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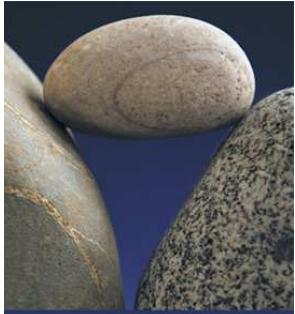
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Enforcement of the ELD

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

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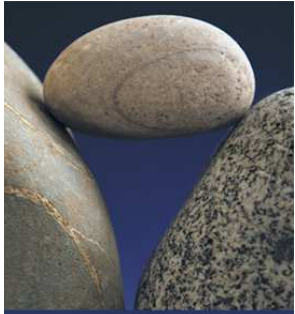
Topics

Self-executing provisions

Remediation

Mandatory “defences”

Optional “defences”



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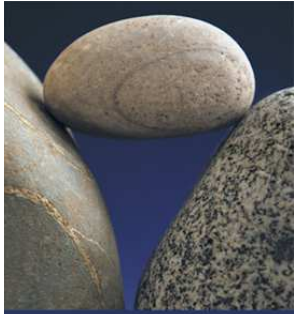
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Self-executing provisions

Operator whose activity causes imminent threat of environmental damage to land, water and/or protected species and natural habitats must

- “*without delay*, take the necessary preventive measures”; and
- if measures fail to dispel imminent threat, inform competent authority of “all relevant aspects of the situation *as soon as possible*”

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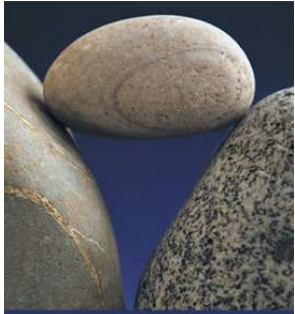
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Self-executing provisions

Operator whose activity causes environmental damage to land, water and/or protected species and natural habitats must

- inform competent authority “*without delay*”; and
- take “all practicable steps to *immediately* control, contain, remove or otherwise manage the relevant contaminants and/or any other damage factors in order to limit or to prevent further environmental damage and adverse effects on human health or further impairment of services”

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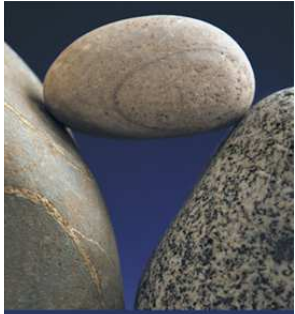
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Self-executing provisions; implications

Duties apply without need for intervention by competent authority

Potential difficulty in knowing when ELD threshold is breached and operator's duties apply

Duty to prevent further contamination (emergency action) appears to continue until environmental damage is fully remediated



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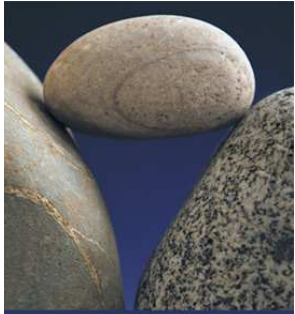
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Remediation - operator's duties

Operator whose activity causes environmental damage to land must remove, control, contain or diminish contaminants so that land no longer poses any significant risk of adversely affecting human health

Remediation standard: current or approved future use of land at time of damage

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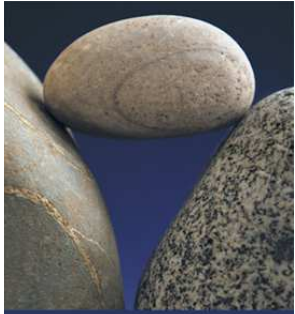
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Remediation - operator's duties

Operator whose activity causes environmental damage to water and/or protected species and natural habitats must carry out

- primary remediation
- complementary remediation
- compensatory remediation

Remediation standard for primary remediation:
baseline condition



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Remediation - competent authority's duties

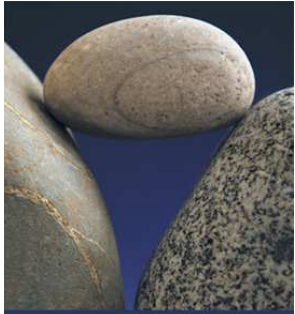
Order operator who fails to carry out remedial actions (i.e., emergency actions and remedial measures) to do so

Assess significance of environmental damage

Select remedial measures to be carried out by operator

Invite comments on environmental damage from NGOs and owner of land to be remediated

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Remediation - competent authority's powers

Order operator

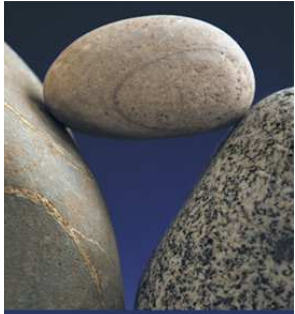
- to provide information regarding environmental damage
- to assess environmental damage

Provide instructions to operator concerning remedial actions to be carried out

Carry out remedial actions; but remedial measures only as last resort



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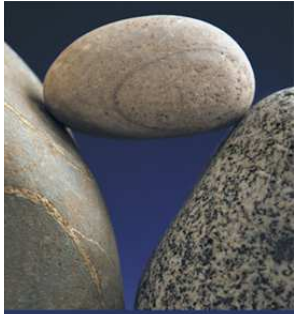
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Remediation - implications

Competent authority enforces remediation process; has duty to require operator to carry out remediation if operator fails to do so

Operator has duty to carry out remediation specified by competent authority



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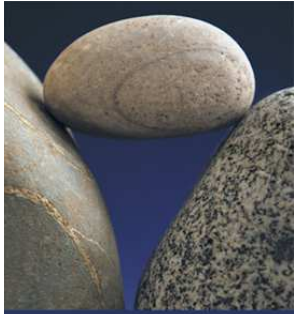
Mandatory “defences”

Imminent threat of, or actual, environmental damage

- caused by third party despite appropriate safety measures
- compliance with governmental authority’s order

“Member States shall take the appropriate actions to enable the operator to recover the costs incurred”

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Mandatory “defences” - implications

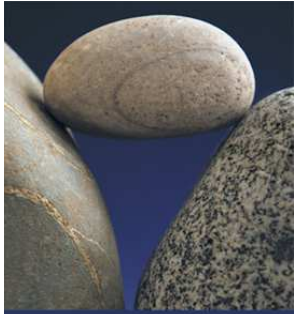
Not true defences

Operator must carry out remedial actions unless third party or governmental authority agrees to do so in lieu of operator

Operator may bring action against third party or governmental authority to recover its costs

Operator has no recourse if damage caused by vandal (same as existing English law)

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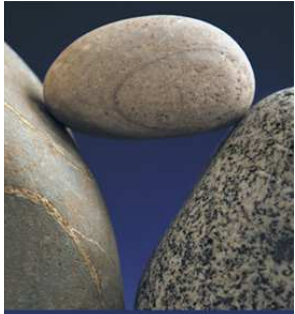
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Optional “defences”

Operator is not required to bear cost of remedial measures “taken” if operator demonstrates it is not at fault or negligent and environmental damage is caused by

- full compliance with permit under annex III legislation
- state-of-the-art activity



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Optional “defences” - implications

Not true defences; grounds of appeal to competent authority’s order

Use of past tense in “taken” implies order is not suspended during appeal

Members States which adopt optional “defences” may be required to reimburse operator if “defence” succeeds

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Conclusions

ELD will be difficult to enforce unless Member States fill in gaps in enforcement procedures

Failure by Member States to fill in gaps could result in inadequate transposition of the ELD and operators being liable for unnecessary costs