

# The overlooked risk: Environmental Liability in the construction sector



In the dynamic world of construction, where developers and contractors juggle multiple risks, insurance coverage is a vital safety net. Yet, one critical area of exposure is often misunderstood and overlooked - **Environmental Liability**.

Many in the construction sector mistakenly believe that their Public and Products Liability or Property insurance provides adequate protection against environmental risks. This assumption can lead to significant financial, operational and reputational consequences when unforeseen environmental incidents occur.

## The coverage gap

### Public and Products Liability Insurance vs Environmental Insurance

Public and Products Liability policies are designed to address third party claims for bodily injury or property damage resulting from the insured's operations. While they may cover some environmental incidents, such as sudden and accidental pollution events, they rarely extend to cover some of the broader environmental risks.

Key exclusions in standard Public and Products Liability policies leave developers, contractors and potentially other stakeholders vulnerable to:

1. **Gradual causes:** Environmental damage often occurs over time and may not be discovered immediately, such as contamination leaking from storage tanks, the accumulation and release of suspended solids and other pollutants from site traffic or run off, and fuel or other contaminants entering the ground or water from a corroded pipe or connection. These gradual incidents are typically excluded from Public and Products Liability policies not only because the pollution has occurred gradually, but because whatever has caused the event (i.e. the proximate cause) has occurred over a period of time.
2. **Statutory liabilities:** Regulatory agencies can impose hefty costs on developers and contractors for cleaning up and preventing pollution or restoring land and water including any flora or fauna, even if the damage was unintentional or caused by an untraceable third party. Public and Products Liability policies generally exclude these costs because they are not considered 'damages' (a monetary award by a court to compensate loss or injury) which is ordinarily required to trigger the insuring clause.
3. **Own property exclusions:** As mentioned above, Public and Products Liability policies are designed to cover claims brought by third parties. Most policies therefore exclude cover for damage to owned property because there is no legal liability in tort (the branch of law that imposes obligations to compensate those that have suffered loss or injury) for such damage.
4. **Consequential losses and emergency costs:** Environmental incidents can result in significant downstream losses, such as loss of income due to project delays along with the associated costs arising from additional interest incurred on project funding, having to renegotiate sales or lease agreements, or having to pay additional professional fees and emergency costs such as investigating and responding to an environmental incident. None of which are typically covered under Public and Products Liability policies.

### Limitations under Property Insurance

Property policies provide cover for losses resulting from damage to property, which is owned or occupied by an insured. As a general rule, this does not extend to the soil below the insured building(s). So, while some cover may exist for damage caused by pollution or contamination arising from a traditional peril, such as a fire or flood at the property causing the release of chemicals or other pollutants, direct contamination of the land is invariably excluded.

## Case Study – Development of a Brownfield Site

This case study illustrates how environmental liabilities for historical pollution can attach to new owners of a property even if they are not the original ‘polluter’ and they carry out remediation in accordance with the local authority’s requirements. In addition, it also highlights how these cases can take a very long time to resolve, during which the work and management of the resolution may be carried out by third parties which have no motivation to control costs.

### Background

Located in Sandridge, near St Albans in Hertfordshire, the site now known as St Leonard’s Court, was acquired in 1983 by the Property Developer, Crest Nicholson to develop into a small housing estate. The site had previously been operated as Steetley Chemical Works, which manufactured, among other things, potassium bromate between 1955 and 1980.

Crest Nicholson was aware of the contamination on site and accordingly developed a remediation strategy in co-operation with St Albans District Council, the local planning authority. The site was remediated in a manner which was thought appropriate at the time and Crest built 66 houses with car parking and landscaped areas which were completed in 1987.

In 1993, Redland Minerals purchased the interests of the companies that had run the chemical works and took on their liabilities.

Bromates and bromides were discovered in drinking water wells around the Hatfield area, some 20 kilometres away in May 2000 and this was traced back to St Leonard’s Court as the source. Nine drinking water wells were closed and treated at a cost of more than £13m.

St Leonard’s Court was determined as a contaminated land site by St Albans District Council in 2002 and was designated a ‘special site’ under the Environmental Protection Act 1990, Part IIA and associated Contaminated Land and Water Regulations, thereby transferring responsibility for enforcement from the Council to the Environment Agency.

### The outcome

Following an extensive and complex investigation, in 2005 the Environment Agency named Redland and Crest as ‘appropriate persons’, meaning they had been identified at law for either ‘causing or knowingly permitting’ the contamination and were therefore legally liable for the full remediation costs. The Environment Agency served a remediation notice on them, but both companies challenged this at High Court. After a lengthy legal battle that started in 2007 and in which both parties blamed each other, the Secretary of State issued a statement rejecting their appeal, and in 2010, Crest and Redland shared the costs.

### The costs

Although the full costs have never been published, they are considered to be significant, and in 2023, third party actions were still ongoing. **It’s estimated today that costs have exceeded £50m and the groundwater is still being treated.**

Had Crest or Redland purchased appropriate insurance, management of the issue and the time taken to resolve the case may have been much quicker, with the majority of costs covered.

**Moreover, this example underscores how such cases can take an extended period to resolve, often involving third-party management and oversight. These third parties may lack the incentive to minimise costs, leading to potentially significant financial implications throughout the resolution process.**

### Statutory Liability

It's important to point out that there are many statutory liability regimes that have been implemented over the years to either prevent environmental harm or impose liabilities on those that cause or fail to take action to prevent environmental damage. These are 'strict' liabilities meaning there is no need to prove fault, and they are regulator-enforced, meaning they avoid certain restrictions in the tort system, such as the need for a third party to have suffered personal injury or property damage to bring a claim. They are therefore more flexible and easily triggered. Below are some of the key statutory liability regimes, as previously mentioned, which are generally excluded under standard Public and Products Liability or Property insurance policies.

### Water Pollution

Where it appears to the Environment Agency that any poisonous, noxious or polluting matter is present in, or is likely to enter, any controlled waters, it can serve a works notice on any "responsible person" under the Water Resources Act 1991.

"Responsible person" means a person who has "caused or knowingly permitted" the matter to be present in, or to be at a place from which it is likely to enter the controlled waters.

The works notice can require the responsible person to conduct preventive works, to remove or dispose of the polluting matter, to mitigate the effect of its presence in the water, and to restore the waters, including any flora and fauna. Rather than serving a works notice on the responsible person, the Environment Agency can, if it wishes, conduct works itself and claim the associated cost from the responsible person.

### Contaminated Land

Where land satisfies the definition of "contaminated land" in Part IIA of the Environmental Protection Act 1990, the relevant local authority can serve a remediation notice requiring the contamination to be cleaned up. As noted above, in some cases, this responsibility can be transferred to the Environment Agency.

Again, the notice is served on any persons who "caused or knowingly permitted" the contamination to get in, on or under the land. If such a person cannot be found, the notice can be served on the current owner or occupier of the land.



### Waste

There are several powers available to regulators to remove waste from public or private land. In particular, the Environmental Protection Act 1990 provides that if any controlled waste is unlawfully deposited in or on any land in the area of a waste regulation authority or waste collection authority, the authority may serve a notice on the "occupier" requiring him to remove the waste from the land and/or take steps with a view to eliminating or reducing the consequences of the deposit of the waste.

In certain circumstances, the Environmental Protection Act 1990 allows a waste regulation authority or waste collection authority to conduct removal works itself and claim the associated cost from the occupier.



## Environmental Damage

Where damage has occurred, or there is an imminent threat of damage, to protected species or natural habitats, a site of special scientific interest, waters or land, the relevant regulator (usually the Environment Agency) can service a notice under the Environmental Damage (Prevention and Remediation) Regulations, on the relevant operator (the person conducting or controlling the activity that caused or may cause the environmental damage) to conduct remediation which either restores the natural resources and or provides compensation whilst they are unable perform their ecological functions until they are fully restored. This is considered 'complementary' and 'compensatory' remediation.

## Civil Liability

A final point to consider is that civil liability may arise where pollution or contamination has caused harm to third parties or their property, for example, if contamination has migrated off-site to neighbouring properties or high quantities of construction dust is released into the air causing third parties to develop cancer, silicosis or other respiratory illnesses. There is therefore plenty of remedies availability to claimants under the existing tort system in which developers and contractors could find themselves liable under torts such as Negligence, Nuisance, Trespass or other case law including Rylands v Fletcher.

## The importance of Environmental Insurance

Environmental Insurance is specifically designed to address gaps in standard Property and Liability policies and provide comprehensive protection against both sudden and gradual pollution events, statutory clean-up costs and other financial losses arising from environmental damage, both on and off site.

For developers and contractors, Environmental Insurance is not just an optional add-on but a critical safeguard against potentially devastating liabilities.

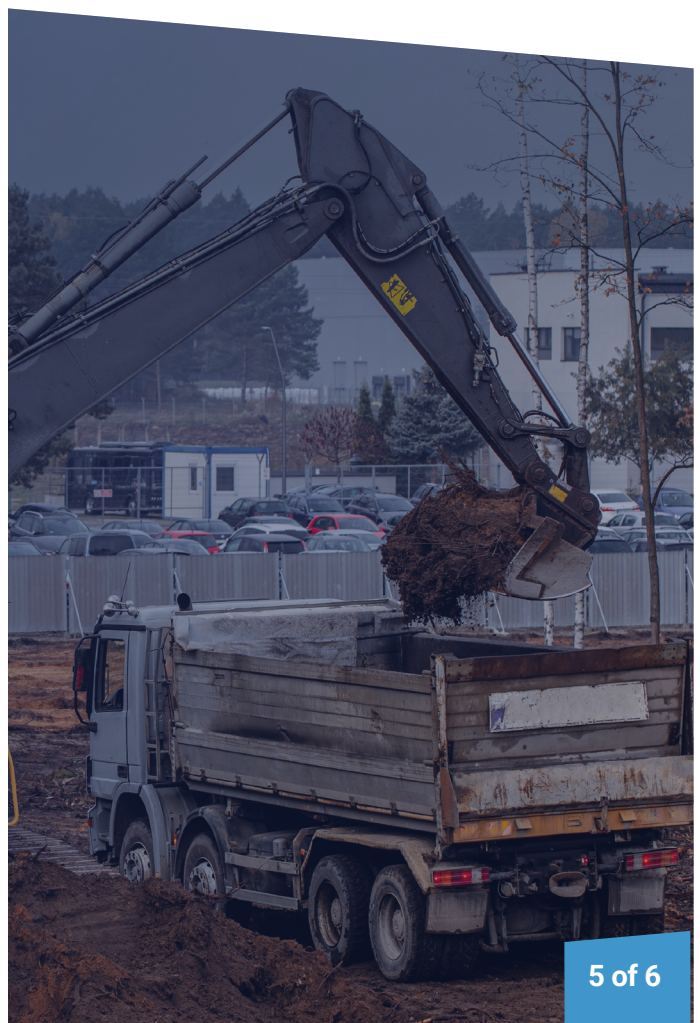
## A proactive approach to Risk Management

**Environmental Liability** is a multifaceted risk that demands a proactive and strategic approach to management. The construction sector, with its reliance on heavy machinery, use of hazardous materials, and activities that disturb land and ecosystems, faces significant exposure to environmental incidents. Addressing these risks requires more than just insurance - it necessitates a comprehensive framework of prevention, preparation and response that includes:

- > Ongoing and thorough risk assessments
- > Preventative measures
- > Preparation for emergencies
- > An ongoing process of 'audit, monitor and adapt'
- > Stakeholder collaboration
- > Establishing a culture of environmental responsibility.

### Sources:

- > Publication: International Underwriting Association of London - Environmental Risks: insured or not?
- > Environmental Damage and Pollution Legal Liability Claims Example (Crest Nicholson) / Zurich pdf
- > Official Document: Environment Agency – St Leonard's Court Decision Document





### Talk to PIB

Insurance serves as the foundation for building these additional strategies, offering a reliable solution to mitigate environmental risk.

PIB has many years' experience within the construction sector with an in-depth understanding of Environmental Liability. We work closely with clients to provide tailored insurance solutions that protect key construction assets, liabilities and financial exposures.

To discuss Environmental Liability and how best to protect your assets, people and business, please contact our specialist construction team at PIB.

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