

**Wildlife and Countryside Link response to Defra's consultation
on amending the Environmental Damage (Prevention and Remediation)
Regulations 2009 in England and Wales**

September 2014

Wildlife and Countryside Link (Link) brings together 44 voluntary organisations concerned with the conservation and protection of wildlife and the countryside. Our members practise and advocate environmentally sensitive land management, and encourage respect for and enjoyment of natural landscapes and features, the historic and marine environment and biodiversity. Taken together our members have the support of over 8 million people in the UK and manage over 750,000 hectares of land.

This response is supported by the following members of Link:

- Environmental Investigation Agency
- Marine Conservation Society
- Royal Society for the Protection of Birds
- The Wildlife Trusts
- WWF – UK

Question 1: do you have any comments on the way in which we propose to transpose Article 38 of the OSD as set out above?

The transposition of Article 38 of Directive 2013/30/EU on the safety of offshore oil and gas operations (OSD), which extends the scope of the Environmental Liability Directive (2004/35/EC) (ELD) into the marine environment is welcomed. In our view it is essential that the highest environmental and safety standards are placed on all offshore operators and that this extends out to the limits of sea areas under English and Welsh jurisdiction.

However, we seek further clarity on the role of the Maritime and Coastguard Agency in relation to the roles and responsibilities of the Environment Agency, National Resources Wales, MMO and Secretary of State for a major spill that has impacts across different jurisdictional boundaries.

Question 2: do you have a view on whether the definition of operator under the EDR adequately captures licensees in the offshore oil and gas industries, as required by the Directive? If not, please explain your reasons.

While we were not previously aware of potential inconsistencies between Article 7 of the OSD and the existing definition of operators under the EDR, we would recommend a technical amendment to ensure clarity and correct transposition of Article 7 of the OSD. In accordance with our understanding of the Petroleum Act (1998) we recommend that there must be joint and several liability for operators that are working together under a single licence.

Question 3: do you have any views on the likelihood of potential damage in marine waters affecting their environmental status as defined under the MSFD?

The document states that ‘the ELD only requires action where a business or other operator has caused-or is imminently about to cause-**significant** environmental damage’ and that ‘remediation requirements under the ELD are triggered by a **measurable adverse change**’. Our concern is a link that needs to be made between ‘measurable adverse change’ in order for them to be judged ‘significant’. As the document itself states, changes within a sub-regional sea area would be difficult to assess. This requirement lacks precaution and pragmatism and it is difficult to see how it can be used in reality to ensure that appropriate remediation is paid for by operator that has caused significant environmental damage.

We believe that the low application of the ELD to date, is because the ‘significant’ threshold has been misinterpreted as a ‘severity threshold, requiring ‘serious’ or ‘severe’ impacts, rather than merely ‘significant ones (i.e. sufficiently important to be worthy of attention).¹ Such an interpretation does not appropriately apply the precautionary principle and goes against the original intention of the ELD. We would therefore encourage the UK to adopt an approach whereby ‘significant’ thresholds do not require there to be ‘**serious**’ or ‘**severe**’ **impacts**, simply ‘measurable’, ‘important’ damage. Such an approach would potentially change the likelihood of application of the EDR and would be a legally consistent approach that adheres to the original objectives of the ELD.

Under the Marine Strategy Framework Directive (MSFD), the vast majority of monitoring that is taking place is relying on an array of existing research programmes. Together these provide a small snapshot that can be used to inform our progress with meeting the Descriptors of Good Environmental Status. Although the MSFD has recommended that member states set ‘quantifiable targets where possible’ (paragraph 64) the UK’s proposals currently have very few quantifiable targets.

Natural variation in populations, the transient nature of some species and other background changes in the marine environment all mean that it is very challenging to establish a meaningful baseline under which any damage caused by an operator can be assessed. In other words, although the spirit and intent of these amendments is welcomed, it is difficult to envisage how they can be implemented to ensure that damage can be linked to a specific operator or a reliable assessment of damage.

We agree that there is very limited scope for compensation to be used to directly and actively restore damage in the marine environment. It therefore makes sense to state that the main costs would relate to paying for environmental improvements. However, this appears to contradict the earlier point that there is limited scope for direct intervention in the marine environment. The scope should be widened to include improved management, monitoring and public awareness-raising. In addition, some more detail should be provided by Defra on how these funds would be used and administered.



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¹ BIO Intelligence Service (2013), Implementation challenges and obstacles of the Environmental Liability Directive, Final report prepared for European Commission – DG Environment. In collaboration with Stevens & Bolton LLP (the Implementation Report), see page 12 and the footnote on the dictionary meaning of ‘significant’.