

Memorandum by Syngenta in response to the DEFRA consultation document on options for implementing the Environmental Liability Directive in England, Wales and Northern Ireland

Syngenta welcomes this opportunity to respond to the DEFRA consultation document on options for implementing the Environmental Liability Directive (ELD) in England, Wales and Northern Ireland

Overview

The scope of the ELD covers Syngenta core activities including the use and release into the environment of plant protection products and genetically modified organisms. However the stringent authorisation requirements of legislation such as the Directive 91/414/EEC (and its proposed replacement (COM (2006) 388 final)); Directive 2001/18/EC and Regulation (EC) No 1829/2003 ensure that products cannot be approved unless they can be demonstrated to have no unacceptable effects on the environment including water, air, soil, non-target species and biodiversity. Therefore, as a matter of principle, if approved plant protection products or genetically modified organisms are used in accordance with the recommendations then they should not result in "environmental damage" within the meaning of the Directive.

We believe that Exemptions/Defences are an essential part of any implementing legislation in that they increase the predictability of potential liabilities, enabling current operators to insure against losses and allowing future investors to reasonably assess risk. Removal of the permit defence (in particular) would publicly signal an unwarranted lack of confidence in existing permitting systems. Furthermore, in both cases, removal would not prevent damage occurring (which should be a key objective of the proposals). Removal of these exemptions would also risk deterring investment in science-based innovation within the UK. We therefore welcome the proposed inclusion of the Permit Defence and the "State of Knowledge" defence in the UK Regulations.

Syngenta also supports the Government's proposal not to require operators to hold financial security in order to meet any liabilities that may arise under the Directive. The decision of whether or not to take out insurance is a matter for individual businesses.

Response to specific questions listed in Annex III of the Consultation Document

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Question 3.1: (paragraphs 3.3-3.7 page 23)

Of the options available, option 1 seems more sensible as it would take into account the importance of the site. However, in practice the two options may not differ as presumably to be designated a Natura 2000 site, the site must be considered an important contributor to the species/habitat. Probably more important is the definition of an adverse effect, which will involve change from a baseline condition. It is therefore critical that appropriate baselines are understood before the definition of an adverse effect can be made. Syngenta would be happy to offer our assistance in establishing baseline and definitions of adverse effects.

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Question 3.4: (paragraph 3.19-3.24; page 28)

We would consider that activities relating to genetically modified (gm) organisms and crop protection products could be covered by a fault based liability regime; however as the ELD
28 February 2007

does not allow for this, we believe that all activities irrespective of whether or not they are listed in Annex III of the ELD should be covered by the strict liability. This will lead to a clearer system which is based on the damage caused rather than the activity causing it.

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Question 3.5: (paragraphs **3.25-3.27** page **30**)

See response to Point 4 above.

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Question 3.6: (paragraphs **3.28-3.30** page **31**)

See response to Point 4 above.

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Question 3.7: (paragraphs **3.31-3.35** page **32**)

For the purpose of clarity we believe that the ELD should be implemented to include only EC protected species and habitats.

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Question 3.9: (paragraph **3.43**; page **34**)

We favour the application of this exception, but we do not believe that the operator should demonstrate that *"he took all reasonable steps to minimise the possibility or impact of environmental damage in the event of natural phenomena of exception, inevitable and irresistible nature"*. We believe it should be the responsibility of the plaintiff to show that these steps were not taken.

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Question 3.10: (paragraph **3.44-3.51**; page **35**)

We agree with the proposed treatment of the exceptions contained in Article 4.

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Question 3.11: (paragraph **3.52-3.59**; page **37**)

We agree that an operator cannot be liable where environmental damage was caused by a third party. We also support the application of the defence before the operator undertakes remedial measures.

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Question 3.12(a): (paragraph **3.60-3.64**; page **39**)

Syngenta fully supports the proposal to implement a permit defence, as this will provide the legal security for users of approved gm products who comply with the legal requirements associated with such products. Failure to implement the permit defence will prevent insurers from entering the market which runs contrary to Article 14 of the ELD.

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Question 3.13: (paragraph **3.65-3.67**; page **41**)

We favour the application of the permit defence before remediation is undertaken by the operator, since recovery of costs under the alternative system would be highly complex.

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Question 3.14: (paragraph **3.68-3.69**; page **42**)

We strongly support the Government's view that the "State of Knowledge" defence is justifiable. Science is continually evolving. It is unreasonable to expect the manufacturer or

user of a gm product to be able to predict effects that may arise in the future and that could not be predicted given the state of scientific knowledge existing at the time of sale and use.

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Question 4.1: (paragraph 4.2-4.5; page 43)

We believe that financial security is best left to general law. Funds are not helpful in terms of preventing damage to biodiversity and they do not function in practice.

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Question 4.2: (paragraph 4.6-4.8; page 44)

In cases where significant environmental damage is caused by a number of identifiable parties, we favour proportionate liability for legal certainty as operators cannot be responsible for the behaviour of third parties. Apart from this fact that it would be inequitable and punitive for companies to bear liability beyond the extent of their contribution to a particular problem, Option 2 (joint and several liability) would deter insurers from entering the market.

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Question 4.3: (paragraph 4.9-4.11; page 45)

We believe the time limit of 5 years as specified in the ELD should be implemented to ensure consistency with the Directive. We do not see a reason to extend the time limit in this case.

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Question 4.4: (paragraph 4.12-4.16; page 46)

We would not support the applying paragraphs 1 and 4 of Article 12 to cases of imminent threat of damage since it could result in unnecessary cost to regulators and businesses.

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Question 4.5: (paragraph 4.21-4.23; page 47)

We believe it is essential to apply the time limit for legal certainty.

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Question 4.6: (paragraph 4.27-4.28; page 49)

We believe it is appropriate for appeals to follow the National law

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Question 4.7: (paragraph 4.27-4.28; page 49)

We believe that there should be a suspension of the requirement during the duration of the appeal, as long as this is consistent with National law.

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Question 4.8: (paragraph 4.32; page 50)

We do not consider it appropriate to create criminal offences where the operator fails to comply with a duty under the ELD.



Further information about Syngenta

Syngenta is a world-leading agribusiness committed to sustainable agriculture through innovative research and technology. Our products and technologies are on the front line in agriculture, maximising its production for both food and non-food uses, whilst seeking to enhance the sector's contribution to a better environment.

The company is a leader in crop protection and ranks third in the global commercial seeds market. Sales in 2006 were approximately \$8.1 billion. We employ more than 19,000 people in over 90 countries.

Whilst Syngenta is headquartered in Switzerland, the business has a strong UK Heritage with interests going back nearly 100 years. Our main Research Centre is in Jealott's Hill in Berkshire which is the largest agricultural research centre in Europe where we employ over 800 scientists, including many world leading chemists, biologists and environmental scientists. As such, we are one of the largest investors in R&D in the UK spending approximately £100m a year in agricultural research.