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CONSTRUCTION POLLUTION RISKS AND COVID-19

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The impacts of COVID-19 on the construction industry are widespread, and are likely to lead to a number of unfortunate consequences. In this article, we will specifically consider how these consequences could impact the environmental liability of landowners, developers and funders.

Environmental law is primarily based on 'the Polluter-Pays' principle, under which liability for pollution is intended to rest with the entity that caused the pollution or released the contamination.

In practice, however, case law such as *Corby*¹ demonstrates that organisations which employ contractors and sub-contractors can retain a contingent responsibility for pollution caused or released by their contractors and can potentially be held liable, even if the employed entity no longer exists when claims or regulatory actions ensue. These cases also demonstrate that such claims or actions may not arise until many years after the pollution was caused by the contractor's works.

Employer, contractor and sub-contractor liability

This legal liability position is often reinforced by contractual environmental provisions in, for example, Project Agreements or Asset Protection Agreements. Under such provisions, the main contractor is commonly responsible for liabilities arising from the actions of its sub-contractors, and employers can be held responsible for the activities of its contractors and sub-contractors. These contractual liability allocations are frequently backed by onerous indemnity provisions.

The collapse of large UK construction firm Carillion in 2018 was widely reported, but what was less widely reported was the significant increase in insolvencies of smaller construction companies as a knock-on effect. A study by the accounting firm Moore Stephens² showed that the number of construction firms becoming insolvent increased by a fifth in the first quarter following the collapse of Carillion.

The impact of the COVID-19 shutdown

Whilst it is obviously far too early to predict the overall long-term impact of the COVID-19 outbreak on the construction industry, it sadly seems almost inevitable that some increase in insolvencies of construction companies will likely result.

One consequence of this is an increased likelihood of employers facing liabilities, at some point in the future, if pollution has been caused or released by contractors they employ. There have been a number of cases where site run off, water overflows and other events have led to contamination escaping a construction site and impacting adjacent properties or natural resources. This can be an especially heightened risk with sites that are left dormant or partially developed.

Employers must consider their actions before and during site shutdown to reduce the risk of pollution and contamination.

In the *Crest Nicholson* case³, the judge specifically cited the impact of the developer's actions in the removal of hardstanding as a significant contributing cause of the contamination release. The judge held that the removal left open ground for a protracted period, resulting in increased rainfall percolation which led to exacerbation of groundwater contamination.



Implementing preventative measures

It is particularly important for those who employ contractors or sub-contractors, whether it is landowners, developers, main contractors or investors, to consider carefully both how project works are managed to prevent pollution and how long-tail pollution liabilities are financially protected.

The potential for pollution liabilities to arise should be carefully considered from the outset, to ensure environmental risks are properly identified, assessed and managed throughout the project. Employers should carefully review their procedures for selecting and appointing works contractors and also for monitoring and managing their contractors' activities, to ensure their controls are sufficient.

Ensuring specific cover is in place

Employers should also consider implementing appropriate financial protection via environmental insurance in the form of a Contractor's Pollution Liability policy. This can either be made a required insurance to be taken out by the (main) contractor, with the employer named as an additional insured on the policy, or taken out directly by the employer on a project-wide basis to protect all interested parties that include: the employer, contractor, sub-contractors and any lenders.

Cover can be also obtained on a contingent basis, solely for the benefit of the employer and any lenders. The contingent approach could have the advantages of i) likely to see premium savings and ii) potentially covering liabilities arising from pollution caused/ released by deliberate actions of the contractor.

To learn more about how our specialist teams can help you to manage and transfer the heightened pollution risks resulting from events such as COVID-19, please contact us on the details below.

SOURCE

- 1 Corby Group Litigation v. Corby Borough Council [2009] EWHC 1944 (TCC)
- 2 Smithers, Rebecca (1 October 2018). "Insolvencies in UK building firms rise 20% after Carillion collapse". Guardian. Retrieved 1 October 2018
- 3 Crest Nicholson Residential Limited, R (on application of) v Secretary of State for Environment, Food and Rural Affairs and Others [2010] EWHC 561 (Admin)

Would you like to talk?

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