand from corporations for co-ordinated advice across Europe. We also advise regulators, industry bodies and a wide range of industrial and commercial organisations on EPR issues.

Our EPR group comprises more than 100 specialist lawyers in Austria, Belgium, China, France, Germany, Italy, the Netherlands, Spain and the UK. Many of these lawyers are recognised as leading practitioners in this field, sitting on industry panels and publishing specialist books and articles. The members of the EPR group have extensive experience of advising on relevant EU and international legislation and global conventions as well as on national laws. We advise in the context of corporate transactions, major projects, dispute resolution and general corporate risk management.