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Environmental Liability Directive

Consultation on the draft regulations and guidance implementing Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage

February 2008



Llywodraeth Cynulliad Cymru
Welsh Assembly Government



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Executive Summary

1. This is a consultation on the draft regulations for England and Wales to implement Directive 2004/35 on environmental liability (ELD) (in this document they will be referred to as 'the Regulations'). The consultation will run for 12 weeks and end on 27th May 2008. A previous consultation was held between December 2006 and February 2007. A summary of the responses received in England was published on 30th May 2007 and a summary of Welsh responses was published on 23rd January 2008. There was an inquiry by the Environment, Food and Rural Affairs Select Committee into transposition in England which took place during the spring of 2007. A Committee report was published on 12 July 2007 and a Government response was published on 17 October 2007. The Minister for Climate Change, Biodiversity and Waste held a meeting with representative stakeholder organisations on 4th September 2007 in respect of transposition in England. Please note that in this document, references to the Government include the Welsh Assembly Government unless otherwise indicated.

2. The Regulations impose obligations on operators of activities which cause or threaten to cause environmental damage. Environmental damage is defined in the Regulations, and generally includes only the more serious damage to certain species and habitats, water and land.

3. The Regulations will supplement existing environmental protection legislation such as the Environmental Protection Act 1990, the Water Resources Act 1991 or the Wildlife and Countryside Act 1981 and the Control of Major Accident Hazards Regulations 1999. Those pieces of legislation will still apply, and to the extent that they impose additional obligations to those in these Regulations, will still need to be complied with. Where these Regulations do not apply, for example, because the damage is established to fall below the thresholds, or because one of the defences applies, operators should bear in mind that alternative legislation might still apply.

4. The Regulations will include offences and penalties for failure to comply with the obligations in them.

5. Enforcement will be by different authorities depending on the nature of the activity and the damage caused. These authorities will be the Environment Agency, Natural England and Countryside Council for Wales, Local Authorities, and in the case of damage at sea, the Secretary of State in England and Welsh Ministers in Wales.

6. The Government has produced draft guidance to complement the Regulations. The aim of guidance is to outline the requirements of the Regulations and offer assistance on the practical application of the Regulations. Your views are also sought on the draft guidance at Annex C.

7. Following the consultation, there will be a period of analysis of responses, and the Government hopes to make the final regulations in about December 2008.

Devolution

8. Environmental protection is a devolved competence. Separate regulations will be made by England, Wales, Scotland and Northern Ireland. Scotland and Northern Ireland will be consulting separately on their draft regulations. This consultation includes separate draft regulations for England and for Wales.

For more information regarding Scotland, please contact:

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For Northern Ireland, please contact:

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Environmental Policy Division
20 – 24 Donegall Street
Belfast BT1 2GP

How to respond

9. The consultation period runs for 12 weeks and ends on 27th May 2008.

10. Additional copies of this document may be made without seeking permission.

11. If you have any queries regarding this consultation please contact:

Defra
ELD Consultation
Environmental Liability Branch
Environment Regulation Policy Division
Area 5B Ergon House
Horseferry Road
London SW1P 2AL

Respondents in England should send their responses to the above address. Responses can also be sent by email to: ELD@defra.gsi.gov.uk.

Respondents in Wales should send their responses to:

Jane Anstee
Waste Regulation Policy Branch
Welsh Assembly Government
Cathays Park
Cardiff CF10 3NQ
Email: Jane.anstee@wales.gsi.gov.uk

12. When you are responding please state whether you are responding as an individual or are representing the views of an organisation.

Data protection Act 1998

13. The Secretary of State for Environment, Food and Rural Affairs is the data controller as defined in Section 1 of the Data Protection Act 1998 in respect of personal data that you provide in response to this consultation exercise. Personal data is information about an individual such as their name, contact details and opinions.

14. In line with Defra and the Welsh Assembly Government's policy of openness, at the end of the consultation period, copies of the responses we receive may be made publicly available through the Defra Information Resource Centre, Lower Ground Floor, Ergon House, 17 Smith Square, London SW1P 3JR and the Publications centre, National Assembly for Wales, Cathay's Park, CF10 3NQ.

15. If you do not consent to this, you must clearly request that your response be treated confidentially. Any confidentiality disclaimer generated by your IT system in e-mail response will not be treated as such a request. You should also be aware that there might be circumstances in which Defra will be required to communicate information to third parties on request, in order to comply with its obligations under the Freedom of Information Act 2000 and the Environmental Information Regulations.

16. Defra and the Welsh Assembly Government also intend to publish a summary of the responses to this document. Normally, the name and address (or part of the address) of its author are published along with the response, as this gives credibility to the consultation exercise. If you do not wish to be identified as the author of your response, please state this expressly in writing to us

17. The Information Resource Centre will supply copies of consultation responses to personal callers or in response to telephone or e-mail requests (tel: 020 7238 6575 / email: defra.library@defra.gsi.gov.uk). Wherever possible, personal callers should give the library at least 24 hours notice of their requirements. An administrative charge will be made to cover photocopying and postage costs.

If you wish to make a complaint or query the consultation process please write to:

Marjorie Addo Defra's Consultation Co-ordinator,
Area 7C Nobel House,
17 Smith Square,
London SW1P 3JR

The first consultation and the approach in the Regulations

18. The first consultation took place between December 2006 and February 2007. In that consultation the Government indicated its intention not to go beyond the minimum requirements of the Directive unless there were exceptional circumstances justified by a cost benefit analysis and following extensive stakeholder engagement.

19. The Government still intends to implement in accordance with this approach. However, as a result of considering consultation responses the proposals made in the first consultation have been amended in some respects. These are explained in this consultation.

20. The Government has decided to extend the scope of species and habitats protected under the Regulations to include all those for which Sites of Special Scientific Interest (SSSIs) have been notified. Among the reasons put forward by stakeholders for this approach, the Government has noted in particular the following:

- Extending protection to the nationally protected interest features on a SSSI is a relatively small extension beyond the minimum required by the Directive and failure to extend protection in this way would result in two different bases of protection and remediation applying within the geographical boundaries of the same SSSI with consequent confusion and complication for operators and enforcement authorities.
- the Government has committed to getting 95% of SSSIs into favourable condition by 2010. Extending ELD to cover all species and habitats on SSSIs could support to a limited degree the achievement of the target by reducing the impact of environmental damage and maintaining the progress already achieved by encouraging changes in operator behaviour.
- the Government has considered expert advice, in particular from the Joint Nature Conservation Committee, to the effect that it is not possible to apply a test of damage based on conservation status to the nationally protected species and habitats within SSSIs. The Government does not consider that it is appropriate to apply two different tests to SSSIs depending on whether the species or habitats are European or nationally protected, and has therefore decided to apply a test of damage for all species and habitats on SSSIs based on site integrity rather than conservation status. This will represent the most efficient means of affording protection for our most sensitive sites. It will also be more certain for operators to apply. It also ties in more closely with the protection already afforded to SSSIs under existing legislation.
- Sites which are protected under the convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar) are also SSSIs and will therefore be fully protected under the Regulations.

21. The Government has also considered whether to extend the Regulations to include species and habitats covered by Biodiversity Action Plans. There

are now 1149 species and 65 habitats. Expert advice is that the precise numbers, location or quantities of such species and habitats are not yet sufficiently well known to allow the Regulations to apply, and the Government also feels that applying the Regulations to these species and habitats would entail a very significant extension over and above what is required by the Directive. The Government has therefore decided not to bring BAP species and habitats within the scope of the Regulations.

22. The Government has decided that there are no exceptional circumstances which justify an extension of strict liability to damage caused by non-annex III activities. Relevant factors in this decision include the following:

- since existing legislation will continue to apply, this issue is principally of importance in the case of biodiversity damage.
- the majority of cases of such damage are likely to come from agricultural and land use activities. In many cases, if damage is caused by such activities, this will be as a result of negligence in any event and therefore already caught by the Regulations.
- many of the additional incidents of biodiversity damage captured under a strict liability regime would involve small businesses where the impact of liability could be serious. For example, the Impact Assessment indicates that the cost of a large incident would represent 17% of a small farmer's turnover.
- extension of strict liability beyond Annex III would create an anomalous situation in which those businesses operating Annex III activities (which are generally subject to permits) would benefit from a permit defence, whereas those operating non- Annex III activities (which may not be subject to permit) would not benefit from such a defence.
- in view of the decision to extend protection to SSSIs and the different threshold of damage in that respect, extension of strict liability beyond Annex III in relation to biodiversity damage would have a cumulative impact on affected businesses on top of that extension in relation to activities which might affect SSSIs.

23. Government has also decided to implement all the defences in article 8 of the Directive, including permit and state of the art defences in full, except in relation to GMOs in Wales, where these defences will not apply. Reasons for this are as follows:

- in most cases permits are granted with careful consideration of environmental conditions and therefore the chances of a serious incident of damage should be extremely small
- permit defences provide greater business certainty in relation to the potential application of the additional requirements imposed by these Regulations, albeit that the defences are not applicable under existing legislation.
- denying these defences might have a detrimental effect on the development of insurance products.

- the permit and state of the art defences do not apply to emergency measures in any event, and does not apply if the operator is negligent or has breached any of the conditions of the permit.
- the state of the art defence facilitates innovation.

24. Where these defences are shown to apply, the operator will not be obliged to carry out remediation under these Regulations. In relation to the 'permit' and 'state of the art' defences, the Directive distinguishes between emergency measures and remediation measures, and applies these defences only to the latter. The Government considers that this is a sensible approach and achieves a fair balance between the business benefits of the defences and the need to prevent and control environmental damage. The Government intends to adopt the same approach in relation to the 'third party' defence.

25. In Wales, the Welsh Assembly Government is proposing not to allow the permit and state of the art defences in relation to damage caused by the release of GMOs.

As far as environmental damage from the deliberate release of any GMOs in Wales is concerned, the Welsh Assembly Government is also proposing to extend liability to the holder of a permit, consent or authorisation issued in accordance with Directive 2001/18/EC or Regulation 1829/2003.

The Welsh Assembly Government believes that this approach would maximise the scope for remedial or preventive action in the case of environmental damage caused by the deliberate release of GMOs and ensure that GMO producers, as well as those operators (such as farmers) who purchase GMOs from them, accept responsibility for damage that may be caused by their products.

26. The Government intends to apply the exclusions in the Directive as indicated in the first consultation, together with the 5 and 30 year limitation periods.

27. The Government has also carefully considered the need for effective enforcement of the Regulations and does not intend to require enforcing authorities to apportion liability before requiring responsible operators to act or before reclaiming costs from operators. Requiring them to do so would be a significant burden and could give rise to serious obstacles and delay in obtaining remediation or reclaiming payment under the Regulations. Operators will however be free to claim contribution or indemnity from other liable persons in civil proceedings in the normal way.

28. In relation to all the damage thresholds, it is the intention of the Government to continue working with stakeholders in order to further develop the guidance and arrive at an approach which is as clear and easy to understand and apply as possible.

29. In the case of the water and land damage thresholds, the Government has considered these further in detail and no longer intends to adopt precisely the

same approach as indicated in the first consultation. In the case of water, the damage threshold will be based on the quality standards being developed for the implementation of the Water Framework Directive in such a way that a breach of a standard for any quality element which is consistent with a deterioration of status would qualify as damage, whereas an incident which does not bring about such a deterioration in the quality element would not. This is considered to be a more certain and clearer approach. In the case of land damage, it is accepted that the definition differs from that in existing legislation in certain respects.

30. In relation to the right to request action the Government has not excluded the right to request action in the case of imminent threats but has attempted to draft the provision in such a way as to balance the rights of interested parties to raise the alarm against the need to avoid overloading enforcing authorities with the need to investigate trivial or inappropriate complaints.

31. Finally, there are some further detailed issues raised in this consultation on which the Government is seeking views. These include enforcement (for example rights of entry, cost recovery and charging) and notice procedures. The Government would also like to invite comments on the approach taken to the overlap with existing legislation. Finally, the issue of fishing and the overlap with the Common Fisheries Policy is raised in this consultation for the first time, and views are invited.

Review

32. The Directive requires member states to report to the Commission on the experience gained in the application of the Directive by 30th April 2013. Information will need to be provided in accordance with Annex VI of the Directive, including details of incidents of damage, outcome of remediation and costs incurred or recovered. The Government proposes to use this opportunity to review the application of these regulations in order to establish whether they are working effectively and to see whether any amendments are appropriate. In this context, the Government intends to consider all the issues mentioned in article 18.3 of the Directive, including genetically modified organisms. Full engagement with stakeholders will be an important part of that review.

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)?

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)?

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

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)?

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)?

Question 6: do you agree with the proposed approach to the threshold for land damage (regulation 4)?

Question 7: do you agree with the proposed approach for deciding remediation for land damage? (Schedule 4)?

Question 8: do you agree with the proposed approach to the overlap with other legislation (regulation 6)? If you prefer an alternative approach please give details of how you think it should work and why you favour it.

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?

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

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?

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

Question 13: do you think the Regulations should contain special provisions about handling emergencies and if so, what should they be?

Question 14 (Wales only): do you agree with extending liability to GMO permit holders (i.e. the GMO producers) as well as operators (such a

farmers) who purchase GMOs from them (regulation 13 of the Welsh regulations)?

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)?

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)?

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

Question 18: should appeal procedures be specified or left at the discretion of the appointed person?

Question 19: should remediation notices be suspended pending appeal?

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

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

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

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

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

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

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

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

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

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?

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

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

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

The proposals

The proposed regulations for England are at Annex A. The regulations for Wales are at Annex B. Guidance is at Annex C. The updated Impact Assessment is at Annex D.

PART 1 INTRODUCTORY PROVISIONS.

Regulations 1 and 5: Title, commencement and application

33. The English Regulations will apply in England. The Welsh regulations apply in Wales. For the purposes of water damage, they will apply additionally to the water out to 1 nautical mile around England and Wales respectively (consistent with the Water Framework Directive). For the purposes of protected species and natural habitats, the English Regulations will also apply to the seabed around the UK out to the limits set out in the Continental Shelf Act 1964, and to the waters in the Renewable Energy Zone, which extends approximately 200 miles out to sea around the UK. Scotland, Northern Ireland and Welsh Ministers will be responsible for the sea and seabed out to 12 miles from their shores.

Regulation 2: Interpretation

34. This regulation defines some of the terms used in the Regulations. The Regulations apply only to commercial activities.

Question 1: do you have any comments on the definitions, in particular the definition of ‘activity’ to which the regulations apply?

Regulation 4: Definition of environmental damage

Biodiversity

35. The Directive defines protected species and natural habitats by reference to the species and habitats listed in the Birds Directive (Directive 79/409/EEC) and Habitats Directive (Directive 92/43/EEC). Everything listed in the parts of those Directives referred to will be protected under ELD wherever it is.

36. In many cases, the most significant EU listed species and habitats will be on Natura 2000 sites, that is, Special Areas of Conservation and Special Protection Areas which have been designated under the procedures in the Birds and Habitats Directives. However, protection is not restricted to those sites.

37. In addition to protecting EU listed species and habitats described above, the Regulations will also protect those species and habitats on a SSSI for which that SSSI has been notified under the Wildlife and Countryside Act 1981.

38. The threshold of damage for species and habitats on and off SSSIs is set out in Schedule 1 of the Regulations (see below).

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?

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

Water damage

39. The definition of water damage in the Directive is expressly linked to the Water Framework Directive, though the precise way in which that link is envisaged to work is not specified. In the Water Framework Directive, member states are required to analyse the condition of water and to report regularly on the condition. The condition of surface water is made up of a combination of chemical status and ecological status. The condition of groundwater consists of chemical and quantitative status. All these concepts derive from the Water Framework Directive (WFD) and it is therefore the Government's intention to apply the criteria and methods of that Directive in the context of these Regulations.

40. If an ELD incident is suspected, tests and samples will establish the substances or processes concerned and will be analysed in accordance with WFD standards and methods. Any deterioration in chemical, ecological or quantitative status which would result in a lower status being reported (that is, any breach of a relevant quality standard which is **consistent with** a deterioration of status, even though status may not actually alter because of other factors) will be treated as significant for the purposes of ELD. Any incident which would not result in such a drop in status will not be treated as sufficiently significant for the purposes of ELD. This represents a change from the approach in the first consultation which suggested that some drops in status might nevertheless not be classified as significant for the purposes of ELD, whereas some deterioration within a status class might be.

41. The Government considers that this approach offers the best way forward because it is the most clear and certain. Enforcing authorities and operators will be able to know quite quickly and with reasonable certainty whether or not an incident falls within these Regulations and will be able to act accordingly. An alternative approach would involve an additional element of uncertainty and subjectivity which could be open to delay and challenge. It is also felt that an approach which is clearly linked to WFD status follows the spirit of the Directive which clearly intends damage to be linked to WFD status. The Government takes the view that this makes sense because an incident which entails failure of a quality standard and would cause a drop in status is by definition serious, whereas an incident which does not trigger such a drop is by definition not as serious.

42. For the purposes of these Regulations, only water bodies as defined in WFD will be relevant. This means that damage to small lakes and ponds would not qualify. However, powers under the Water Resources Act 1991 could still be used to ensure clean up if necessary.

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)?

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

Land Damage

43. The definition of land damage under the Regulations differs from that in Part 2A of the Environmental Protection Act 1990. It only includes contamination which gives rise to significant risk of human health being adversely affected, whereas current legislation applies to any kind of significant harm including damage to ecological systems or property (see Table A at Annex 3 of Circular 01/2006: Contaminated land for England and Table A in the Statutory Guidance for Wales). On the other hand, the list of potential adverse effects on human health is probably somewhat wider than 'significant harm' in existing legislation. In addition, contamination by organisms and micro organisms will also be relevant, whereas current legislation only applies to 'substances'.

44. The draft guidance refers to CLR 11 which will be relevant for the assessment of land damage under the Regulations. However, the guidance points out that the assessment in individual cases will have to be a matter of judgement based on all the factors and cannot be a purely scientific matter.

45. The Government proposes that whether or not land damage has been caused will be decided in accordance with the current or approved future use of the land. On the other hand, in deciding the appropriate level of remediation, it will be appropriate to take into account likely future use in appropriate cases, even where that is not yet the subject of formal planning permission. For example, a future use may be outlined in a local or regional plan.

Question 6: do you agree with the proposed approach to the threshold for land damage?

Question 7: do you agree with the proposed approach for deciding remediation for land damage (Schedule 4)?

Strict and Fault based liability

46. Regulation 4(2) includes reference to strict and fault based liability.

47. The Regulations reproduce the approach in the Directive by imposing strict liability on those engaged in the activities in Schedule 2 (which reproduces Annex III of the Directive). This means that there is liability without the need to prove negligence or other fault (but subject to defences discussed below).

48. In relation to biodiversity damage, in addition to strict liability for Schedule 2 activities, operators of any other activities may be liable if they intended the damage or were negligent as to whether or not such damage would be caused. This reproduces the approach in the Directive.

Regulation 6: Other legislation

49. The Regulations provide that other enactments regarding environmental damage continue to apply.

50. In some cases, the same incident could be governed both by these regulations and by existing legislation. For example, if water damage has been caused which exceeds the threshold in these Regulations, then the responsible operator will be required to carry out remediation in accordance with Schedule 4. In such a case, it would also have been possible for the Environment Agency to serve a works notice under the Water Resources Act 1991. However, it would not be appropriate for them to do so if and to the extent that the incident is governed by these Regulations.

51. On the other hand, if such damage was caused by an operator acting in accordance with a permit, so that the duty to remediate under these Regulations does not apply, it may still be appropriate for a works notice to be served in relation to the incident. This is because it has never been the Government's intention to diminish the protection offered by existing legislation.

52. Alternatively, if land is contaminated in a way which does not involve a risk to human health, so that these Regulations do not apply, the contamination would still fall to be dealt with under Part 2A of the Environmental Protection Act 1990. Similarly, if a case of land damage is shown to have been caused by an emission which predates these Regulations, the powers and duties under Part 2A may still apply to the contaminated site.

53. It is possible that the same incident might give rise to one type of damage to which these Regulations apply and to another type of damage which is not sufficiently serious to breach the damage threshold, for example land contamination which involves a risk to human health and water damage which does not breach the threshold. In such a case, it is possible that remediation to the land would need to be dealt with under these Regulations, whereas the remediation to the water would be dealt with under the Water Resources Act 1991.

54. The above approach is similar to that which currently exists for water pollution as a result of land contamination. The legislation does not explain whether this should be dealt with under Part 2A of the EPA 1990 or the Water Resources Act 1991. In practice the overlap is dealt with by a memorandum of understanding between local authorities and the Environment Agency.

55. The Government considers that this approach has the benefit of flexibility and enables these Regulations to complement existing legislation without losing protection. In practice, it is anticipated that operators and enforcing authorities dealing with incidents of threatened or actual damage would look first at these Regulations, principally because they impose duties on operators. If and to the extent that they do not apply, then it may be appropriate to look at existing legislation.

Question 8: do you agree with the proposed approach to the overlap with other legislation? If you prefer an alternative approach please give details of how you think it should work and why you favour it.

Regulation 7(1): Timing

56. The Regulations will not cover environmental damage if it was caused by an emission or incident which took place and finished before the Regulations come into force, even if that damage continues to exist after that date. Nor will they apply to damage caused after they come into force, even if the emission itself post dates the coming into force date, if this is the result of an activity which ceased before that date.

57. In view of the late implementation of this Directive, the Government takes the view that this is the better approach in the circumstances because it offers improved certainty for both business and enforcing authorities. The Government made this position clear in relation to England in its evidence to the EFRA Select Committee and also in a statement posted on the Defra website in 2007.

58. Where an emission such as a slow leak is ongoing both before and after the coming into force of the Regulations, then the Government proposes that the Regulations should impose liability to remediate only the proportion of the damage which is attributable to the emission which occurs after the coming into force of the Regulations.

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?

Regulation 7: Exemptions

59. Regulation 7 exempts certain activities.

60. In relation to oil pollution, the 1992 Convention already imposes strict liability and compulsory insurance.

61. In relation to other damage from shipping, operators will still be able to limit their liability for personal injury and property claims under the 1976 Convention.

62. Regulation 7 uses the term 'natural disaster'. The Government considers it reasonable for this to include exceptional disasters such as the 1987 hurricane, or exceptional flooding, but not, for example, regular seasonal flooding.

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

Commercial Sea Fishing.

63. Fishing is regulated under the Common Fisheries Policy. This aims not only to regulate the fishing industry but also to protect the natural environment. For example, areas may be closed to fishing under CFP regulations, or fishing may be restricted in order to protect sensitive habitats.

64. In addition, sites of Community importance may be designated in accordance with the Habitats Directive and national legislation provides for their protection. The Marine Bill will also introduce mechanisms for setting up marine conservation zones.

65. The Government appreciates that fishing can cause damage in the marine environment. However it takes the view that it is better to address this through prevention under the mechanisms provided in the CFP, rather than by trying to take action against individual operators to remediate damage after the event.

66. Furthermore, there are practical difficulties in applying the Regulations to fishing. For example, it is unlikely that, in practice, individual operators could be responsible for sufficient biodiversity damage to fall under the Regulations. It is more likely that environmental damage would be caused by numerous operators over a period of time. It would also be very difficult to identify responsible operators or to obtain evidence linking their actions to a given case of damage.

67. For these reasons, and in order to achieve clarity and certainty, the Government therefore proposes that the Regulations should not apply to fishing activities carried out in compliance with the CFP. To the extent that damage is caused through a breach of the CFP, for example by fishing in a closed area or with prohibited gear, these Regulations could still apply in addition to penalties imposed under the relevant fisheries legislation.

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?

Regulations 9 and 10: enforcing authorities

68. Different authorities will have responsibility for enforcing the Regulations depending on the type of damage. These are the authorities which will issue notices under the Regulations. They are also the authorities which will need to be notified in the case of damage or threatened damage, and the authorities to which complaints may be made by interested parties as defined in article 12 of the Directive.

69. Broadly speaking, the approach taken in the Regulations is to allocate responsibility as closely as possible to existing responsibilities. Thus, the Environment Agency will be the appropriate authority for all activities which they already licence under Environmental Permitting Regulations 2007. It will also be the authority for water damage as well as biodiversity damage in waters other than the sea. Local authorities will deal with land damage and Natural England and the Countryside Council for Wales will deal with biodiversity damage.

Table 1 in the draft guidance document lists the enforcing authorities for the different types of environmental damage.

70. The allocation of this last role to local authorities represents a departure from the position indicated in the first consultation, and arises as a result of further consultation with enforcing authorities including local authority representatives. It is the solution favoured by Local Authority co-ordinators of Regulation (LACORS) on behalf of the local authorities they represent.

71. Obviously there are some cases where the division of responsibility is complex, and there could be cases where it is unclear. In such cases the authorities may decide among themselves who is to take the case forward.

72. Where the operator is under a duty to notify the enforcing authority, then provided he has notified whichever authority appears to him to be the correct one, this will be sufficient.

Marine enforcing authority

73. The Marine Bill will create a new enforcing authority with responsibility for the marine area. Until then, the intention is that the Secretary of State, acting through the Marine and Fisheries Agency (MFA) will be the enforcing authority for protected species and natural habitats in the marine area around England and Wales. (Out to 12 miles around Wales the enforcing authority will be Welsh Ministers acting through the Marine and Fisheries Agency). Because, apart from the first mile out to sea, we are concerned only with biodiversity damage in the marine area, it will be necessary for expert advice to be taken from Natural England and the Countryside Council for Wales (out to 12 miles) and the JNCC beyond that, and perhaps from other expert bodies in specific cases. In addition, it will be necessary for the MFA to liaise with other bodies

with offshore responsibilities. Principally these will be local authorities and Environment Agency for incidents near the shore, Maritime and Coastguard Agency for shipping spills and DBERR for incidents involving offshore oil and gas facilities. Other interested bodies include port and harbour authorities.

74. Consideration is still being given to the precise nature and extent of enforcement obligations at sea. In view of this, further discussions will be held with officials responsible for the Marine and Coastguard Agency with a view to ascertaining how best to handle the overlap with their existing role in relation to marine oil and chemical spills.

Question 12: do you agree with the proposed division of responsibilities between competent authorities?

Emergency handling

75. The Government will also be considering further whether the Regulations need to contain any specific measures for the handling of large scale emergencies. In the case of oil spills at sea, a large number of different bodies are involved, ranging from local authorities to the emergency services. These roles are coordinated by a person appointed by the Secretary of State with overall responsibility. The Government would be interested in hearing views as to whether a similar appointment would be of value in the context of these Regulations.

76. The Government is also further considering the role of the Health and Safety Executive and Health Protection Agency in relation to the Regulations. The HSE currently have responsibility for relevant areas including contained use of Genetically Modified Organisms and as a competent authority under the Control of Major Accident Hazards Regulations.

Question 13: Do you think the Regulations should contain special provisions about handling emergencies and if so, what should they be?

PART 2 – ENVIRONMENTAL DAMAGE

Regulation 11: Prevention of environmental damage

77. This regulation places a duty on operators of activities to take all practicable steps to deal with imminent threats of environmental damage. This will cover threatened emissions or incidents, for example, where a fault in equipment might give rise to a leak. In such a case, the operator must take all practicable steps to prevent such an incident occurring.

78. Because this regulation is intended to prevent damage, and is envisaged to apply in emergencies, it will not always be possible to say with certainty whether or not the threatened damage would actually be

above the thresholds in the Directive. It is therefore essential to apply this regulation equally to cases where there are reasonable grounds to believe that the threatened damage would be environmental damage.

79. In all cases, unless the operator has successfully dealt with the threat, he will need to notify the enforcing authority as to the relevant details of the incident. A notice may be served on the operator telling him what to do to deal with the threat.

See chapter 5 of the draft guidance for what constitutes “imminent threat” for the purposes of these Regulations.

Regulation 12: prevention of further environmental damage

80. Where damage has been caused and there are reasonable grounds to believe that this is or will become environmental damage, this regulation requires operators to take immediate steps to control and contain whatever is causing the damage so as to prevent it getting worse.

81. Clearly this cannot just be restricted to cases where environmental damage has been established as in many situations there will need to be detailed analysis before the precise nature of the damage can be ascertained. However, delay in controlling the damage would defeat the object of this provision and it is therefore essential to include cases where there are reasonable grounds to believe that the damage is or will become environmental damage.

82. Where the operator fails to take the right measures, the enforcing authority can serve a notice on him telling him what to do. This power will exist all the way through until remedial measures are carried out. If, during the course of identifying the right remedial package, it becomes clear that some further emergency action is needed to contain the damage, then the enforcing authority will be able to require the operator to do this.

Chapter 5 of the draft guidance sets out when immediate action is required and outlines the steps required from the responsible operator.

83. Regulation 13 in the Welsh regulations defines the responsible operator as including the holder of a deliberate release consent for the purposes of release of GMOs.

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?

PART 3 – REMEDIATION

Regulations 13, 14 and 15: assessment and identification of remedial measures, and remediation notices. (Regulations 14, 15 and 16 in the Welsh Regulations.)

84. Where it is reasonable to believe that environmental damage has been caused, the enforcing authority is required to assess the extent of the damage in order to decide whether it is indeed environmental damage.

85. In most cases, the authority will work closely with the responsible operator to identify the extent of the damage. Where environmental damage is identified, then the costs of this assessment will be recoverable from the operator (in accordance with article 8.1 of the Directive). Where no environmental damage has been caused, then the Regulations will not apply and costs will not be recoverable from the operator concerned.

86. Once it has been established that environmental damage has been caused, the enforcing authority will identify the responsible operator and notify him that it intends to serve a remediation notice.

Chapters 7 and 8 of the draft guidance deal with remediation.

Appeals at the notification stage.

87. The operator may appeal against the notification on the basis that he did not cause the damage concerned, or that the damage does not exceed the thresholds in the Regulations, or that one of the exemptions in regulation 7 applies.

88. The operator may also appeal at this stage on one of following grounds:

(a) That the damage was caused as a result of compliance with an instruction from a public authority (other than an instruction arising out of the operator's own activities).

(b) That he was not at fault or negligent, and

(i) That he had a relevant permit under Schedule 4, and that he was operating in accordance with any conditions in that permit, or,

(ii) That the emission or activity was not considered likely to cause environmental damage according to the state of scientific knowledge at the time. (This defence does not apply to GMOs in Wales – see regulation 19 of the Welsh regulations)

(c) That although he caused the damage, the actions of another person also contributed to the damage despite the fact that all appropriate safety measures were in place.

89. Note that all these defences only apply to the requirement to remediate. They do not apply to the requirements to take emergency steps in regulations 11 and 12. In relation to damage which is contributed to by third parties, it will in all cases be possible for the operator to claim contribution or indemnity from that third party. However, the Government considers that it is also extremely important to ensure that in all cases, action is taken to avert the threat of very serious environmental damage.

90. Note also that where these defences do apply, the operator will not be required to carry out remediation work. The Government takes the view that this is the most sensible interpretation of article 8 of the Directive. It has been argued that the provisions of article 8 still require the operator to carry out remedial work in every case, but that where the provisions of that article apply, he should be able to claim reimbursement from the state.

91. The Government does not feel that this is a practical approach. It would oblige operators to carry out expensive remediation in the full knowledge that they are not liable to pay for the work. It would also oblige competent authorities to sit back and allow operators to carry out remedial works in the knowledge that they would have to pay for those works. It would also mean, in effect, that the state would bear responsibility for all remediation, even in cases where article 8 applies. The Government does not feel that this was the intention of the Directive.

Question 15: do you agree with the way in which the ‘defences’ in the Directive have been applied?

Remediation notices

92. Where there is no appeal against the notification in regulation 14 (15 in Wales), or that appeal is unsuccessful, then the enforcing authority will serve a remediation notice under regulation 15 (16 in Wales), specifying the steps required to be taken to remediate the environmental damage.

93. Before doing so, the operator will be invited to submit proposed remedial measures. It is anticipated that in many cases the operator will wish to take advantage of this opportunity since, by doing so, he is able to influence the eventual content of the remediation notice. The Government takes the view that this is a pragmatic interpretation of the Directive. An approach which obliges the operator to identify remedial measures first in every case could well result in duplication of cost and effort since the enforcing authority has to decide on the ultimate remediation package in every case.

94. In many cases, the operator may engage the services of a relevant consultant. If the consultant can be agreed with the enforcing authority, this may mean that once the consultant has reported on the possible remedial measures, it will be simple for the enforcing authority to endorse recommendations in the report and in this way time and money can be saved for the operator and the enforcing authority.

95. The Government recognises that in serious cases the identification of remedial measures may be an expensive process, and would wish to avoid duplication of effort by the operator and enforcing authority wherever possible. However, the final decision as to the contents of the remediation notice will rest with the enforcing authority, taking into account the factors mentioned in Schedule 4.

96. The remedial package which will be contained in the remediation notice will include not only primary remediation, but also compensatory and complementary remediation as appropriate.

97. Regulation 15 (16 in Wales) provides that further remediation notices may be served. This is intended to cover situations where the appropriate nature and extent of compensatory or complementary remediation only becomes clear after the primary remediation package has been embarked upon. For example, if the primary remediation takes 6 months longer than initially anticipated, then it will be necessary to carry out a further 6 months' worth of compensatory remediation which was not anticipated at the outset.

Question 16: do you agree with the proposed procedures for assessment and identification of remedial measures, and for the service of remediation notices?

Regulation 16: Appeals against remediation notices (regulation 17 in Wales)

98. In addition to the grounds of appeal mentioned above, an operator may also appeal against a remediation notice if he disagrees with the measures contained in it. Appeals under these Regulations are to the Secretary of State (or in Wales to Welsh Ministers) but in practice will probably be dealt with by the planning inspectorate (PINS). They will decide on an appropriate procedure depending on the nature of the case. This may allow appeals to be dealt with on the basis of written representations, or there may be a hearing.

99. Generally speaking the remediation notice would be suspended pending the appeal. Otherwise there is a danger that the operator would be carrying out expensive works which the appeal might ultimately rule were unnecessary or inappropriate. If urgent steps are needed pending the hearing of the appeal, then the enforcing authority should serve a notice under regulation 12 specifying emergency steps to be carried out to prevent further damage, or alternatively, could take steps itself and recover the costs. Because of the urgent nature of these steps the Government does not propose to allow an appeal against such a notice.

100. Of course, decisions by the enforcing authority under these Regulations should be made in a spirit of cooperation and discussion with the responsible operator. If the operator disagrees with a decision made by the enforcing authority, then in the first instance this should be discussed and if possible, a compromise arrangement will be found.

Question 17: do you agree with the proposed appeal procedures?

Question 18: should appeal procedures be specified or left at the discretion of the appointed person?

Question 19: should remediation notices be suspended pending appeal?

Regulation 17: costs (regulation 18 in Wales)

101. Where environmental damage is threatened, then the operator will be responsible for any costs incurred in the service of a notice under regulation 11 or 12. Where environmental damage has been caused, then the costs of assessing that damage, deciding the responsible operator, deciding the remedial package, and of monitoring the remedial work, will be the responsibility of the operator. Costs include the cost of collecting relevant data and other administrative costs. This is in accordance with the Directive which defines 'costs' very widely.

PART 4: ENFORCEMENT

Regulation 18: requests for action (regulation 20 in Wales)

102. This regulation implements the right to request action in article 12 of the Directive. This does not replace the right of any interested person to alert the Environment Agency or Local Authority if they are concerned about something.

103. The request imposes certain obligations on the enforcing authority. In appropriate cases the enforcing authority must consider the request and inform the complainant as to any steps it intends to take. It must also notify the responsible operator and invite them to submit comments.

Chapter 13 of the draft guidance sets out the procedures for how anyone with sufficient interest can request action.

104. 'Sufficient interest' is not defined in the Regulations. It will be for the complainant to give details of their interest to the authority, along with details of the threat or damage.

105. It is difficult to give a clear definition of 'sufficient interest' since this will vary depending on the circumstances of the case. An established NGO will be deemed to have sufficient interest. In addition, there may be smaller, less well funded or less long established organisations which may well have a sufficient interest. Residents associations and neighbourhood groups may also have sufficient interest. Individuals may have sufficient interest, for example if their property or health or that of their family is threatened. In addition, it is quite likely that anglers, ramblers or birdwatchers might have sufficient interest if

there is a threat to an area of particular concern to them. On the other hand, those with no established link to the area of threatened damage, or with no legitimate interest in it may be ruled not to have a sufficient interest.

106. Where action is very urgent then the enforcing authority will need to give priority to responding to the incident and in such a case, the obligations to consult and report back to the complainant will not apply. As a matter of good practice, however, enforcing authorities will always endeavour to cooperate with genuine complainants as fully as reasonably possible.

107. Where a complainant feels that the enforcing authority has failed to act appropriately then he would be able to seek judicial review. Such an application would be governed by the normal rules applicable in such cases. The Government does not feel that it would be necessary or appropriate to create a different route of challenge.

Question 20: do you agree with the provisions dealing with requests for action?

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

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

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

Regulation 19: power for enforcing authority to take action (regulation 21 in Wales)

108. In some cases it will be necessary for the enforcing authority to take the steps necessary to deal with the threat or damage. It is not thought reasonable for the enforcing authority to be obliged to carry out compensatory or complementary remediation in such cases. This is because it is not necessarily sure that the costs can be recovered from the operator.

109. In some cases, it will be possible for the responsible operator to demonstrate to the satisfaction of the enforcing authority that he has a defence, for example, that he was operating in accordance with the conditions of a relevant permit. In such a case, the enforcing authority may carry out the works itself, knowing that it will not be possible to recover costs from the responsible operator.

110. Where it is necessary to recover costs in cases where there is more than one responsible operator, the enforcing authority will not be obliged to apportion costs. Recovery proceedings may be commenced against any responsible operator, and that operator will have the ability to claim contribution or indemnity from any other party who joined in causing the damage. Alternatively, the enforcing authority may decide to apportion costs

prior to the claim, but will only be able to do this where it is practicable to do so.

Question 24: do you agree with the proposed power for the enforcing authority to take action?

Regulation 21: Entry onto land (regulation 23 in Wales)

111. This provision caters for cases where it is necessary for the responsible operator to enter land belonging to a third party in order to carry out works under the Regulations. In such a case, the third party will be obliged to grant rights of entry, but he will be able to claim compensation from the responsible operator.

112. In such a case, it is appropriate for the operator to compensate the owner of that land for any damage caused by him in carrying out the works. This is not the same as compensation for the original damage which is not covered by the Regulations and may have to be recovered by civil action from the operator.

Regulation 22: powers of entry (regulation 24 in Wales)

113. This regulation provides for powers of entry for authorised officers.

Question 25: do you agree with proposed powers of entry?

Regulation 24: charges on land (regulation 26 in Wales)

114. In some cases where an operator fails to comply with his duties under the Regulations, it will considerably assist the enforcing authority to recover its costs if a charge can be placed on property belonging to the operator. The Directive envisages this when it says (article 8.2) 'the competent authority shall recover, inter alia, via security over property or other appropriate guarantees from the operator who has caused the damage or the imminent threat of damage, the costs it has incurred in relation to the preventive or remedial actions taken under this Directive'.

Question 26: do you agree that there should be a charging provision in the Regulations?

Regulation 25: penalties (regulation 26 in Wales)

115. These penalties are the maximum available when making regulations to implement European legislation under section 2(2) of the European Communities Act 1972. Where the Magistrate's powers of sentencing are insufficient to deal with the gravity of the offence, they will send the case to the Crown Court, which will have greater sentencing powers.

Schedule 1: damage to species and habitats

116. This Schedule sets out the criteria for deciding whether damage is significant and therefore whether it reaches the thresholds set out in the Regulations. It implements Annex I of the Directive, together with the definitions of conservation status in article 2.

117. There will be two different tests of damage depending on whether the species or habitats are situated inside or outside a SSSI. Inside the SSSI, the test will be based on site integrity. In relation to any European species or habitat outside a SSSI, the test will be based on conservation status. The Government has adopted this approach for the following reasons:

- The Government is advised that it is not possible to apply a test based on conservation status to the nationally protected species and habitats within SSSIs.
- A test based on site integrity is already in use in relation to proposed development under the Habitats Directive.
- In view of this, it is clearer and easier to understand if the test for all species and habitats within a SSSI is based on site integrity, rather than applying two different tests within one SSSI.
- It is still necessary to apply a test based on conservation status to all EU listed species and habitat outside the boundaries of SSSIs in order to achieve full implementation of the Directive.

Chapter 3 of the draft guidance sets out how both tests will be applied.

118. The Government does not intend to reproduce the last four points in Annex I of the Directive for the following reasons:

- It is not clear how damage to species and habitats can have a proven effect on human health. Even if it does, this does not appear to fit in with the definitions of biodiversity damage.
- It is self evident that small natural fluctuations would not be classified as environmental damage.
- Damage relating to normal management of sites will not normally be classed as environmental damage. However, the fact that certain management activities have been carried out in the past should not of itself mean that the effects cannot be classified as environmental damage if it turns out that they are sufficiently serious.
- Where species or habitats are able to recover without intervention in a short space of time, it is highly likely that the damage would not be classified as environmental damage in any event.

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

Schedule 2: activities causing damage

119. This Schedule implements Annex III of the Directive. It sets out all the activities included in Annex III and refers to the relevant English implementing legislation for those activities.

The spreading of treated sewage sludge for agricultural purposes has been excluded from Annex III. It is not excluded from the Regulations entirely so could still be relevant in the case of biodiversity damage. Annex III has been amended to include reference to the management of extractive waste (mining waste).

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

Schedule 3: Permits etc.

120. This sets out all the permits to which the ground of appeal in regulation 14(4)(e) applies. This does not include every activity in Annex III of the Directive because some of those do not currently require a permit. The activities in Annex III for which the Government considers that a qualifying permit may not exist in national legislation are as follows:

(a) Manufacture, use, storage, processing, filling, release into the environment and onsite transport of dangerous substances and preparations (unless these are authorised under one of the other headings in Annex III such as a permit under the Environmental Permitting Regulations 1998).

(b) Transport by road, rail, inland waterways, sea or air of dangerous or polluting goods.

(c) Transboundary shipment of waste.

In the above cases, the current regime generally entails notification and packaging or labelling requirements, but there is no express authorisation.

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?

Schedule 4: remediation

121. This Schedule sets out the criteria to be taken into account when arriving at a package of remediation measures for the purposes of regulation 15. It lists the factors to be taken into account when choosing those measures.

122. Remediation is intended to ensure that the damaged environment is restored to the state it was in at the time the damage was caused (referred to in the Directive as the 'baseline'). In addition, compensatory remediation is required to compensate for the interim loss of natural resource pending the completion of primary remediation. In cases where it is not possible to return to the pre-existing state, or where this cannot be done without excessive expense, then complementary remediation will also be required, probably involving an enhancement to an alternative site.

123. In all cases it is anticipated that there will be a delay before remediation can be carried out. The length of the delay will depend on the primary remediation chosen. It is therefore the case that the operator will have to put forward compensatory remediation in order to compensate for the loss of amenity pending the completion of primary remediation.

124. Compensatory and complementary remediation are not required in the case of land damage.

125. Paragraph 2 of Annex II contains the statement:

'If the use of the land is changed, all necessary measures shall be taken to prevent any adverse effects on human health.'

The Government does not consider it reasonable to expect operators to have to return and carry out further remediation to a site if, in the future, there is a decision to grant planning permission to change the use. Planning authorities are already able to take into account the state of a site when considering planning applications and may attach conditions to planning permission under existing powers. (See also question 6 on the approach to deciding remediation for land damage)

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

Schedule 5: compensation

126. This Schedule is required because regulation 21 provides for rights of entry onto land not owned or occupied by the operator. This will be necessary where the operator is obliged to carry out works on another person's land in order to comply with the Regulations. In such a case, the Government considers that it is reasonable to provide that the landowner affected should be able to claim compensation from the operator for any damage caused. These provisions mirror those already in place under the Water Resources Act 1991 and the Anti-Pollution Works Regulations 1999.

The Impact Assessment

127. The Impact Assessment has been revised since the Regulatory Impact Assessment on options for implementing the Environmental Liability Directive published previously. The IA assesses the Government's decisions as reflected in the Regulations. It also provides summary analysis of the options not chosen. Briefly,

Option 1 assesses the 'do nothing' option

Option 2: minimum transposition

Option 3: minimum plus extending to SSSIs (ie the proposed position in the Regulations)

Option 4: minimum plus extending to SSSIs plus removing the permit defence
Option 5: minimum plus extending to SSSIs plus removing the permit defence
plus extending strict liability to all activities

Two aspects of the analysis have changed. The conclusion is that more cases of land damage would be caught by the Regulations than previously assessed, to reflect the fact that the criteria for 'adversely affecting human health' may be wider than those under the existing legislation and further information about implementation of the Water Framework Directive suggests that fewer cases of water damage would be caught by the Regulations than previously thought. Otherwise there are no substantive changes to the analysis.

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

ANNEXES

Annex A: Draft regulations: England

Annex B: Draft regulations: Wales

Annex C: Draft guidance

Annex D: Updated IA

Annex E: Directive 2004/35/EC