



Environmental Liability Directive

NGO Coalition RESPONSE to

Defra's and the Welsh Assembly Government's
Consultation on the draft regulations and guidance
implementing Directive 2004/35 on environmental liability
with regard to the prevention and remedying
of environmental damage

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Summary

- 1. This document is a joint response to Defra's and the Welsh Assembly Government's February 2008 consultation on the draft regulations and guidance implementing Directive 2004/35 on environmental liability (the 'ELD' or the 'Environmental Liability Directive') on behalf of the following organisations:**

**Anglers' Conservation Association
Butterfly Conservation
ClientEarth
Environmental Law Foundation
eppac
Friends of the Earth (England, Wales & Northern Ireland)
GeneWatch UK
GM Freeze
Institute of Ecology and Environmental Management
Marine Conservation Society
Royal Society for the Protection of Birds
WWF-UK**

- 2. It should be noted that the views expressed are those of the organisations listed above only, and are not intended to reflect the views of the NGO community in general. In addition, a number of the organisations who have participated in this response are also submitting separate responses on more specialised issues that are more particularly relevant to their specific organisations.**
- 3. The following table sets out our key issues, which are all discussed in the context of the questions asked as part of the consultation exercise.**

Key points: The environmental NGOs listed above:

Strongly support:

- a. **the inclusion of SSSIs and Ramsar sites** in the Environmental Damage (Prevention and Remediation) Regulations 2008 (the 'Environmental Damage Regulations'): We think that this will secure a much more environmentally and economically efficient level of wildlife protection in harmony with existing wildlife legislation. However, we still believe that **Biodiversity Action Plan ('BAP') habitats and species should be included** in the Environmental Damage Regulations as soon as enough baseline information becomes available to enable this; this also goes for other marine protected sites;
- b. **the inclusion of the right to notify action in the case of imminent threats**, although in conformity with the provisions of the Environmental Liability Directive this should be expressed as a right to request action, rather than notify it; and the right to be given reasons for a refusal to take action needs to be expressed more clearly;
- c. **the introduction of joint and several liability and the potential for Directors' to be criminally liable if they commit offences under the Environmental Damage Regulations:** this ensures that the Regulations can actually be applied and enforced in practice - proportional liability would make the regime unworkable, although the principle of joint and several liability should be clearly stated in the Regulations, not just the Guidance;
- d. **the Welsh approach to genetically modified organisms ('GMOs') and in particular the way liability is allocated in relation to GMOs, as well as their exception from the application of the permit and state of the art defences**, and call on the English Government to follow the Welsh approach.

Disagree with the continued use of the minimum implementation approach in conflict with real better regulation principles, with particular emphasis on the inclusion of the permit and state of the art defences.

Are concerned that the Environmental Damage Regulations as drafted will cause too much delay when damage is ascertained and the necessary remedial measures are being decided upon.

Are particularly concerned that the Environmental Damage Regulations' approaches to water damage (in particular in relation to types of water bodies covered and the definition of water damage) and marine damage (in particular in relation to marine SACs and to the Common Fisheries Policy) will exclude important categories of damage which are or should be covered.

Responses to Consultation questions

Question 1: do you have any comments on the definitions, in particular the definition of 'activity' to which the regulations apply (regulation 2)?

4. The Environmental Liability Directive appears to define 'occupational activity' more widely than the Environmental Damage Regulations: as '*any activity carried out in the course of an economic activity, a business or an undertaking...*', not just as '*any commercial activity*'. The word '*undertaking*' particularly could potentially be given a wider meaning.
5. In addition, the ELD defines the word '*operator*', which the Environmental Damage Regulations do not, although the Guidance explains that this includes permit holders and persons registering or notifying the activity. However, the ELD also gives Member States the possibility to include persons '*to whom decisive economic power over the technical functioning of such an activity has been delegated*'. This goes further than the Regulations and should be included to ensure that the Regulations cover all potential operators and that the 'polluter pays principle' is applied properly.

Question 2: do you agree that the Regulations should apply to all species and habitats within a SSSI for which that SSSI has been notified as well as to EU listed species and habitats (regulation 4)?

We strongly support the inclusion of SSSIs in the Environmental Damage Regulations. However, we would welcome further provisions and/or guidance clarifying that non-Natura 2000 Ramsar sites and all relevant protected marine sites are also included, as well as a reference to the possible inclusion of BAP habitats and species in future.

SSSIs and Ramsar sites

6. We strongly support the Government in its inclusion of SSSIs and Ramsar sites in the Regulations and fully agree with the reasoning set out in paragraph 20 of the Consultation as regards the inclusion of SSSIs. However, we are concerned that Ramsar sites which are outside the Natura 2000 network¹ are not covered by the Environmental Damage Regulations and would ask the Government to make clear either in the Regulations themselves or in the Guidance that all Ramsar sites are to be covered.

¹ See list of such Ramsar sites at para 89, p. 31 of the RSPB's response to Defra's first consultation on the implementation options for the Environmental Liability Directive (the 'RSPB response').

Other nationally protected biodiversity - BAP habitats and species and marine sites

7. We agree with the Government that the precise numbers, location or quantities of Biodiversity Action Plan (BAP) habitats and species are not currently known. However, a programme of work is underway, which will mean that such data will be available in the near future, and a biological assessment will be possible. We therefore believe that the Government should make provision for the inclusion of BAP habitats and species at a date when the relevant underlying data is available, which should occur within the next five years². This is particularly important in the marine context, as there are currently no marine SSSIs and presently just 1.4% of the UK's waters to 200nm are designated Natura 2000 sites. For the adequate protection of the marine environment and for consistency with the approach on land, it is also crucial that OSPAR MPAs, Nationally Important Marine Sites and Highly Protected Marine Reserves should also be covered by the Environmental Damage Regulations.

8. This is supported by the EFRA Committee enquiry report, which states:

'We recommend that the Government should exercise its discretion to include nationally protected species and habitats within the scope of the Environmental Liability Directive. In so doing it would be able to trade off any criticism of 'gold plating' against the gains arising from a better and more consistent implementation of the Directive³.'

Question 3: do you agree that the test of damage within SSSIs should be based on site integrity (Schedule 1)?

We welcome the site integrity approach on SSSIs, but we have concerns that the damage threshold outside SSSIs is wrong and too high.

9. We support the use of the site integrity approach on all SSSIs, both in relation to SSSI features and features designated under the relevant European legislation, although we think that the Guidance does not currently make it sufficiently clear that where a protected species is adversely affected on a SSSI, without the rest of the SSSI being significantly affected, this still constitutes damage under the Environmental Damage Regulations. Clarification of the Guidance in this respect would be welcome.

10. However, we are concerned that the Government's approach to relevant damage outside SSSIs sets the damage threshold unreasonably high.

² See RSPB response paras 90-95.

³ Para 80, *Implementation of the Liability Directive*, EFRA Committee, Sixth Report 2006-07 (HC 694), on 12 July 2007; <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmenvfru/694/694.pdf>;

11. We agree with the Government that it is the importance, rather than the magnitude, of an effect which determines whether it is 'significant' for reaching or maintaining favourable conservation status⁴. However, in view of the accelerating decline of biodiversity and the lack of progress towards the Government's goal to halt the decline of biodiversity by 2010, it should be clear that any adverse effect on reaching or maintaining favourable conservation status is necessarily a 'significant' one, as it further impedes and sets back the Government's sustainability goals and the achievement of the goals of the Habitats and Birds Directives⁵. Moreover, it should not be assumed that impacts should be measured at UK level (or beyond that at EU level). If appropriate, local or regional levels should also be considered⁶. A good test in this context would be whether there has been any effect on the maintenance or long-term viability of a habitat or species⁷, which the Guidance does seem to apply at least partially⁸.

Question 4: do you agree that any damage which would be consistent with a drop in WFD status class should be classified as damage for the purposes of ELD (regulation 4)?

- 1. We agree that any damage which would be consistent with a drop in WFD status class should be classified as damage for the purposes of the ELD, as it is by definition 'significant'⁹. However, we are very concerned that significant damage within a status class, so without a drop in status class, will not be caught by the new Regulations. We consider this to be a potential breach of the ELD and of the polluter pays principle, as well as ecologically unsound.**
- 2. We are concerned that, under the proposed system, there could be significant ecological impacts, e.g. fish kills, without triggering action under the new Environmental Damage Regulations, because the system is not designed to detect significant albeit short-term pollution events. The timescales over which the Environmental Damage Regulations and the WFD are required to operate are clearly different and therefore require different approaches.**

⁴ see para 3.32 of the Guidance

⁵ Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora and Council Directive 79/409/EEC on the conservation of wild birds.

⁶ See RSPB response, paras 34-40- and Annex I.

⁷ See RSPB response, paras 35-46 and Annex I, p. vii

⁸ see para 3.39 of the Guidance.

⁹ See RSPB response, paras 49-50

- 3. There are a number of water bodies that will not have baselines for certain quality elements. However, this does not mean that there will be insufficient information to use powers under the Environmental Damage Regulations if a significant event occurs. The polluter should still be pursued under the Environmental Damage Regulations in such circumstances. The Guidance should explain clearly the procedure for such situations.**
- 4. Hydro-morphological damage is covered by the ELD, but not by the Environmental Damage Regulations. It needs to be expressly included. Moreover, it should be made clear that ecological potential is also covered.**

Drop in status class

12. The ELD deliberately refers to '*significant adverse effect*¹⁰' rather than '*deterioration in status*', which is the language generally used by the WFD¹¹. As the ELD definition is so closely linked to the WFD, the fact that '*deterioration in status*' is not the language used to define the water damage threshold under the ELD means that it is not intended to be so.
13. The WFD's overall purpose is to prevent further deterioration of aquatic ecosystems. The purpose of the ELD is to prevent and remedy environmental damage in general, including water damage, and this is reflected by the wider and more absolute damage threshold of '*significant adverse effects*' introduced by the ELD. Therefore, any interpretation of '*significant adverse effects*' as merely covering damage which changes the status category of a water body will be in contravention of the ELD.
14. Moreover, a restriction of water damage to a lowering of status category is of concern also because of the probable manner in which status and the different determinands of status are likely to be defined. Obviously standards set by UKTAG in relation to WFD status characteristics and boundary changes will be crucial in determining damage under the ELD, but they are not sufficient to establish '*significant adverse effect*' as referred to in the ELD, particularly where only a limited number of determinands is set.

¹⁰ Article 2(1)(b), ELD

¹¹ See Article 4, WFD

15. If, for example, phosphorus standards are set for rivers and lakes, but not estuaries, and nitrate standards are set for estuaries, but not lakes and rivers, which appears to be the intention under the UKTAG, it makes no sense whatsoever that a significant case of point source nitrate pollution, for example, would be water damage under the Environmental Damage Regulations in estuaries, but not in rivers or lakes. This is not only impractical, it is also inequitable, not in the least for potential operators who will be subject to a type of 'water body lottery'. This would make the law uncertain, and it goes against the 'polluter pays principle', which is at the heart of the ELD 9 (see also para. 25 of this document which picks up this concern).
16. Although the Guidance goes some way towards addressing this problem by distinguishing between '*deterioration in status*' and '*deterioration of the 'status' of any quality element for the classification of bodies of surface water or any 'parameter' (conductivity, level or concentration) for the classification of groundwater¹²*', this does not adequately deal with the problem, for instance in the case of nitrate pollution as just mentioned.
17. Similarly, if there is a significant incident in a river which happens to affect ecological or chemical characteristics falling within the WFD description of such characteristics, for example in Annex V of the WFD, but it is one for which no determinand has been set under UKTAG, then it will still amount to water damage under the WFD-linked ELD definition. However, it will be much more difficult to show that this is the case in a system that is so focused on the relevant quality elements under Annex V and the very specific and limited standards which may be set as a consequence. This could be particularly important, for example, where there is a direct impact on one of the biological quality elements set out in Annex V of the WFD, for example on fish fauna or benthic invertebrates, without there being a significant effect on one of the chosen UKTAG determinands relating to hydrology, morphology or chemical standards. This type of incident ought to be included, but the Regulations need to be clarified in this regard. The easiest way to do this would be to make sure that '*significant adverse effects*' is not interpreted narrowly to only encompass status boundary change under the WFD (see linked arguments in para. 25 of this document).

Use of WFD reporting standards

18. Notwithstanding the above concerns, if a drop in status is to be used, then we agree with Defra's and the Welsh Assembly Government's approach of using a

¹² At para. 3.52(b)

drop in the class of individual quality elements as an indicator of significant damage rather than an overall drop in water body status.

19. However, this is not to say that we agree with the standards that have been set for each quality element. A number of NGOs have outstanding concerns about the standards being adopted for WFD reporting. We refer to you Wildlife and Countryside Link responses to three consultations, the first on Defra's river basin planning guidance volume two and the second and third on the UKTAG standards consultations¹³.
20. We would be unhappy for the Environmental Damage Regulations to link water damage to these WFD quality elements until the issues outlined in the above documents have been resolved.
21. Even with these unresolved concerns we do not feel that the confidence levels and monitoring program that have been put in place for the WFD are fit for purpose for the Environmental Damage Regulations, especially as many of the standards, monitoring and compliance regime proposed by UKTAG and the Environment Agency for quality elements are not designed to detect significant albeit short-term pollution events. It is clearly unsatisfactory to have to wait for a year to determine any impacts of a significant one-off event. We are concerned that, under the proposed system, there could be significant ecological impacts e.g. fish kills, without triggering action under the Environmental Damage Regulations, even though the Environment Agency would, under normal circumstances, carry out an investigation.
22. These concerns are substantiated by the following extract from the Environment Agency document on the standard to be used for WFD reporting¹⁴. It states that:

"The discussion around this issue centred on one key concern. With the relatively modest monitoring programmes generally envisaged, there may be cases where it is not actually possible to demonstrate with sufficiently high confidence that a site was NotGood, however poor the true quality was. The view was expressed that, in these circumstances, it might be necessary to relax the confidence criterion. However, others felt that this would be unwise. If the monitoring signals contain too much statistical noise to be very

¹³[http://www.wcl.org.uk/downloads/2008/Link response to WFD ministerial guidance 19May08 \(no appendices\).pdf](http://www.wcl.org.uk/downloads/2008/Link%20response%20to%20WFD%20ministerial%20guidance%2019May08%20(no%20appendices).pdf);
[http://www.wcl.org.uk/downloads/2007/Joint Links response to UKTAG Phase II consultation 9AUg07.pdf](http://www.wcl.org.uk/downloads/2007/Joint%20Links%20response%20to%20UKTAG%20Phase%20II%20consultation%209AUg07.pdf);
[http://www.wcl.org.uk/downloads/2006/Joint Links response to UKTAG 18Apr06.pdf](http://www.wcl.org.uk/downloads/2006/Joint%20Links%20response%20to%20UKTAG%2018Apr06.pdf)

¹⁴ 'Combining Multiple Quality Elements and Defining Spatial Rules for WFD Classification'; Environment Agency

useful, this is an important piece of feedback that should inform the future monitoring, rather than be 'papered over' by slackening the assessment criteria¹⁵."

23. This is completely unacceptable. There is no reason to believe that relaxing the confidence criterion required to trigger action on water bodies where it is known the monitoring is inadequate to meet 95% confidence should undermine the fundamental requirement to improve the monitoring regime. Indeed as the Environment Agency is already aware of this problem, changes to either the monitoring programme or the use of confidence levels should be put in place for the first river basin management plans, otherwise unacceptable delays are being deliberately designed into the process.
24. Clearly then, in order for the Environmental Damage Regulations to be effective, the standards for each quality element must be modified, either in terms of the confidence of class or a change of monitoring frequency (perhaps triggered through investigative monitoring), to allow them to work over shorter time periods that would be appropriate for identifying major one-off pollution events. Although both the Environmental Damage Regulations and the WFD must rely on the same thresholds for the status of individual quality elements **the timescales over which these are required to operate are clearly different and therefore require different approaches.**

Water bodies where all Quality Elements are not covered

25. Due to the risk-based approach to monitoring adopted by the Environment Agency, there are a number of water bodies that will not have baselines for certain quality elements. However, this does not mean that there will be insufficient information to use powers under the ELD if a significant event occurs. Even if a pollution event occurs where the pollutant is not monitored, it should be possible, through the analysis of linked quality elements and further investigative monitoring, to identify the polluter. For example, if a significant fish kill is reported, subsequent investigation may link it to a chemical that is not routinely monitored. However, just because it does not fit within the routine WFD monitoring programme, the polluter should still be pursued under the ELD. The Guidance should explain clearly the procedure for such situations.

¹⁵ Section 3.3, page 14

Ecological potential and hydro-morphological quality elements not covered by the draft Regulations

26. The ELD defines water damage by reference to *'ecological, chemical and/or quantitative status and/or ecological potential, as defined in Directive 2000/60/EC¹⁶'*. *'Ecological status' under the WFD 'is an expression of the quality of the structure and functioning of aquatic ecosystems associated with surface waters, classified in accordance with Annex V¹⁷'*. Annex V of the WFD further breaks this down into biological, hydro-morphological and physico-chemical quality elements. *'Surface water status' is defined as 'the general expression of the status of a body of surface water, determined by the poorer of its ecological status and its chemical status¹⁸'*. However, the draft Regulations state that for water damage to occur in relation to surface water, one of only the following elements has to be adversely affected:

- (a) Biological quality elements listed in Annex V, WFD;
- (b) The level of one of the chemicals listed in Annex IX or X of the WFD;
- (c) Physicochemical quality elements listed in Annex V, WFD.

27. The list misses out any reference to hydro-morphological quality elements, which is therefore necessarily excluded. The Guidance does not mention hydro-morphology either. This is clearly in contravention of the provisions of the ELD, and in conflict with the WFD, and needs to be rectified in the final Regulations.

28. In addition, the draft Regulations do not make any reference to *'ecological potential'* anywhere, although this may possibly be covered by the references to Annex V of the WFD, as Annex V contains a list of *'definitions for maximum, good and moderate ecological potential for heavily modified or artificial water bodies'*. The Guidance also mentions ecological potential. However, it would greatly enhance the clarity of the Regulations if they also clearly referred to *'ecological potential'*, which after all, is part of the ELD's basic definition of water damage.

Question 5: do you agree that the definition of water should be limited to water bodies as identified for the purposes of WFD (regulation 4)?

The definition of water should not be limited to water bodies.

The ELD does not define 'waters' as 'water bodies'. Limiting the application of the Water Damage Regulations in this way would amount to a breach of the ELD, and would be ecologically unsound.

¹⁶ Article 2(1)(b), ELD

¹⁷ Article 2(21), WFD

¹⁸ Article 2(17), WFD

The Regulations should make clear that all waters, including smaller water bodies, are covered.

29. The draft Regulations refer to the definition of surface water bodies in Annex II of the WFD. Annex II allows two different approaches to identifying water bodies, but the one favoured by the UK Government is the one which sets minimum size limits on the size of a water body. These size limits are 50 ha for lakes and 10km² for rivers. Because of the link of the ELD's water damage definition to status under the WFD, and the link of status under the WFD to water bodies, as opposed to waters, it could be argued that the application of the ELD's water damage definition is restricted to water bodies, as defined by the WFD. However, the ELD applies to significant adverse effects on the different types of status already discussed '*of the waters concerned*¹⁹'. '*Waters*' is defined as '*all waters covered by Directive 2000/60/EC*²⁰, not all '*water bodies*' covered by the WFD. '*[A]ll waters covered by [the WFD]*' are basically all groundwater and surface water, including inland, transitional and coastal water²¹. The word expressly not used is '*water bodies*', which is what would have been used, had it been the intention of the ELD to restrict itself to '*water bodies*' only. Therefore, the Regulations should make clear that all waters, including smaller water bodies, are covered. This would also be in line with existing UK legislation, such as the Water Resources Act 1991, which covers all '*controlled waters*', which are not subject to any size restrictions.

30. Moreover, this approach also makes sense from an environmental point of view, as there are many small water bodies, such as upland streams and ponds, which may be of high environmental significance, and any water damage caused to them should be covered by the ELD and the Environmental Damage Regulations (for example damage to headwater species in a headwater stream caused by sheep dips or cattle slurry).

Question 9: do you agree with the proposed approach to damage caused by emissions which are ongoing at the date of coming into force of the Regulations?

European law says that a Directive must be applied from the date it is supposed to be transposed. In the absence of proper implementation of a Directive, courts must interpret existing law in the light of the wording and the purpose of the Directive. Not applying the Directive until the date the Regulations enter into force is in breach of EU law.

¹⁹ Article 2(1)(b), ELD

²⁰ Article 2(5), ELD

²¹ See Article 2(1), (2), (3), (6) and (7), WFD.

31. The transposition deadline and deadline for entry into force of the ELD was 30 April 2007. The ELD's provisions apply from that date onwards and anyone subject to its provisions, such as operators or competent authorities are bound by its terms and must follow its provisions.

32. According to the European Court of Justice in Marleasing²²:

*'The Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5[10] of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by it and thereby comply with the third paragraph of Article 189 [249] of the Treaty*²³.' (Emphasis and brackets added)

33. In cases where damage has occurred after 30 April 2007, but before the Regulations come into force, this clearly means that national courts have to apply the provisions of the ELD when they are interpreting national law. Therefore, damage currently being caused by dredging, for example, to a number of marine SACs, would be subject to the rules of the ELD already, if it was brought to court now, and, of course, if this kind of case goes to court after the Regulations come into force, the ELD will apply back to any damage caused after 30 April 2007.

Question 10: do you have any comments on the meaning of the term 'natural disaster' particularly in the context of flooding (regulation 7)?

Regulation 7(4)

34. We oppose the introduction of a 30 year long-stop limitation period in Regulation 7(4). Environmental damage has notoriously long-term effects and sometimes latency periods. Therefore, we advocate no long-stop limitation on liability.

²² *Marleasing SA v La Comercial Internacional de Alimentacion SA*; Case C-106/89 [1992] 1 CMLR 305

²³ Para 1 of Summary

Regulation 7(2)(e)

35. Moreover, although we agree that activities the main purpose of which is to serve national defence or international security should be exempt from the Environmental Damage Regulations, we have a number of concerns:

- It needs to be clarified in the Guidance that companies who merely supply the military or are contractors should not be covered by this exclusion;
- There are many SSSIs and Natura 2000 sites on MoD land, which should not be left wholly without protection under the Environmental Damage Regulations. Therefore, wording similar to that in Regulation 7(2)(b) should be added (i.e. that reasonable precautions were taken).

Question 11: do you agree that commercial sea fishing activities which are in accordance with the CFP should be excluded from the scope of the Regulations?

No, we believe this approach to be wrong for the reasons set out below. Commercial fishing activities should not be excluded from the scope of the Regulations. On the contrary, the ELD should be used to help the CFP achieve its environmental goals.

36. We accept that in principle commercial fishing is a policy area where the Community has exclusive legislative jurisdiction. However, this does not mean that Member States have no jurisdiction in relation to any commercial fishing activities anywhere under the CFP or that the Community in the application of the CFP does not need to pay any regard to environmental considerations and other environmental legislation, such as the ELD.

- Article 8 of Regulation 2371/2002 EC, which sets out the Union's reformed CFP, gives Member States the right to take emergency measures if there is evidence '*of a serious and unforeseen threat to the conservation of living aquatic resources, or to the marine ecosystem resulting from fishing activities*'. Such emergency measures cannot exceed three months and must be notified to the Commission. However, if fisheries were to cause significant damage or a threat of such damage to a protected species, for example through dredging, then the relevant Member State would have a right to take emergency measures. If such a case occurred, it would make sense for a Member State to apply the rules of the Environmental Liability Directive, which after all is also an EU instrument and has the same underlying aims and principles as the CFP (see below). Therefore, the ELD should be treated as one of the instruments that are available for taking emergency measures.

- Article 9 of the same Regulation allows Member states to *'take non-discriminatory measures for the conservation and management of fisheries resources and to minimise the effect of fishing on the conservation of marine eco-systems within 12 nautical miles of its baselines provided the Community has not adopted measures addressing conservation and management specifically for this area...'* This does not apply to vessels of another Member State; or from 6 to 12 nautical miles where treaty rights exist between Member States that allow fishing by foreign vessels. However, this does mean that, as long as none of the exceptions apply, Member States can apply the ELD, at least to fishing vessels flying their own flag.
- Under Article 10, Member States can *'take measures in waters under their sovereignty or jurisdiction if they apply solely to their fishing vessels'*. This applies mainly up to 6 nm from baseline, but again Member States can apply their own laws in this context and should enforce the ELD against their own fishing vessels.
- Together these articles mean that between 0 to 6 nautical miles the activities of the inshore fishing fleet are definitely subject to Member State competence, and the ELD therefore applies in such circumstances. Depending on the circumstances, this may extend out to 12 nautical miles.
- In addition, the fact that the CFP is subject to the exclusive competence of the Community does not mean that the CFP is free to disregard the environmental protection requirements which have to be part of all Community policies under Article 6 of the Treaty, which prescribes the integration of environmental requirements in all Community policies, including the CFP. This would include both the Habitats Directive and the ELD.
- Moreover, the reform of the CFP in 2002, the Marine Strategy Framework Directive²⁴ and recent developments of policy in relation to a new ecosystems based approach to fisheries, the use of maximum sustainable yield, fish discard etc. show clearly that the Commission is incorporating environmental considerations into the CFP and also that *'fisheries policy is fully coherent with and supportive of the actions taken under the cross-sectoral Marine Strategy and Habitats Directive^{25'}*. The CFP has to be guided by principles of good governance including the *'consistence with other Community policies, in particular environmental.... policies^{26'}*.

²⁴ 2005/0211(COD); P6_TA(2007)0595

²⁵ 'Commission Guidelines for the establishment of the Natura 2000 network in the marine environment. Application of the Habitats and Birds Directives', May 2007, p. 105

²⁶ Article 2(2)(d), CFP

'The general policy objective of an ecosystem approach to marine management cannot be achieved by sector policies such as the CFP alone. Actions within different sector policies must link to this integrative framework by developing and implementing those measures that can be taken within the sector policy to support the overall objectives'.²⁷ The same document goes on to say that it is the *'task of fisheries management within an ecosystem approach in a EU context ... to ... ensure that actions taken in fisheries are consistent with and supportive of actions taken under the cross-sectoral Marine Strategy and Habitats Directive'*; and that the *'integrated approach through the Maritime Policy and its environmental pillar, the Marine Strategy, will fully benefit sustainable fisheries by ensuring integrative management of all human, environmental and economic interactions in the maritime field'²⁸.*

Also it says that the *'Natura 2000 network of marine protected areas will provide protection for representative habitats. The coordinated use of CFP instruments such as closures for specific fisheries or no-take zones will be implemented as required to achieve the objectives of the specific Natura 2000 sites.'* Again this shows clearly how the CFP is now subject to other EU policies and environmental laws²⁹. There is no reason why this should not extend to the ELD, particularly as the ELD, at least once damage has occurred, is virtually the only enforcement mechanism in relation to many of the protective mechanisms of the Habitats Directive.

- The CFP itself, like the ELD, is based on the following principles: (i) that it contributes to the achievement of the environmental objectives set out in the Treaty; (ii) that the CFP is based on the principles of precaution, prevention, rectification at source and the polluter pays; (iii) that the CFP aims at a progressive implementation of an ecosystem-based approach³⁰.

37. Therefore, it is clear that the ELD and the CFP do not 'trump' each other, as is sometimes implied. They must both take the other into consideration when they are applied. Therefore, the ELD cannot be excluded in cases of damage caused by fisheries, and should be applied, if necessary, with the input of the Commission/Council which have to take relevant measures if the CFP cannot adequately protect protected biodiversity and ecosystems. The ELD should be treated as an additional measure to help implement the environmental aims of the CFP.

²⁷ *'Communication from the Commission to the Council and the European Parliament; The role of the CFP implementing and ecosystem approach to marine management'*, Commission, 11.4.2008, p. 2.

²⁸ P. 4 same document.

²⁹ See p. 6.

³⁰ *'Communication from the Commission setting out a Community Action Plan to integrate environmental protection requirements into the Common Fisheries Policy'*, COM (2002) 186final, p. 3 and see also CFP, Article 2(1) on precautionary approach

Question 12: do you agree with the proposed division of responsibilities between competent authorities (regulations 9 and 10)?

38. The split between the Environment Agency and Natural England or Countryside Council for Wales seems appropriate given the relevant permitting regimes. However, the allocation of responsibility for enforcement to local authorities for permits in relation to biodiversity and water would benefit from additional guidance and clarification.
39. We also suggest that the Forestry Commission and the Forestry Commission for Wales be either a competent authority or a statutory consultee in cases which fall within its land or expertise.

Question 14 (Wales only): do you agree with extending liability to GMO permit holders (i.e. the GMO producers) as well as operators (such as farmers) who purchase GMOs from them (regulation 13 of the Welsh regulations)?

We welcome the Welsh approach to GMOs. The permit holders are the developers of the technology and should have the greatest knowledge of their products and thus be liable for any environmental damage caused. We urge the Government in England to follow the Welsh approach.

40. We welcome the stance taken in Wales in relation to GMOs. The ELD is the legislation that was promised in the preamble to the Deliberate Release Directive on GMOs³¹ to deal with liability for environmental damage caused by GMOs, and the Welsh approach will help to make the Welsh regulations an effective legal instrument in this regard.
41. By extending liability to GMO permit holders, the Welsh Regulations take account of the fact that the permit holder who has developed the technology will have most experience working with any specific GMO and furthermore has produced the data for the risk assessment upon which the permit has been granted. **Therefore, permit holders, as opposed to other operators such as farmers sowing GM seeds, have the most knowledge of each GMO and of the likelihood of environmental damage that could be caused by it, and should therefore be the parties held responsible for such damage.**

³¹ Directive 2001/18/EC

42. We also urge the Government in England to follow the Welsh approach. This will not only ensure an effective liability regime in relation to GMOs, but will prepare the road for other new and emerging technologies, for example nanotechnology, which may face the same kinds of issues in future. A system that makes companies who are developing such new technologies strictly liable for any damage they cause would provide an incentive for industry to develop high levels of competency in risk assessment alongside the development of the new technologies. Such a system is likely to lead to increased public confidence in GMOs, and if extended could do so for other emerging technologies.

Question 15: do you agree with the way in which the ‘defences’ in the Directive have been applied (regulation 14 in England, regulation 15 in Wales)?

It is our opinion that if the ‘defences’ under the ELD are to operate as currently suggested in regulation 14(15), then this will be contrary to the provisions of the ELD itself, and will constitute a breach of the ELD.

43. Both Article 8(3) and 8(4) of the ELD, which are the basis of regulation 14 (3)(d), (e), (f) and (g) and the equivalent in the Welsh Regulations, are not really ‘defences’ in the true legal sense of the word. If they apply, they do not exempt the operator from liability for damage caused. Neither do they absolve the operator from having to carry out preventive or remedial measures. Articles 5 and 6 clearly impose a duty on operators who have caused environmental damage as defined by the Directive to take preventive action in order to prevent damage from happening and to take remedial measures where damage has happened.

44. There is a certain amount of latitude in relation to the remedial measures that are chosen, as they have to be discussed with and decided by competent authority. However, except in relation to the true legal exceptions from liability listed in Article 4, the obligation to carry out such measures is absolute. The concession made in Article 8(3) and (4) is merely for operators **not to have to bear the cost of preventive (in some cases) and remedial actions already taken**. This is confirmed also by reference being made to ‘measures taken’, instead of ‘to be taken’.

45. Although Member States are given a discretion in relation to whether they wish to introduce the so-called ‘permit’ and ‘state of the art’ defence in Article 8(4), the way these defences are worded effectively means that they can only be implemented into national laws, if the relevant Member State is prepared to pay

for, and possibly carry out, the remedial (and preventive) measures itself. This view is confirmed by provision in Article 8(3) that Member States '*shall take the appropriate measures to enable the operator to recover the costs incurred*'. The only reason why this is not similarly expressed in Article 8(4) is precisely that Article 8(4) gives Member States a discretion whether or not to introduce it in the first place.

46. Therefore, applying the 'defences' as grounds for appeal against a notification of intention to serve a remediation notice, effectively amounts to an exception from liability, rather than exemption from the obligation to pay the costs of preventive and remedial measures, and is clearly in breach of the ELD.

47. For these and the other reasons already set out in NGO responses to the Government's first consultation³², we continue to oppose the introduction of the permit and state of the art defences.

48. However, if some form of permit and state of the art defence were to be introduced after all, we would generally support the fact that they should not apply to preventive/ emergency measures under regulation 11 and 12.

49. In addition, as stated above, the defences, in order not to be in breach of European law, would have to be phrased in terms of exemption from costs requirements, not from liability. Moreover, the list of applicable permits in Schedule 3 would need to be shortened to only include 'real' authorizations and permits, which consider the specific situation in which environmentally damaging events or acts are permitted, so that the likely actual damage could be accurately predicted because the actual environmental medium in which the event were to occur would be known and the consequences of events or acts would be reasonably foreseeable (see answer to question 29 below).

Question 16: do you agree with the proposed procedures for assessment and identification of remedial measures, and for the service of remediation notices (regulation 15 in England, regulation 16 in Wales)?

The system set out in regulation 15 (16) is not precise enough and allows for too much time delay. In addition, rules on consulting affected parties are not wholly in accordance with the underlying ELD provisions and need to be clarified.

50. The system of allocating liability, rights to appeal and deciding on remediation is too loosely phrased in the draft Regulations and allows too much time delay.

³² See for example RSPB response, pp. 34 – 43, paras 107 and 108.

Having a right to appeal against a competent authority's remediation notice, as well as against a notice of intention to serve such a notice, is overly bureaucratic and complex, although it is obviously meant to implement a more practical approach. It will also lead to unnecessary time delays.

51. Moreover, reading the Regulations and the Guidance together, more unnecessary time delays are going to be occasioned by the fact that affected parties and NGOs are going to be consulted on remedial measures so late on in the process.
52. In addition, both the entities requesting the competent authority to take action and operators, and in fact also competent authorities, need to be aware that the longer it takes before remedial measures are finally carried out, the more interim costs will have built up.
53. In this context, it should also be noted that Article 7(4) of the ELD imposes an absolute obligation on competent authorities to invite affected persons to submit observations on remedial measures, and it has to take their views into account. The draft Regulations weaken this, to impose an obligation to consult, '*as far as is practicable*'. Also, they impose no duty to actually consider any comments made, although the Guidance does³³.
54. In order to comply with Article 7(4) of the ELD it is necessary to amend the text of the draft Regulations to:
 - reflect the Guidance in providing for a duty of the competent authority to take account of relevant comments;
 - provide an absolute duty for authorities to consult in the first place, with a **duty** to contact affected parties and a range of relevant (statutory) consultees, such as nature conservation organisations or the Forestry Commission for example.
55. In relation to time limits, the Guidance explains that the relevant consultation exercise is carried out by the publication of a notice in the press, in public places, on the authority's web-site or in their offices, and it says that only '*in some cases the authority may also write to specific individuals to be significantly affected by the plans*³⁴'. In opposition to some of the other time limits stipulated in these Regulations, the 21-day time limit (from publication of the notice) for commenting on remedial measures will be too short in many cases. Remediation can be very complicated, and independent scientific expertise may need to be obtained, which is not possible in the suggested 21 day period.

³³ Para 7.63 of the Guidance.

³⁴ Para 7.62 of the Guidance.

56. Moreover, we oppose the removal of all public notices after 21 days. Even though this may be in line with planning practises, we consider that this is in breach of relevant environmental information and freedom of information laws. The Environmental Information Regulations 2004, for example, oblige public authorities to make environmental information they hold available to the public on a general basis, without any temporary restrictions³⁵.

Question 17: do you agree with the proposed appeal procedures (regulations 14 and 16 in England, regulations 15 and 17 in Wales)?

The proposed appeal procedures involve too many possible delays to remedying environmental damage and open the door to operators to ‘over’-appeal, particularly on purely economic grounds.

57. The proposed appeal procedures involve too many possible delays (see also answer to question 16 above).

58. Also, the fact that the grounds of appeal in Regulation 16(2) refer to ‘*measures other than those specified in the notice [that] are more **appropriate***’ (emphasis added), could not only lead to cumbersome, long-winded and overly complex appeals but also to the appeal system being abused by operators, in order to evade their liabilities on purely financial grounds (i.e. by arguing that other measures were more appropriate simply because they were cheaper). Consequently, we propose that the reason for an appeal should not be that there were other more appropriate measures, but rather that there were other measures more effective in achieving the objective of remediation (as set out in Schedule 4, para.3). Moreover, appeals should only be open to operators who have engaged effectively in the process of identifying and deciding on the suggested remediation measures, for example by proposing measures themselves. Otherwise it will be possible for operators to distance themselves from the process of identifying the necessary remediation measures and then appeal against them as being inappropriate.

59. In addition, even though Regulation 14(g) is an accurate reflection of the provisions of the ELD, it is drawn much more widely than current English precedent suggests. The judgment of the House of Lords in the *Empress Cars*³⁶ case restricts the available defences for water pollution offences, for example, to

³⁵ See Regulation 4(1).

³⁶ *Empress Car Company (Abertillery) Ltd v National Rivers Authority*, [1998] UKHL 5

extreme events such as terrorism, rather than the simple intervention of the third party, such as a vandal. Therefore, the current wording in Regulation 14(g) conflicts with national law and should be changed accordingly. As this would be making the applicable rules stricter, this would not be in breach of the ELD.

Question 19: should remediation notices be suspended pending appeal?

60. No, they should not. This would lead to damage being prolonged and could lead to more severe damage. Such a delay would also increase potential interim costs for the operator and possibly the competent authority.

Question 20: do you agree with the provisions dealing with requests for action (regulation 18 in England, regulation 20 in Wales)?

We welcome the inclusion of a right to request action in cases of imminent threat of damage.

However, the draft Regulations do not reflect Article 12(4) ELD correctly in relation to the obligation of competent authorities to provide reasons for their decision whether or not to take action when they have received a request.

61. We welcome the fact that the Government has not exercised its discretion under Article 12(5) of the ELD to prevent requests for action being made in relation to cases of imminent threat of damage.

62. However, the remaining provisions contained in Article 12, particularly in Article 12(4), have not been accurately reflected in the draft Regulations. The ELD gives NGOs and other affected parties the following rights:

- To submit observations on environmental damage to the competent authority and request them to take action³⁷: The draft Regulations allow affected parties and persons with a 'sufficient interest' to 'notify' the authority of the damage, rather than to 'request action', which is a much stronger expression of a right.
- To be given a reasoned response of the competent authority's decision on the request for action³⁸: The draft Regulations provide for this right in principle, but then go on to say that no reasoned response is necessary if '(a) the notifier is not likely to be affected or does not have a sufficient interest; (b) in the opinion of the enforcing authority the information provided does not disclose any environmental damage or threat of environmental damage; or (c) as a result of the urgency of the situation, it is not practicable for the enforcing authority to comply with [that

³⁷ Article 12(1)

³⁸ Article 12(4)

obligation]. This does not reflect the very simple right to be told what decision the authority has reached in relation to acceding to or refusing the request for action and the reasons for that decision, and would amount to a breach of the ELD if it is introduced.

Question 21: do you think ‘sufficient interest’ should be further defined and if so how?

63. We suggest that generally applicable law in England & Wales should apply. However, it should be made clear that not only charitable organisations can have a ‘sufficient interest’. Other organisations who work in the public interest should also be included.

Question 22: do you think an NGO should be defined for these purposes and if so how?

64. There is no need to define this further, as existing laws deal with this issue adequately.

Question 23: do you agree that judicial review is an appropriate route for challenging decisions by enforcing authorities?

Judicial review is an appropriate route for challenging decisions by enforcing authorities, but it needs to be brought into compliance with Article 13(1), ELD and the Aarhus Convention.

65. Judicial review is an appropriate route for challenging decisions by enforcing authorities. However, in its current form it is not sufficient to comply with the ELD, or for that matter with the Aarhus Convention³⁹. Both the ELD and the Aarhus Convention phrase the right to legal review as right to review (by a court or other competent independent and impartial public body) of the ‘*procedural and substantive legality of the decisions, acts or failure to act of the competent authority*’⁴⁰ (emphasis added). The Environmental Damage Regulations do not mention the addition of a right for a review of the substantive legality of the case (i.e. a right to review a judicial decision on the basis of the law as applied to the facts) and neither they nor the Guidance make clear that such a right exists both under the ELD and in general under the Aarhus Convention. Therefore, it is necessary to extend the current law on judicial review.

³⁹ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998

⁴⁰ Article 13(1), ELD, Article 9, Aarhus Convention

66. Moreover, Article 13(1) of the ELD says that affected persons 'shall' have access to a court. Again, this is also a right under the Aarhus Convention⁴¹. However, the costs of judicial review actions in England & Wales are currently prohibitively high so that in deserving cases it is often not possible for potential complainants to bring an action because of the amount of potential costs involved. Although protective costs orders are increasingly used in public interest cases, it is by no means clear whether this would also occur in relation to ELD actions. Therefore, the current rules on judicial review will not adequately comply with the ELD and if they are not expanded or extended in some way in these Regulations, the Regulations will be in breach of EU law.

Question 24: do you agree with the proposed power for the enforcing authority to take action (regulation 19 in England, regulation 21 in Wales)?

67. Yes.

Question 25: do you agree with proposed powers of entry (regulation 22 in England, regulation 24 in Wales)?

68. Yes.

Question 26: do you agree that there should be a charging provision in the Regulations (regulation 24 in England, regulation 26 in Wales)?

69. Yes

Question 27: do you have any comments on Schedule 1?

Authorised damage under WCA 1981 exception:

70. Paragraph 1(2) of Schedule 1 says that '*[d]amage to protected species and natural habitats does not include damage caused by an act expressly authorised by the relevant authorities in accordance the Conservation (Natural Habitats, etc.) Regulations 1994(a) or the Wildlife and Countryside Act 1981(b).*'

71. **Although this appears to be based on the definition of damage to protected species and natural habitats in Article 2(1)(a) of the ELD, the actual provision in the ELD is significantly narrower than this, which make this provision a breach of the ELD.**

⁴¹ Article 9, Aarhus Convention

72. The ELD excludes from its operation ‘...previously identified adverse effects which result from an act by an operator which was expressly authorised by the relevant authorities in accordance with provisions implementing Articles 6(3) and 6(4) or Article 16 of [the Habitats Directive]⁴² or Article 9 of [the Wild Birds Directive]⁴³. These are very specific, limited, targeted provisions, with some of the derogations even having to be notified to the Commission, and in other cases compensatory measures must have been carried out. The draft Regulations on the other hand apply a blanket approach exempting any damage subject to any express authorisation under two very large and wide-reaching laws, thereby effectively introducing a new and much wider permit defence. This is not the intention behind the ELD and will be a definite breach of its provisions.

73. We support the Government’s approach set out in paragraph 4(1) and (2) of Schedule 1.

Question 28: do you have any comments on Schedule 2?

74. We oppose the exclusion of the spreading of sewage sludge from urban waste water treatment plants from Schedule 2⁴⁴.

Question 29: do you have any comments on the authorisations listed in Schedule 3? In particular, are there any other authorisations to which the permit defence ought to apply in your view?

We support the deletion of some of the most unsuitable activities listed in Annex III of the ELD from the list of relevant permits. However, we consider that pesticide and biocide authorisations⁴⁵ and GMO related permits are unsuitable in this context⁴⁶ and should be deleted from Schedule 3.

75. As already stated, we are fundamentally opposed to the permit defence in principle. Moreover, we think that in its current form the permit defence in the draft Regulations would be in breach of the ELD.

76. If a workable permit defence is introduced⁴⁷, then it will be crucially important that the list of relevant permits and licences in Schedule 3 only contains

⁴² Directive 92/43/EEC

⁴³ Directive 79/409/EEC

⁴⁴ Paragraph 2(3)

⁴⁵ Para 8 of Schedule 3

⁴⁶ Para 9 of Schedule 3

⁴⁷ i.e. one that that exempts operators from the obligation to bear the costs of remedial measures carried out and provides for the indemnization of operators by the state

authorisations in relation to which the application of a permit defence would actually make sense and be fair and equitable. This can only be the case in relation to authorisations that:

- Are specific and precise (as opposed to general or vague);
- Consider the actual planned activity, the precise nature, location and type of 'receiving' environment and the potential damage that could be caused by that activity to that environment.

77. Only in relation to a permit of this sort do the arguments for the permit defence, which are based on fairness and equity, have any weight.

78. Considering this, we support the deletion of some of the most unsuitable activities listed in Annex III of the ELD from the list of relevant permits. However, we consider that pesticide and biocide authorisations⁴⁸ and GMO related permits are unsuitable in this context⁴⁹. We do not wish to repeat arguments already made in previous consultations, but would refer to the relevant GeneWatch and RSPB responses to the first consultation on this subject.

79. Moreover, because of the long-term nature of water abstraction licences and the relatively limited scope for review, we consider that water abstraction licences should not be included in Schedule 3.

Question 30: do you have any comments on Schedule 4?

80. In the list of factors that influence which remediation option is to be chosen under Schedule 4 para 6(1), the costs of implementing the options should be a secondary consideration, after factors like the likelihood of success.

Question 31: do you have any comments on, or additional evidence for, the Impact Assessment?

81. Extensive comments were made by the environmental NGO sector on the draft Regulatory Impact Assessment in their responses to the first consultation. As the Impact Assessment has not changed much in content from the draft provided then, we would refer Defra and the Welsh Assembly Government back to those responses, particularly the RSPB response, and with particular emphasis on our continuing concern about the way the Government has applied the rules on Better Regulation in its 'minimum implementation' approach.

⁴⁸ Para 8 of Schedule 3

⁴⁹ Para 9 of Schedule 3

Question 32: do you have any comments on the guidance that are not already reflected in your answers to earlier questions?

82. Both the consultation document⁵⁰ and the draft Guidance⁵¹ state that the competent authority has the power to enforce the Regulations and reclaim the relevant costs under the Regulations from one operator only, even where more than one operator may have contributed to the damage. In legal terms, this means that an approach using ‘joint and several liability’ has been chosen. However, the Regulations themselves make no such express provision. Although the draft Regulations give competent authorities a number of duties and powers to identify operators, serve relevant notices etc, this is not necessarily enough to give them a right to identify only one of a range of operators where a number of operators have contributed to the damage. In such circumstances operators could appeal against a competent authority’s intention to serve a remediation notice under Regulation 14(3) and (4), arguing that their activity was not the one that caused the damage, or that the damage (or at least ‘their’ part of the damage alone) did not amount to ‘environmental damage’ as defined. Therefore, it is crucial that the Regulations should contain a clear statement giving the competent authority the right to use an approach based on joint and several liability.

⁵⁰ At para. 27.

⁵¹ At para 10.2.

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