CONSULTATION ON OPTIONS FOR IMPLEMENTING THE ENVIRONMENTAL LIABILITY DIRECTIVE

Joint response from Wildlife and Countryside Link, Northern Ireland Environment Link, and Wales Environment Link

February 2007

1.0 Introduction

19 voluntary organisations concerned with the conservation, enjoyment and protection of wildlife, countryside and the marine environment have joined forces under the umbrella of the three UK Link organisations (Wildlife and Countryside Link, Northern Ireland Environment Link and Wales Environment Link) to welcome the opportunity to respond to the consultation document on options for implementing the Environmental Liability Directive in England, Wales and Northern Ireland.

Wildlife and Countryside Link brings together 37 environmental voluntary organisations in the UK united by their common interest in the conservation and enjoyment of the natural and historic environment.

Northern Ireland Environment Link is the networking and forum body for non-statutory organisations concerned with the environment of Northern Ireland. Its 43 Full Members are involved in environmental issues of all types and at all levels from the local community to the global environment.

Wales Environment Link is a network of 28 voluntary environmental and countryside organisations. It is officially designated the intermediary body between government and the voluntary environmental sector in Wales. WEL's vision is to increase the effectiveness of the sector through facilitating and articulating its joint voice.

This document contains a summary, a list of key points and answers to a selection of questions posed in Section 3 and 4 of the Environmental Liability Directive (ELD) Consultation. It is supported by the following organisations:

- Buglife – The Invertebrate Conservation Trust
- Bat Conservation Trust
- Butterfly Conservation
- Campaign to Protect Rural England
- Friends of the Earth
- Herpetological Conservation Trust
- Keep Wales Tidy
- Marine Connection
- Marine Conservation Society
- The National Trust
- Plantlife
- Pond Conservation – The Water Habitats Trust
- Ramblers' Association
- Royal Society for the Protection of Birds (RSPB)
- The Wildlife Trusts
- Whale and Dolphin Conservation Society
- Woodland Trust
- WWF-UK
- Zoological Society of London (ZSL)

2.0 Summary

The UK Link organisations of England, Wales and Northern Ireland recognise the importance of better regulation and the Government's efforts to improve the regulatory environment for businesses in the UK. However, we are concerned that the Environmental Liability Directive (ELD) Consultation document fails to adequately protect wildlife, to effectively apply the "polluter pays principle", or to meet the aims of the Government's sustainable development policy. We believe these failings arise from a misinterpretation of the Government's own approach to better regulation in the ELD Consultation document, as it assumes that any new costs to business automatically go against the grain of better regulation, even where overall benefits to society far outweigh the additional costs to business.

The ELD Consultation stipulates a "minimum transposition" approach, unless "there are exceptional circumstances, justified by a cost benefit analysis and following extensive stakeholder engagement". We are concerned that the Government's preferred options will result in the under-implementation of the ELD even where the Partial Regulatory Impact Assessment ("RIA") illustrates the discussed variations have strong overall benefits. A number of the Government's proposed options, which are dealt with in the detailed comments below, attempt to over-restrict the interpretation of particular ELD articles and risk weakening or conflicting with existing UK laws. The Link organisations are also concerned that proposed options risk breaching the provisions of existing EU Directives, such as the Habitats Directive and the Wild Birds Directive, and related international Conventions[1].

We suspect that the rules on better regulation may not be being applied correctly for one of two reasons. Either an error has occurred in both the interpretation of the ELD and of the relevant figures, resulting in policy costs accidentally being double-counted; or a qualitative judgement has been made to avoid increased costs to business even where such costs achieve net benefits to society and the environment.

2.1 Key points

The Link organisations of England, Wales and Northern Ireland;

- **agree with the Government's goals for better regulation**, but are concerned they may not have been applied correctly or efficiently in the ELD Consultation;

- **strongly support the inclusion of SSSIs / ASSIs, as well as Ramsar sites and marine areas of national importance, in the implementing legislation** in order to secure an environmentally and economically efficient level of wildlife protection in harmony with existing wildlife legislation. We would like to see cover for UK BAP habitats and species included at a later stage;

[1] For example, Article 9(3) of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, (the "Aarhus Convention").

- **strongly support the extension of strict liability to apply to all activities causing biodiversity damage**[2] - as key to the practical workability of the ELD and to ensure compliance with existing provisions of the Habitats and Wild Birds Directives;

- **believe that the definition of water damage includes, but should not be limited to, actions which cause or threaten to cause deterioration across a class boundary**, as defined under the Water Framework Directive;

- **strongly oppose the introduction of the permit and state of the art defences** – as key to the practical and economic effectiveness of the ELD**,** to avoid weakening the effect of existing laws and to secure the restoration of environmental damage at the polluter's cost, not at the cost of the state.

- **support the extension of strict liability for water and land damage to all activities, not just Annex III activities** – as key to the practical workability of the ELD and to avoid weakening the effect of existing laws, such as the Water Resources Act 1991[3] and Part IIA of the Environmental Protection Act 1990 .

- **oppose the removal of NGO rights of access to justice in cases of imminent threat of damage** – in order to help ensure the effective enforcement of the ELD.

- **would like to see the adoption of workable interpretations of the definitions of biodiversity and water damage to be issued in statutory guidance,** and which are not in breach of EU laws.

- **oppose the exemption of activities covered by the European Common Fisheries Policy from the provisions of the ELD.**

3.0 Responses to implementation options and questions

In responding to individual questions, the Link organisations would like the following points to be borne in mind;

Article 16 of the ELD allows implementing legislation to be more stringent and stricter than the ELD itself. This is crucial in situations where stricter national laws already exist, so that such laws are not weakened by the implementing legislation. It can also be important in situations where the ELD shows certain weaknesses or gaps which could be dealt with in the implementing legislation to ensure effective transposition.

Recital 5 of the ELD states:

[2] Where "biodiversity damage" refers to damage to what the ELD terms "protected species and natural habitats".
[3] See also Water (Northern Ireland) Order 1999 in Northern Ireland

> "Concepts instrumental for the correct interpretation of the scheme provided for by this Directive should be defined especially as regards the definition of environmental damage. ***When the concept in question derives from other relevant Community legislation, the same definition should be used so that common criteria can be used and uniform application promoted****". (Emphasis added).*

This is of fundamental importance, as many of the concepts used, particularly in relation to water and biodiversity are the same, or similar to, existing Community legislation, in particular to the Water Framework Directive (the "WFD"), the Habitats Directive and the Wild Birds Directive, as well as Directives which deal with environmental impact assessments (EIA and SEA).

For ease of reference we refer to "biodiversity damage" when talking about damage to what the ELD terms "protected species and natural habitats". In addition, it is understood that the term "protected" biodiversity used within the consultation refers to the specific and restricted definition of "protected" biodiversity under the ELD, not to what may otherwise be considered protected biodiversity, even under EU law.

Question 3.1

Bearing in mind that an assessment must be made of damage which may have a significant adverse effect on reaching or maintaining FCS outside sites, should the Government, in respect of the elements of damage that occur on sites;

(i) apply a test of significant adverse effect on reaching or maintaining FCS which focuses on damage to Natura 2000 sites, but which takes account of the significance of the particular site or sites to the conservation status of the habitat or species over its natural range? or

(ii) apply a test of significant adverse effect on reaching or maintaining FCS, such that any damage to a Natura 2000 site which affects the integrity of that site would trigger liability under ELD?

If you do not agree with these options what alternative(s) would you suggest and why?

We disagree with both options. The transposing legislation must apply to relevant protected biodiversity on and outside designated sites.

There must be no restriction of the definition of biodiversity damage under the ELD otherwise the transposing law will be in breach of EU legislation. We suggest that guidance on the definition of biodiversity damage in the ELD itself would be preferable to a new definition set out in the transposing legislation. We believe this would also meet "minimum implementation" goals.

Option (i) could be read as restricting biodiversity damage covered by the ELD to protected sites only, which we believe would result in a breach of the ELD. It also applies the relevant

thresholds at the wrong level, which would also be considered a breach of the ELD and the Habitats Directive. Option (ii) also fails to take account of biodiversity outside designated sites, and in relation to site-based biodiversity, the site integrity test is incomplete without also including a reference to conservation objectives.

We are concerned that although the ELD Consultation (Sec 3, paras 3.2 to 3.7) recognises that biodiversity damage under the ELD can happen on and outside Natura 2000 sites, the text of the Government's preferred position (Annex II) appears to focus solely on biodiversity damage on Natura 2000 sites. If the ELD were transposed so as to cover only Natura 2000 sites, this would breach EU law. Furthermore, the ELD Consultation makes biodiversity damage on a Natura 2000 site dependent on effects on the relevant habitat or species over its natural range, claiming that "damage to any one Natura 2000 site or a collection of sites would not necessarily have an adverse effect on FCS". This ignores the fundamental requirement of the Habitats Directive which is the achievement of FCS through the Natura 2000 site network (see Article 3(1), Habitats Directive), and the FCS of *each site* within the Natura 2000 network is a prerequisite for the overall achievement of FCS.

The Habitats Directive defines conservation status and FCS not solely in terms of natural range, but also in terms of the territory of the relevant Member State, as well as long-term survival, long-term distribution and abundance (see Article 1(e) and (i), Habitats Directive). This distinction is crucial and is supported by the ELD in Annex I, which says that an assessment can be made at local, regional and higher level including Community level. Case law also supports the fact that an adverse effect at site level is relevant to ensuring FCS. Therefore, to determine the appropriate level at which a significant adverse effect on reaching or maintaining FCS occurs, it is necessary to take into account all relevant underlying facts and circumstances, and to measure the impact at the appropriate level.

We suggest that a useful approach to interpreting "significant adverse effects on reaching and maintaining favourable conservation status" is to interpret such effects as an undermining of the maintenance and long-term viability of the relevant protected biodiversity. This approach takes into account the Habitats Directive reference to "significant" effects and "adverse" effects.

As explained above, it is crucial to apply significant adverse effects at the appropriate level, and to consider all conditions listed in the Habitat Directive's definition of FCS. By applying the threshold for damage too high and breaching the relevant ELD and Habitats Directive provisions, the UK would be failing to ensure the prevention and restoration of environmental damage thereby failing to comply with its duty to take "appropriate steps to avoid … deterioration" of the relevant biodiversity under Article 6(2) of the Habitats Directive.

In summary, we believe the ELD Consultation's approach set out in Sec. 3, para 3.5 (p24) and in Fn52 (p74) of the RIA is too simplistic, and if applied unchanged in any transposing legislation or guidance, risks being in breach of EU legislation.

Question 3.2

For the threshold for water damage under the ELD, what are your views on a test of water damage using a number of criteria which give practical effect to the requirements of the ELD drawing upon the WFD standards?

The Link organisations do not accept the analysis of water damage presented in the consultation. Deterioration across a WFD class boundary is, by definition, significant and will bring with it liabilities and costs that should be passed on to those responsible through the ELD. However, we do agree that the wording of the ELD indicates that significant damage can occur within class boundaries and accept that it is sensible to draw on the standards established for the implementation of the WFD. We wish to emphasise that water damage includes not only chemical and biological pollution damage, but also morphological damage.

We believe that damage that triggers a deterioration in WFD class is by definition *significant* because even if the absolute changes in a quality element are small, the consequences of crossing a class boundary are great. For example, if a water body fails to meets its WFD objectives because of the action (or inaction) of a third party, the Member State will either face infraction proceedings or, if exemption under Article 4.6 of the WFD are applied, costs will be incurred in preventing further deterioration and restoring damage. Should the preferred approach be taken, operators whose actions trigger such costs may not always be held liable resulting in the taxpayer footing the bill. This undermines the stated purpose of the ELD to establish a framework of strict liability based on the polluter-pays principle.

We agree that the deliberate use of the *significant adverse effect* test, rather than deterioration of status, in the ELD means that damage could occur when quality is impaired within a WFD class boundary rather than only when a class boundary is crossed. This reflects the WFD's overall purpose to prevent further deterioration of aquatic ecosystems. Indeed, the wording adopted in the ELD could be seen as reflecting an absolute, rather than boundary based, definition of what constitutes deterioration within the meaning of the WFD. We also accept it is sensible to draw on the standards and conditions established for the implementation of the WFD[4] although these, in themselves, will not be sufficient to define *significant adverse effect.*

The use of WFD concepts of "status" when defining damage brings with it obligations towards the protection of surface water bodies from damaging physical change through the inclusion of hydro-morphological quality elements. In the case of *High Status* water bodies, the obligation to prevent damage is almost absolute. However, for other water bodies, morphology must be maintained or restored to a state consistent with the ecological objectives, which could bring liabilities for those carrying out engineering work in or near a water body e.g. flood defence, coastal protection, marina construction etc.

[4] See the final report from the UK Technical Advisory Group (UK TAG) on Environmental Standards & Conditions (Phase I) for the WFD. http://www.wfduk.org/stakeholder_reviews/Standards_Jan_2006/

Question 3.4

Which of the following liability approaches for biodiversity damage do you favour and why:

(i) one based on the strict/fault-based distinction in the ELD? or
(ii) one based on strict liability irrespective of whether the damage was caused by an occupational activity listed in Annex III of the ELD?

We agree with option (ii). From an environmental point of view, imposing strict liability in relation to any environmental damage, including biodiversity damage, makes sense. The principle of strict liability should be applied to all biodiversity damage, irrespective of what type of activity caused the damage or where the damage took place. Extending the principle of strict liability to biodiversity damage caused by non-Annex III activities would correctly apply the "polluter pays principle" thus preventing unforeseen state liability. It would ensure legal certainty and aid compliance with Member State duties under Articles 6(2) and 12(1)(d) of the Habitats Directive 1992 and Article 2 of the Wild Birds Directive 1979. Furthermore, strict liability would also aid better regulation by bringing different obligations under various legislative instruments in line with each other, thus avoiding confusing and conflicting laws.

We are concerned that, unlike damage to water or land that is subject to a strict liability regime under the UK Contaminated Land Regime (Part IIA Environmental Protection Act 1990) and the Water Resources Act 1991[5], there are currently no strict liability rules (nationally) in relation to biodiversity damage. This leaves wildlife protection at a clear disadvantage despite biodiversity being one of the major areas where the ELD adds to existing legislation, and runs contrary to the Government's commitment to saving endangered UK wildlife, protect and enhance species and habitats, and to halt the loss of biodiversity by 2010.

The Link organisations support the arguments in favour of the extension of strict liability to biodiversity damage caused by all activities, which is also the favoured approach of the RIA's economic analysis. The ELD Consultation (p29) notes that the costs of this option would be greater than if it was not introduced, and yet the RIA shows the opposite. On the Government's best estimates, the introduction of this option would lead to an overall benefit, not a cost, despite the possible double-counting of enforcement costs, the failure to include potential off-sets and the likely general over-estimate of costs for this option. It is unclear how the conclusion was reached that this option would mean additional costs.

We believe that if a system of fault-based liability is introduced in relation to biodiversity damage caused by non-Annex III activities, then, in cases where no fault can be established (and restoration cannot be achieved under section 31 of the Wildlife and Countryside Act 1981 (the WCA), as amended) the companies causing the damage will not be obliged to restore it, but Member States will still be subject to the relevant obligations under Article 6(2) of the Habitats Directive and will be responsible for meeting these obligations and, therefore, for restoring the damage.

[5] See also Water (Northern Ireland) Order 1999 in Northern Ireland

Whilst most Natura 2000 sites are underpinned by SSSIs, not all Natura 2000 qualifying interest features are also features of the corresponding SSSI[6]. Where this is the case, the Natura 2000 feature may not benefit from protection under the WCA, and it would not fall within the ELD[7] if no fault/negligence could be established. In such cases, there will be no mechanism available to prosecute and seek restoration of the feature unless strict liability under the ELD is applied. Introducing a general rule of strict liability would strengthen incentives to prevent damage, guarantee restoration and provide a greater degree of legal certainty. It would also make the ELD regime easier and simpler to understand and apply.

Although the ELD has a somewhat unclear approach to enforcement, we understand that operators who cause/are about to cause environmental damage, including biodiversity damage, are under an absolute duty to take preventive/remedial measures, even if their liability has not yet been established (including the proof of negligence or fault in cases of biodiversity damage caused by non-Annex III activities), or one of the available defences (including the permit and state of the art defences) applies. There is no mechanism for the competent authority to establish liability first, and waiting for the competent authority to act would be in breach of the ELD's provisions. If no fault can be shown, the costs of restoration will necessarily have to be borne by the competent authority / the state (if the operator was not at fault). Strict liability for biodiversity damage in all cases would ease this burden on the state and competent authorities.

Question 3.5

In respect of water damage, which of the following approaches to strict liability do you favour, and why:

(a) limited to activities falling within Annex III of the ELD, or
(b) applying to any activity causing environmental damage?

The Link organisations agree with option (b). The principle of strict liability should be applied to all environmental damage, including water and land damage, irrespective of what type of activity caused the damage or where the damage took place. We believe the distinction between Annex III and other activities is arbitrary and goes against existing UK laws. Introducing this distinction could potentially lead to a watering-down of UK laws, leading to inconsistencies and confusion in the application of the ELD itself and of other existing laws.

Question 3.6

In respect of land damage, the Government proposes to limit strict liability for remediation of damage to activities falling within the scope of Annex III of the ELD.

Do you support this approach? If you do not what are your reasons?

[6] Although strictly speaking they should be: if a species is considered to be of EU importance it will also automatically qualify as a species of national importance and should therefore have a SSSI designated for it.
[7] Unless the species were covered both by the ELD and the WCA.

We do not support the proposed approach. We believe the principle of strict liability should be applied to all environmental damage, including water and land damage, irrespective of what type of activity caused the damage or where the damage took place, for reasons explained in answers 3.4 and 3.5 above.

Question 3.7

Should the ELD be implemented to include only EC protected species and habitats or also to include species and habitats for which any SSSI is designated under national legislation?

The Link organisations strongly urge the Government to include SSSIs / ASSIs in the protective regime introduced to transpose the ELD. Given the importance of the SSSI / ASSI network for UK wildlife protection and the Government's own targets for their protection, together with the fact that the RIA's cost benefit analysis has found there to be an overall benefit in extending the ELD to include SSSIs, all evidence points toward including these sites in the ELD system. In addition, SSSI designated features, which are not part of the protective system of an SAC or SPA, are not strictly covered by the ELD and may not be covered by the transposing legislation. Confusion will occur in cases of damage to more than one species or habitat at the same site that are subject to different levels of protection. It would be unfair and inequitable if damage to only one of the qualifying interest feature types could be remedied under the ELD, when all are protected interest features of the SSSI.

We would also urge the Government to include Ramsar sites in the protective regime introduced to transpose the ELD. As there is extensive overlap between Ramsar and Natura 2000 sites, with only 7 Ramsar sites across the UK not wholly or partly overlapping with Natura 2000 sites, additional costs of inclusion are likely to be marginal. Moreover, by not including Ramsar sites in the ambit of the ELD regime, the Government is reneging on its policy commitment to treat Ramsar sites as Natura 2000 sites.

Defra's preferred transposition option would offer little marine biodiversity protection beyond 12 nautical miles[8] as there is currently only one marine SAC[9] in UK offshore waters (12 to 200 nautical miles). The Marine Bill is expected to introduce a new mechanism to protect marine areas of national importance, including in offshore waters, and it is important that any sites designated under this mechanism in future are included in the UK legislation transposing the ELD.

We would also like to see UK Biodiversity Action Plan (UK BAP) habitats and species covered by the legislation, at least in the form of an option to be considered at a later date. Government figures show that minimum transposition of the ELD would not cover 375 UK BAP species, which represents 79% of the 475 species that are currently included in UK BAP species action plans.

[8] except for a 100 km^2 area at the Darwin Mounds
[9] 61 of which are within 12 nautical miles of the territorial baseline.

Furthermore, considerable public and charitable expenditure is being invested in efforts to restore large-scale habitats and to protect particularly vulnerable species of conservation importance. Yet if an activity causes significant damage to a UK BAP species that falls outside the scope of the basic ELD, there will be no requirement for the person or company undertaking the activity to pay for remediation to take place. This failing will undermine the Government's commitment to halt biodiversity loss by 2010.

Question 3.8

Do you support the Government's intention to exclude treated sewage sludge spread for agricultural purposes from the scope of the ELD?

If you do not, what are your reasons?

The Link organisations disagree with the Government's intention in relation to the sewage sludge exclusion. We support the safe and responsible application of sewage sludge for agricultural benefit but are concerned about extending any form of exemption to liability, not least because inappropriate application can lead to excessive leaching of nutrients and direct runoff to sensitive waters.

While we accept the logic of the argument presented (paras 3.37 – 3.40) it is our belief that there is both an economic and an environmental case to extending the liability for water and land damage beyond the scope of Annex III activities. The spreading of sludge for agricultural improvement (whatever their origin) should fall under the scope of the ELD, so where damage to land, air or water is threatened, or occurs, action could be taken. Such an approach would provide operators with a clear incentive to manage sludge application in a way that minimizes risk of damage and provide a clear route for recovering damages and securing restoration.

Question 3.12(a)

The Government's view (in respect of England and Northern Ireland) is that, on balance, a permit defence is justifiable and intends to implement this defence for those elements of the ELD which are additional to those addressed by existing environmental protection legislation. Do you agree?

If you do not what are your reasons?

No, The Link organisations do not agree for the same reasons set out in answer to Question 3.14 below.

Question 3.14 (and Question 3.12(a))

The Government's view is that, on balance, this defence is justifiable and intends to implement this defence for those elements of the ELD which are additional to those addressed by existing environmental protection legislation. Do you agree?

If you do not agree, what are your reasons?

No, the Link organisations do not agree. We strongly oppose the inclusion of the permit and state of the art defences in the UK's transposing legislation. We believe there are no convincing reasons for including the permit defence, except opposition from the business sector. All legal and logical arguments speak against it. We remain convinced that the principle of polluters taking responsibility for their action holds true across all sectors of industry.

We believe that including the permit and state of the art defences provides less certainty as the defences introduce several elements of doubt in relation to the restoration of environmental damage, and the application and enforcement of the regime. Instead of providing an automatic duty to pay for restoration of environmental damage when an operator is liable under the ELD, defence related liability will be contingent on the type of activity carried out, the type of permit operated under, proof of negligence, proof of a permit breach, and proof of whether the activity or emission was in accordance with the state of scientific and technical knowledge at the time. As the permit and state of the art defences apply to remedial actions only, i.e. not to preventative actions, defence related liability creates confusing and inconsistent rules. In addition, if the enforcement mechanisms of the ELD remain unclear, further uncertainties will arise should the defences be introduced.

We believe that it is unfair to penalise operators who adhere to their permits in the same way as operators who do not. This should be dealt with under the legislation under which the permits are issued, e.g. IPPC which will impose sanctions and penalties for breaches. The ELD is a separate and distinct piece of legislation with sometimes similar, but separate and distinct aims to those of the Annex III instruments that can give rise to the permit defence. Compliance with a permit does not free operators from liability under general laws on liability (e.g. tort law) or other environmental laws such as Part IIA of the Environmental Protection Act (EPA) 1990 or the Habitats Directive. Furthermore, the introduction of the permit and state of the art defences has been rejected by the Government in relation to Part II A of the EPA. Similarly, under the Water Act 2003 a form of permit defence for abstractors has also been removed. In the Defra assessment of the benefits of removing the permit defence it considered immunity from liability was inconsistent with the environmental responsibility and that costs will only fall on those who do not take proper responsibility for the environmental effects of their abstractions[10].

We are concerned that the Government's support of permit and state of the art defences will introduce fault-based liability through the back door, and note that the European Court of Justice (ECJ) has held that it is not possible to introduce a derogation from the application of the species protection provisions in Articles 12 and 13 of the Habitats Directive on the basis

[10] Water Bill Regulatory Impact Assessment, Environmental and Equal Treatment Appraisals. (2nd Edition) www.defra.gov.uk/environment/water/legislation/pdf/riaupdate_030722.pdf

of the legality of the act carried out[11]. Similarly, the ECJ has also ruled that "state of the art" considerations taken into account under Art 6(3) and (4)) in assessing the safety of a plan or project do not preclude the Habitats Directive from applying, i.e. a decision that a plan/project can go ahead based on state of art considerations is not a defence, because of the general duty contained in Art 6(2) of the Habitats Directive. Introducing the state of the art defence under the ELD would militate against this fundamental principle.

We are also concerned that the ELD's twin goals of preventing and remedying environmental damage through the application of the "polluter pays principle" and a "strict liability" regime, will be missed if "compliance with permit" and "state of the art" are given as reasons to release operators from clean-up costs. The proposed defences directly oppose the "polluter pays principle" and undermine the principle of strict liability. Operators who cause environmental damage should be liable regardless of whether they are at fault, thereby ensuring that damage is remedied by the person who causes it and not at the taxpayer's expense.

In addition, and in respect of the marine environment, we are concerned that activities covered under the European Common Fisheries Policy (CFP) will have special derogation from the provisions of the ELD. At present it is our understanding that any damage caused to marine biodiversity as a result of the CFP is exempt from the ELD, regardless of the behaviour of the operator. This would include damage caused, for example, by fisheries by-catch, scallop dredging, and bottom trawling.

Question 3.12(b)

The Welsh Assembly proposes to disapply the permit defence for GMO-related occupational activities in line with paragraph 3.64, above. For respondents in Wales, do you agree? If you do not what are your reasons?

If the permit defence is introduced, which we wholly oppose (see above), we would support it being disapplied in relation to GMO related occupational activities in Wales and/or the whole of the UK.

Question 3.13

Do you favour the application of the permit defence before or after remediation is undertaken by the operator? In either case what are your reasons?

The Link organisations do not favour the inclusion of the permit and state of the art defences in the UK's transposing legislation. However, the introduction of what has been termed "self-executing provision" means that applying the permit defence before remediation takes place would amount to a breach of the ELD.

[11] See paras 109-114 of Case C6-04 ECJ ruling of 20 October 2005.

Although the enforcement mechanisms of the ELD have been left opaque, it does appear to impose a duty on operators to carry out some, if not all, remedial actions before asserting their potential right to avoid the costs of those measures under Art. 8(4). This follows on from Art 6 which imposes an absolute obligation on the operator to take immediate control, containment and prevention measures and to take the necessary remedial measures according to what the competent authority determines. The right not to have to bear the costs of the measures "taken"[12] is an express right to be reimbursed in relation to the mandatory defences (see Art 8(3)). Given that the permit and state of the art defences are discretionary, there would be no need to specify such a mechanism in the ELD itself.

It is presumed that there will be a mechanism for reimbursing claims and yet the question as to who will reimburse operators is unclear. Furthermore, if the discretionary defences are introduced in addition to the mandatory ones, this could reintroduce the concept of "subsidiary state responsibility" through the back-door, as it would convert the powers of the competent authority to request operators to carry out remedial measures or to take remedial measures itself as a last resort, to a de facto obligation either to pay for such measures or to carry them out itself[13], unless other models for reimbursement, such as purpose-made industry or state-financed funds, insurance or other financial security mechanisms are considered.

If a reimbursement mechanism is not provided for, there may be little incentive on operators to comply with the regime. Competent authorities will have little incentive to enforce the ELD, if they are under pressure to pay for remedial measures without there being a robust mechanism to deal with such claims. In the absence of third party involvement, e.g. by NGOs, an enforcement stalemate might ensue and the regime would be ineffective.

Question 3.14

The Government's view is that, on balance, this defence is justifiable and intends to implement this defence for those elements of the ELD which are additional to those addressed by existing environmental protection legislation.
Do you agree? If you do not agree, what are your reasons?

No, the Link organisations do not agree for the reasons stated in answer to Question 3.12(a) above.

Question 4.4

Are you in favour of or opposed to applying paragraphs 1 and 4 of Art 12 to cases of imminent threat of damage? In either case what are the reasons for your position?

[12] Note the use of the past tense.
[13] See Art 6(3): The ELD contains a power, not a duty, for the competent authority to take remedial measures if the operator fails to comply with its obligations, cannot be identified or "is not required to bear the costs under the Directive" as a means of last resort.

The Link organisations strongly support applying paragraphs 1 and 4 of Article 12 to cases of imminent threat of damage, and fundamentally oppose the exercise of the Government's discretion to remove public rights of access to justice in such cases.

The Aarhus Convention[14], to which both the EU and the UK are signatories, gives members of the public a right of access to administrative or judicial procedures to challenge acts and omissions by public authorities that contravene national environmental law provisions (see in Art 9(3)). Therefore, removing the right of access to justice in cases of imminent threat of damage would not only be ineffectual, but would, we believe, effectively amount to a breach of the Aarhus Convention under Art 12(5).

Furthermore, we suggest that NGO and public involvement in enforcing the ELD would result in better enforcement of the ELD transposing legislation and less burden on the public purse. As the ELD does not provide a strong enforcement regime, especially if the permit and state of the art exceptions are introduced without an effective system of paying for the costs of restoring environmental damage, the rights of NGOs to request the competent authority to take action (under Article 12) will be crucial. For example, in cases where there is an imminent threat of damage, the right to request the competent authority to take action will be essential.

There may be concern that access to justice provisions may increase administrative costs for the competent authority, despite there being a duty to provide evidence in such cases. However, other environmental regimes already use and even, to an extent, rely on help from members of the public or environmental organisations in much less well defined circumstances than under the ELD. For example, the Environment Agency water pollution incident hotline, the involvement of statutory consultees in UK planning processes such as the Environmental Impact Assessment (Uncultivated Land and Semi-natural Areas) (England) (Amendment) Regulations 2001[15], and the help and support of members of the public and environmental organisations in the notification and prosecution in cases of breaches in wildlife law.

Far from being an additional administrative burden and given a proper framework for participation, environmental NGOs could ease the competent authorities' costs by assisting them in identifying real or threatened environmental damage, and thereby carrying a proportion of the costs the authorities would otherwise be bearing. Therefore, we suggest the discretion under Article 12(5) for Member States to remove affected persons' and environmental NGO's rights to request the competent authority to take action in cases of imminent threat of damage and to be informed of the competent authorities' reaction, were not exercised and the right remained.

[14] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998, Aarhus, 25 June 1998

[15] See also the Environmental Impact Assessment (Uncultivated Land & Semi Natural areas) (Wales) Regulations 2002

Question 4.8

What are your views on whether the Government should create criminal offences where the operator fails to comply with a duty under the ELD?
We strongly support the creation of criminal offences where the operator fails to comply with a duty under the ELD. It is vital that such offences be created. The ELD does not have any real teeth as such and there are no substantive provisions to help authorities enforce its provisions, as it is a "self-executing" Directive (as already mentioned). In addition, the creation of a criminal record works as an additional deterrent for companies who may otherwise postpone complying with the Directive as long as possible without serious consequences.

Question 4.9

Are there any other additional offences that the Government should consider creating or circumstances where you consider criminal offences would be inappropriate (for example in relation to preventive measures)?

We suggest that the removal of an operator's license (if applicable) may be a measure worth considering, although this might happen automatically once a criminal record was obtained.

Question 4.10

Would it be preferable to give the competent authority powers to enforce an operator's duties under ELD by way of injunction?

The Link organisations believe that if operators are not complying with the orders of a competent authority to carry out preventive or remedial measures, the competent authority should carry out the necessary measures itself and then pursue the operator for the re-imbursement of its costs, as is its right under Article 8(2).

In addition, it is unclear who will stand as competent authority in respect of the marine environment beyond one nautical mile from baseline. We urge the Government to put forward proposals for a marine competent authority as soon as possible, perhaps in its second ELD consultation. The putative Marine Management Organisation should be considered, although it is unlikely that this body will exist before the transposition of the ELD is completed.

Wildlife and Countryside Link
Northern Ireland Environment Link
Wales Environment Link

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