



Department of the  
**Environment**

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**Summary of Responses to Consultation on  
Options for Implementing the Environmental  
Liability Directive**

## **Introduction**

The Environmental Liability Directive (the Directive) was adopted in April 2004 and is intended to give effect to the “polluter pays” principle by imposing liability for the prevention and remediation of environmental damage. This is damage that has a significant adverse effect on the conservation status of EU-protected biodiversity, and on waters subject to EU legislation. It also covers land contamination which poses a significant risk of adverse effect on human health. The Directive was due to be implemented by 30 April 2007.

The consultation document was issued in November 2006 in collaboration with the Department for the Environment, Food and Rural Affairs and the Welsh Assembly Government and closed on 28<sup>th</sup> February 2007. Scotland undertook a separate, simultaneous consultation exercise for its jurisdiction. It should be noted that this report refers only to responses received from Northern Ireland. The Department for the Environment, Food and Rural Affairs and the Welsh Assembly Government are responsible for publishing separate summaries of the responses received for their respective administrations.

The Directive provides for a number of discretions for Member States. The consultation document invited views on the exercise of those discretions and on the implementation generally, including the Regulatory Impact Assessment (RIA) on the costs and benefits of the different options set out in the document.

This was the first of two public consultations on the Directive. The second consultation will be on the draft legislation for Northern Ireland, which will be prepared in the light of responses to this consultation, is expected to be launched by Summer 2008.

This document is intended to summarise as far as possible the responses received by the Department.

## Summary of Responses

The Department received 16 substantive responses to the consultation from:

- **ARMAGH CITY & DISTRICT COUNCIL**
- **BELFAST HILLS PARTNERSHIP** – formed in 2004 to improve the management and development of the Belfast Hills area, which covers roughly 4,400 hectares.
- **CHIEF ENVIRONMENTAL HEALTH OFFICERS' GROUP (CEHOG)** – a group representing the Chief Environmental Health Officers of the 26 District Councils of Northern Ireland.
- **COUNCIL FOR NATURE CONSERVATION & THE COUNTRYSIDE (CNCC)** – an advisory Council to the Department of the Environment (DOE).
- **DEPARTMENT OF AGRICULTURE & RURAL DEVELOPMENT (DARD) – Environmental Policy Division**
- **DISABILITY ACTION** - a Northern Ireland charity working with and for people with disabilities.
- **GENEWATCH UK** – a not-for-profit organisation that monitors developments in genetic technologies from a public interest, environmental protection and animal welfare perspective.
- **GEOLOGICAL SURVEY OF NI** – an office of the Department of Enterprise, Trade and Investment (DETI), responsible for providing a wide range of geological advice and information in support of planning, land use, environmental protection and natural resource assessment.
- **GM FREEZE** – an alliance of 55 organisations calling for a moratorium on GM foods, the growing of GM crops for any purpose and on patents on genetic resources in agriculture, food production and forestry until the need for and safety of GM technology has been established and alternative approaches have been fully evaluated.
- **JOINT RESPONSE- WILDLIFE & COUNTRYSIDE LINK, NI ENVIRONMENT LINK, WALES ENVIRONMENT LINK** – voluntary organisations concerned with the conservation, enjoyment and protection of wildlife, countryside and the marine environment under the umbrella of the three UK Link organisations.
- **NEWRY AND MOURNE DISTRICT COUNCIL**

- **ROYAL SOCIETY FOR THE PROTECTION OF BIRDS (RSPB)** – a charity that takes action for wild birds and the environment. The RSPB is the largest wildlife conservation organisation in Europe.
- **SCOTTISH POWER PLC** – an international energy business that provides electricity transmission and distribution services in the UK.
- **STEPHEN ACHESON** – personal response
- **ULSTER ANGLING FEDERATION** – the representative body for game angling clubs in Northern Ireland.
- **ULSTER FARMERS UNION (UFU)** – the largest farming organisation in Northern Ireland representing over 12,000 farming families.

The consultation document posed a series of questions on specific policy issues. These questions were all contained within Sections 3 & 4 of the consultation document, hence the numbering sequence below. Further questions were asked in respect of the Regulatory Impact Assessment but no responses specific to Northern Ireland were received.

#### Question 3.1

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

- (i) **apply a test of significant adverse effect on reaching or maintaining FCS which focuses on damage to Natura 2000 sites, but which takes account of the significance of the particular site or sites to the conservation status of the habitat or species over its natural range? Or**
- (ii) **apply a test of significant adverse effect on reaching or maintaining FCS, such that any damage to a Natura 2000 site which effects the integrity of that site would trigger liability under ELD?**

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

11 of the 16 respondents (69%) have provided an answer to this question. Of those who responded:

- 5 respondents (46%) agree with option (i)
- 2 respondents (18%) agree with option (ii)
- 1 respondent (9%) agreed with both options
- 3 respondents (27%) disagreed with both options
- 4 respondents (36%) have formulated alternatives to the two proposed tests.

As stated earlier, 4 respondents formulated alternatives to the two proposed options. All 4 of these respondents are environmental NGOs. All 4 NGOs stated that the transposing legislation must apply to relevant protected biodiversity on and outside designated sites and that there must be no restriction of the definition of biodiversity damage under the ELD. It is their opinion that guidance, rather than a new definition set out in transposing legislation, is the appropriate vehicle for providing assistance in understanding the meaning of the definition of biodiversity damage in the ELD.

### **Particular concerns expressed by the environmental NGOs**

- 3 environmental NGOs consider that option (i) could be read as restricting biodiversity damage covered by the ELD to protected sites only, which they believe would result in a breach of the ELD. They also state that option (i) applies the relevant thresholds at the wrong level, which would also be considered a breach of the ELD and the Habitats Directive. In their opinion option (ii) also fails to take account of biodiversity outside designated sites, and in relation to site-based biodiversity, the site integrity test is incomplete without also including a reference to conservation objectives.
- One of these environmental NGOs additionally believes that the test of significant adverse damage must be related to the specific site and/or species affected and its ability to meet a favourable conservation status. Without this approach, over time, damage at more than one site could accumulate and be much more difficult to reverse.
- One environmental NGO is concerned that the text of the Government's preferred position appears to focus solely on biodiversity damage on Natura 2000 sites. If the ELD were transposed so as to cover only Natura 2000 sites, this would breach EU law. It is also a concern that the fundamental requirement of the Habitats Directive, which is the achievement of FCS through the Natura 2000 site network, is ignored. The ELD Consultation's approach set out in Section 3, para 3.5 (p24) and in Fn52 (p74) of the RIA is too simplistic, and if applied unchanged in any transposing legislation or guidance, risks being in breach of EU legislation.

#### Question 3.2

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

10 of the 16 respondents (63%) have answered this question. Of those who responded, 4 (3 from local government and 1 business respondent) respondents (40%) agree with the Government's proposal to apply a test of water damage using a number of criteria which give practical effect to the requirements of the ELD drawing upon the WFD standards. 4 environmental NGOs and 1 respondent from the leisure sector (50%) accept it is sensible to draw on standards established for the implementation of the WFD, but raise concerns about this approach. 1 business respondent (10%) neither agrees

nor disagrees but does raise concerns regarding the use of the WFD standards.

### **Particular concerns expressed by the environmental NGOs**

While all the environmental NGOs who answered this question accept that it is sensible to draw on standards established for implementation of WFD, they do not accept the analysis of water damage presented in the consultation document. In their view deterioration across WFD class boundaries is, by definition, significant and will bring liabilities and costs that should be passed on to those responsible through ELD. They also agree that the ELD wording indicates that significant damage can occur within class boundaries. In addition they emphasise that water damage includes not only chemical and biological pollution damage, but also morphological damage.

One environmental NGO voiced their concern over the UK standards currently being proposed through the recent Scottish consultation as regards their ability to identify damage significantly. They are based on a series of chemical assessments that would enable *potential* ecological status of a water body to be measured but not its actual ecological status and unless the standards are modified considerably to address this, the NGO would have concerns about them being used to underpin the ELD.

### **Particular concerns expressed by the business sector**

One business respondent is concerned regarding the use of the WFD standards to determine whether damage to water is significant, particularly as these have not yet been finalised. It is their opinion that there needs to be clear criteria in order to determine 'damage' to water and that for the purposes of the ELD this should only apply where there has been a very serious water pollution incident.

### **Particular concerns expressed by the leisure sector**

A respondent from the leisure sector believes that the definition of water damage must include, but should not be limited to, actions, which cause or threaten to cause deterioration as defined by the WFD.

#### Question 3.3

**What are your views on whether the threshold for land damage under the ELD is effectively the same as that under the existing contaminated land regime (Part 2A of the Environmental Protection Act 1990)?**

**If you do not agree with the assessment:**

- (a) What approach do you suggest?**
- (b) How would it work in practice? And**
- (c) What would be the benefits of your suggested approach?**

7 of the 16 respondents (44%) have answered this question. Of those who responded 1 (14%) explicitly agrees with the Government's proposal that the

threshold for land damage for purposes of the ELD is the same as for contaminated land under Part 2A of the Environmental Protection Act 1990. 3 respondents from local government and 1 environmental NGO agree that the threshold of protection should be the same under both regimes but that there appears to be a discrepancy between the wording set out in the 2 regimes. 1 environmental NGO and 1 business respondent only comment on the question.

### **Particular concerns expressed by the environmental NGOs**

One environmental NGO states that the definition of land damage should not be limited to risks that pose a threat to human health alone and that environmental harm should also be included. According to this NGO this is needed to bring consistency with the risk assessment of GMOs under the Deliberate Release Directive and the Food and Feed Regulations.

### **Particular concerns expressed by the local government sector**

Three respondents from local government and 1 environmental NGO responded by stating that there appears to be a discrepancy between the wording set out in the 2 regimes at the moment. There would appear to be a lower threshold of damage required to trigger ELD damage compared to that referred to in the Contaminated Land regime. Therefore it is considered that the application of the same threshold in both cases could be open to legal challenge. There is agreement that the threshold of protection should be the same under both regimes; this could perhaps be facilitated by amending the wording of legislation to affect such a similarity.

### **Particular concerns expressed by the business sector**

One business respondent expressed a reluctance to comment on this question as they have no experience of how the relevant legislation, Part 3 of the Waste and Contaminated Land (Northern Ireland) Order 1997, works in practice as it has not yet been implemented.

### Question 3.4

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

**(i) one based on the strict/fault-based distinction in the ELD? or**

**(ii) one based on strict liability irrespective of whether the damage was caused by an occupational activity listed in Annex III of the ELD?**

12 of the 16 respondents (75%) answered question 3.4. Of those who responded 2 (18%) agree with the liability approach for biodiversity damage based on the strict/fault-based distinction in the ELD and therefore agree to limit strict liability to activities falling within Annex III of the ELD. Both of these respondents are from the business sector.

10 respondents (83%), on the other hand, disagree with this first option and favour applying strict liability irrespective of whether the damage is caused by

an occupational activity listed in Annex III of the ELD. 3 of these respondents are from local government, 5 are environmental NGOs, 1 is a private respondent and 1 is from the leisure sector.

### **Particular concerns expressed by the environmental NGOs**

Two environmental NGOs argue that Option (ii) would be more beneficial in many ways. In their opinion, it would make sense from an environmental point of view and also apply the 'polluter pays principle' properly and prevent unforeseen state liability. It would also ensure legal liability and legal compliance with Member State duties under Articles 6(2) and 12(1)(d) of the Habitats Directive 1992 and Article 2 of the Wild Birds Directive 1979. Additionally it would aid better regulation by bringing different obligations under various legislative instruments in line with each other, thus avoiding confusion and conflicting laws.

#### Question 3.5

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

**(i) limit to activities falling within Annex III of the ELD or**

**(ii) applying to any activity causing environmental damage?**

11 of the 16 respondents (69%) answer question 3.5. Of those who responded, 2 (18%) agree to limit the strict liability for water damage to the activities dealing within Annex III of the ELD. They are both business respondents. 9 respondents (82%) agree with option (ii) and favour applying strict liability irrespective of whether the damage is caused by an occupational activity listed in Annex III of the ELD.. Opinions clearly show a preference for option (ii), mainly because of the wider scope of environmental protection that would be afforded.

### **Particular concerns expressed by the leisure sector**

The respondent from the leisure sector stated that the distinction between Annex III and other activities is arbitrary and goes against existing UK laws. Introducing this distinction could potentially lead to a watering-down of UK laws, leading to inconsistencies and confusion in the application of the ELD itself and of other existing laws.

### **Particular concerns expressed by the environmental NGOs**

All the environmental NGOs that answered this question (4) were in favour of Option (ii) stating that the principle of strict liability should be applied to all environmental damage, including water and land damage; irrespective of what type of activity caused the damage and irrespective of where the damage took place. The NGOs also made the point above as expressed by the respondent from the leisure sector.

One environmental NGO is concerned that, if the government proposal is adopted, contained use of GM plants and animals would have fault based liability, while the liability for GM micro-organisms would be strict. This would conflict with the approach taken in UK's safety regulations, given that in the UK law all GMOs were brought within the scope of the regulations implementing the European Contained Use Directive.

#### Question 3.6

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

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

10 of the 16 respondents (63%) have answered this question. Of those who responded, 2 (20%) agree with the Government's proposal to limit strict liability for remediation of land damage to Annex III activities. They are both business respondents. 8 respondents (80%), comprising of 3 respondents from local government, 4 environmental NGOs and 1 respondent from the leisure sector do not support this option.

#### **Particular concerns expressed by the environmental NGOs/local government sector**

All the environmental NGOs/local government respondents oppose restricting strict liability for land damage to Annex III of the ELD mainly for the same reasons as stated for Question 3.5.

One environmental NGO suggested that Option (ii) in paragraph 3.30 of the consultation document would be a preferred option as this would be in the interests of maintaining the same level of protection afforded by Part 2A of the Contaminated Land regime (excluding organisms and micro-organisms damage).

Another environmental NGO states that, if the government proposal is adopted, contained use of GM plants and animals would have fault-based liability and that from GM micro-organisms would be strict and this would conflict with the approach taken in the UK's safety regulations. In UK law, all GMOs (not only micro-organisms) were brought within the scope of the regulations implementing the European Contained Use Directive.

#### Question 3.7

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

13 of the 16 (81%) respondents answered this question. Of those who responded, 11 respondents (82%) supported option (ii) and, 2 respondents (18%) supported option (i).

Both respondents who supported option (i) were from the business sector while the 3 local government respondents, 6 environmental NGOs, 1 respondent from the leisure sector and 1 private respondent all supported option (ii).

### **Particular concerns expressed by the business sector**

One business respondent would be totally opposed to the inclusion of ASSIs under this regime and feels that any attempt to introduce this option would be going beyond what the ELD requires. They have concerns that this approach would add potential additional financial burdens on certain business sectors.

### **Particular concerns expressed by the environmental NGOs**

Three environmental NGOs put forward several arguments for the inclusion of SSSIs/ASSIs, including the importance of the SSSI/ASSI network for UK wildlife protection and the Government's own targets for their protection. They also refer to the RIA's cost benefit analysis and the overall benefit in extending the ELD to include SSSIs. These NGOs also urge the Government to include Ramsar sites in the protective regime introduced to transpose the ELD, as the Government has made a policy commitment to treat Ramsar sites as Natura 2000 sites.

Three environmental NGOs would also like to see UK Biodiversity Action Plan (UK BAP) habitats and species covered by the ELD, possibly as option to be included within next five years..

Another environmental NGO opposes limiting the scope of biodiversity protection to sites and species with international protection as they believe that this approach is at odds with the regime under the Deliberate Release Directive and the Food and Feed Regulations. These rules require an assessment of *all* risks to the environment.

### **Particular concerns expressed by private respondent**

A private respondent favoured neither option and instead suggested that protected species and habitats should include EU protected species and habitats; species and habitats for which any ASSI is designated under national legislation; and NIBS priority species and habitats, where damage occurs.

#### Question 3.8

**Do you support the Government's intention to exclude treated sewage sludge spread for agricultural purposes from the scope of the ELD? If you do not what are your reasons?**

10 of the 16 (63 %) respondents answered this question. Of those who responded 5 (50%) support the Government's intention to exclude treated sewage sludge from the scope of the ELD, 5 respondents (50%) are against the exclusion.

### **Particular concerns expressed by the environmental NGOs**

All 3 NGOs that responded express concerns about extending any form of exemption from liability, because inappropriate application of sewage sludge can lead to excessive leaching of nutrients and direct runoff to sensitive waters. These NGOs accept the logic of the argument presented but believe that there is both an economic and environmental case to extending the liability for water and land damage beyond the scope of Annex III activities.

#### Question 3.9

**Do you favour the application of this exception subject to an operator demonstrating that he took all reasonable steps to minimise the possibility or impact of environmental damage in the event of natural phenomena of exceptional, inevitable and irresistible nature?**

7 of the 16 (44%) respondents answered this question. Of those who responded 5 (67%) are in support of the exception, 1 supported the exception but with concerns and 1 only commented. Of the 5 who are in support of this exception, 3 are local government respondents, 1 is an environmental NGO and 1 is a business respondent.

### **Particular concerns expressed by private respondent**

A private respondent asked how the “demonstration of reasonable steps” is to be assessed and added that there needs to be clear guidelines developed to clarify this issue from a legal perspective.

### **Particular concerns expressed by the business sector**

One business respondent favours the inclusion of Article 4.1 exceptions, however would have some concerns with the requirement that the operator ought to demonstrate that he/she took all reasonable steps. It would be extremely difficult for small and medium businesses such as farms, to ensure that they had taken all reasonable steps to minimise damage in the event of it being caused by an event of an exceptional nature as many would not have the capacity to carry out risk assessments etc on the likelihood of such events happening and therefore would not be aware of what reasonable steps could be taken.

#### Question 3.10

**What are your views on the proposed treatment of the exceptions contained in Article 4?**

6 of the 16 (37.5%) respondents answer this question. Of those who responded 2 (33%) support the proposal and 4 only provide comments. The 2 respondents in favour of the proposal are both business respondents, while 3 of the 4 respondents providing only comments are from local government with the fourth being an environmental NGO.

## **Particular concerns expressed by the environmental NGOs/local government sector**

The 1 environmental NGO to respond and the 3 respondents from local government all stated that they would prefer for all specified environmental damage to be treated within the scope of ELD irrespective of whether it is caught by International Conventions in force in the UK. It is considered that this would afford a higher level of environmental protection than that provided by such conventions.

The environmental NGO also added that with respect to diffuse pollution and establishment of a causal link to one or more parties, the directive should apply the precautionary principle to those activities. They believe the directive should apply at a sectoral level where a causal link has been established. Furthermore, mechanisms should be put in place where a sector could be held responsible possibly through the establishment of compensatory funds.

### Question 3.11

**(a) What are your views about the treatment of costs in relation to cases where an operator can prove that the incident giving rise to an imminent threat or to actual environmental damage is the result of action by a third party (non-contractual) despite appropriate safety measures?**

**(b) Do you have a view about whether the Government should provide for express cost recovery mechanisms in the implementing regulations to enable the operator to recover costs from third parties? If so, what new or additional mechanisms would you suggest?**

### Proposal

**It is proposed that the test of whether the operator should bear the costs of, in particular, remedial measures where the environmental damage has been caused by the actions of one or more third parties, should be applied before the remedial measures are actually undertaken by the operator.**

8 of the 16 respondents (50%) have given some kind of answer to the set of questions under question 3.11.

5 respondents (63%) agree with the Government's proposal that the test should be applied before the remedial measures are actually undertaken by the operator. No other respondents gave an opinion on this part of the question except for 1 private respondent who only commented.

7 respondents (88%) agree that the Government should provide for express cost recovery mechanisms in the implementing regulations to enable the operator to recover costs from third parties. 1 business respondent (12.5%) has formulated new or additional mechanisms.

1 environmental NGO (12%) stated that they support a particular professional representative organisation's response in relation to this question.

## **New or additional mechanisms suggested**

One business respondent does formulate some suggestions regarding the cost recovery mechanisms. It is suggested that there should be mechanisms for establishing a voluntary agreement with the operator and the competent authority. Failing this, the competent authority should have recourse to legal recovery in the courts. In cases of administration and insolvency, there should be adequate provision via HM Customs and Excise for recovery of funds for environmental remediation.

## **Particular concerns expressed by private respondent**

One private respondent expressed concerns that part (a) appears to 'exempt' third parties in many cases which may lead to an unscrupulous operator using a small firm from which they know it would never hope to recover costs.

### Question 3.12(a)

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

13 of the 16 respondents (81%) have answered this question. Of those who responded, 6 respondents (46%) agree with the Government's proposal to adopt a permit defence. 6 respondents (46%) oppose a permit defence. 1 respondent (8%) chose only to comment on the question.

All 5 environmental NGOs who answered this question disagree with the permit defence. The position of the business and local government respondents is clear. All of these respondents who answer this favour the adoption of the permit defence.

## **Particular concerns expressed by the environmental NGOs**

The environmental NGOs strongly oppose the introduction of the permit defence. In particular one NGO puts forward many reasons not to adopt the permit defence. The main arguments refer to certainty, insurability, equity, encouraging prevention, and strict liability.

One NGO states that there are no convincing reasons for including the permit defence, except to appease the business sector. It is their opinion that all legal and logical arguments speak against it and that the principal of polluters pay and take responsibility for their actions is true for all sections of industry.

One NGO puts forward some arguments for not applying the permit defence with respect to GMOs. First of all it states that the practical effect of a permit defence is that it makes strict liability fault-based. A second argument is that the permit for use of GMOs may be general and not site specific (for

marketing consents at least). These may be even Europe wide. Thirdly the NGO argues that the permit defence places a considerable burden on authorities to demonstrate the operator had been at fault or negligent. This can be onerous, especially if relatively long periods of time elapsed between use of GMO and harm arising. The NGO concludes that the broad permissive nature of GMO consents and the limited policing once marketing consent has been granted could render environmental liability a hollow concept for GMOs.

In the opinion of one NGO, introducing the permit defence provides for less certainty, because the defence introduces several elements of doubt and uncertainty in relation to the restoration of environmental damage and the application and enforcement of the regime.

The permit defence only applies to remedial actions, not preventive actions, thereby creating confusing and inconsistent rules, i.e. uncertainty, in relation to financial responsibility before and after an event causing environmental damage.

With respect to insurability, one NGO states that complying with relevant permits could merely give providers of financial security added comfort that the insured event may be less likely to happen, but it would not make a difference to the predictability or calculability of the underlying risk of environmental damage happening. The difference would be one of costs (premiums), not certainty or calculability of risk.

With respect to equity, one NGO states that compliance with an IPPC or any other permit does not free operators from liability (or an obligation to pay for clean-up) under general laws on liability (e.g. tort law) or other environmental laws (e.g. Part 2A of EPA 1990 or the Habitats Directive). Another argument relating to equity, is that permit conditions may not consider all potential pollutants, but that the permit exception still would apply because the damage was caused by an authorised 'event'.

This NGO further comments that most of the permits listed in Annex III are very general in nature. Introducing the permit defence will therefore not promote certainty or prevention. Liability and an obligation to pay for restoration irrespective of compliance with a permit on the other hand provide a strong incentive to promote prevention of environmental damage.

A last major argument against the permit defence put forward by this particular NGO is that it could bring the liability regime several steps closer to a reintroduction of the concept of 'subsidiary state responsibility' through the back-door. In this NGO's view, the ELD imposes a duty on operators to carry out some, if not all, remedial actions before being able to assert their potential right not to have to bear the costs of those measures. If no reimbursement mechanisms are provided, large parts of the powers of the competent authority to request operators to carry out remedial measures or to take remedial measures itself as a last resort would convert to a de facto obligation to pay for such measures or to carry them out themselves.

#### Question 3.12(b)

**The Welsh Assembly Government proposes to disapply the permit defence for GMO-related occupational activities in line with paragraph 3.64, above. For respondents in Wales, do you agree? If you do not what are your reasons? (This question is aimed at Welsh stakeholders. The Welsh Assembly Government is publishing a separate summary. The summary for this particular question has been agreed with the Welsh Assembly Government and has been included here as the views expressed have wider relevance)**

2 respondents (12.5%) have answered this question although this question is addressed specifically to Welsh respondents. Both respondents (100%) agree with the Welsh Government's proposal not to apply the permit defence for GMO-related occupational activities.

#### Question 3.13

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

9 of the 16 respondents (56%) have answered this question. 2 respondents (22%) agree with the Government's proposal to apply the permit defence before remediation is undertaken by the operator. 7 respondents (77%), comprising 3 environmental NGOs, 3 local government respondents and 1 private respondent, disagreed.

#### **Particular concerns expressed by the business sector**

One business respondent expressed concerns on behalf of farmers. In their opinion, if the permit defence is applied after the remediation is undertaken by the operator then operators such as small farmers may have to bear potentially huge remediation costs, which could question the future viability of their businesses before being able to prove that they were not liable, due to an appropriate 'defence' mechanism being in place.

#### **Particular concerns expressed by the environmental NGOs**

Two environmental NGOs state that they are opposed to the introduction of a permit defence. However they also say that the introduction of what has been termed a "self-executing provision" means that applying the permit defence before remediation takes place would amount to a breach of ELD.

One of these environmental NGOs also argues that the ELD appears to impose a duty on operators to carry out some, if not all, remedial actions before asserting their potential right to avoid the costs of those measures under Art 8(4). This follows on from Art 6 which imposes an absolute obligation on the operator to take immediate control, containment and prevention measures and to take the necessary remedial measures according to what the competent authority determines.

### Question 3.14

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

12 of the 16 respondents (75%) have answered this question. Of those who responded, 6 (50%) agree with the Government's proposal to adopt a 'state of knowledge' defence, 6 (50%) oppose a 'state of knowledge' defence.

The 2 business respondents and 3 respondents from local government were all in favour of implementing this defence, as was the private respondent.

All but one of the 6 who oppose the defence are environmental NGOs, with the other respondent representing the leisure sector.

#### **Particular concerns expressed by the business sector**

One business respondent suggested that further guidance on state of knowledge criteria that are applicable in respect to the awarding of licences and authorisations at a particular time should be set out. They also stated that there must be a new, legally justifiable, state of knowledge established by a competent authority that involves consultation with interested parties.

#### **Particular concerns expressed by the environmental NGOs**

Two of the NGOs who answered this question believe that there are no convincing reasons for including this defence, except opposition from the business sector. They believe that the principle of polluters taking responsibility for their actions holds true across all sectors of industry. The respondent from the leisure sector also agrees with this view.

Another environmental NGO believes such an exemption is in contravention of the precautionary principle.

One environmental NGO answers the question from the perspective of the effect on GMOs. They believe this defence would be dangerous for the advancement of scientific knowledge as it will be advantageous in terms of future liabilities to remain ignorant of possible future harmful effects of GMOs.

#### Question 4.1

**In respect of recovering the competent authority's costs, it would be helpful to have your views on:**

**(a) the nature of security the competent authority may take a charge against; and**

**(b) how conversion of the charges should be realised (i.e. converted into actual funds)?**

2 respondents (13%) submitted substantive comments on this question. 1 response came from the business sector while the other was from a private individual.

The business respondent suggested the use of provisions under Part 2A of the Environmental Protection Act 1990 (not applicable in Northern Ireland) or, failing that, general law. This respondent was of the view that mandatory financial security was neither necessary nor desirable.

The private respondent commented that the means of security needs to be clearly specified and legally binding and that this would dictate how the charge was converted.

#### Question 4.2

**In cases where significant environmental damage is caused by a number of identifiable parties, which approach to apportioning costs do you support and why:**

**(a) proportionate; or**

**(b) joint and several?**

8 respondents (50%) answered this question. Of these, 2 (25%) favoured proportionate liability; 5 (63%) favoured the application of joint and several liability; and 1 (12%) was content with either approach but suggested there may be an equality issue if not all parties could pay.

Only 2 environmental NGOs (33%) answered this question, and both support option (b) (joint and several), as do all 3 local government organisations. The 2 business respondents are in favour of proportionate liability. The private respondent did not express a preference.

#### **Particular concerns expressed by local government sector and environmental NGOs**

The local government and environmental NGO respondents all shared the view that the application of joint and several liability is likely to afford a greater standard of protection than proportionate liability.

#### Question 4.3

**Do you think that the time limit for recovering the competent authority's costs should be 5 years, as in the ELD, or 6 years in line with the national statutes of limitation; and, in either case, why?**

7 respondents (44%) answered this question. Of these, 2 (29%) favoured a 6 year limit in line with national statutes of limitation while the remaining 5 (71%) supported the adoption of the 5 year limit proposed in the Directive.

The 2 respondents favouring the 6 year limit both came from the business sector. The 5 respondents favouring a 5 year limit consisted of 3 local government organisations, 1 environmental NGO and 1 private individual.

#### **Particular concerns expressed by the business sector**

1 of the business respondents gave no reason for their preference while the other felt that the 6 year limit would allow businesses an additional year to meet their liabilities. This may not actually be the case as the statute of limitations approach would be 6 years from the date damage was caused while the ELD approach would be 5 years from the completion of remedial measures.

#### **Particular concerns expressed by the local government sector**

The 3 local government respondents agreed that the ELD approach was preferable as it would appear to give greater scope for the successful recovery of costs.

#### **Particular concerns expressed by the environmental NGOs**

The environmental NGO that responded to this question concurred with the local government view above.

#### **Particular concerns expressed by private respondent**

The private respondent points out that in many cases, given that the identity of the offending operator may not become known for many years, option (ii) (6 years) simply cannot meet the requirements of the Directive.

#### Question 4.4

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

9 respondents (56%) answered this question. Of these, 2 (22%) were opposed to the application of paragraphs 1 and 4 to cases of imminent threat of damage and 7 (78%) were in favour.

Both business respondents were opposed to this proposal while 3 environmental NGOs, 3 local government organisations and the private respondent were all in favour.

### **Particular concerns expressed by the business sector**

One of the business respondents felt it was unnecessary to grant additional rights which place additional and possibly counterproductive burdens on regulators. Furthermore, they suggest, most imminent threats will be within the boundaries of operations where environmental NGOs etc would be unaware of their existence. The other business respondent felt that application of these paragraphs would lead to operators devoting resources to cases which may not be necessary. If these paragraphs are applied it is felt that the competent authority should only act where comprehensive supporting data is supplied.

### **Particular concerns expressed by the local government sector**

All of the local government respondents agreed that, since there would be no statutory duty to act on such requests, it would be reasonable to apply these paragraphs providing appropriate protocols were in place.

### **Particular concerns expressed by the environmental NGOs**

The 3 environmental NGOs that responded agree that the inclusion of the two paragraphs in national provisions is desirable. In particular 2 of these NGOs state that removing access to justice rights under Article 12 would be in breach of the Aarhus Convention.

The NGOs make the following points:

- It would not be in their interests for NGOs to attack industries with spurious actions as they wish to remain credible;
- NGO and public involvement might be beneficial for the enforcement of the ELD, as ELD does not provide for a very strong enforcement regime;
- Other environmental regimes that use, and even rely, on the help of the public or of NGOs, in much less well defined circumstances (i.e. EA's hotline to notify water pollution incidents, the role of RSPB under the EIA Regulations 2001 and the involvement of environmental NGOs in numerous planning processes);
- NGO involvement could ease the competent authorities' costs by assisting them in identifying environmental damage;
- A proper framework would need to be established for the effective involvement of NGOs.

## **Particular concerns expressed by private respondent**

The private respondent observed that application of paragraphs 1 and 4 of Article 12 would give a greater level of environmental protection but suggested that requests for action must be accompanied by relevant information and data and that the competent authority should have a policy in place to deal with spurious requests.

### Question 4.5

**Do you believe that the 30 year time limit of the ELD should be adopted or that there should be no limit,, in line with existing contaminated land and water legislation?**

10 of the 16 respondents answered this question. Of these, 2 (20%) felt that the 30 year time limit in the Directive was appropriate and should be adopted; 5 (50%) argued that no limit should be adopted, in line with existing legislation; 1 (10%) declared a preference for there being no limit but felt that, if the 30 year limit had to be implemented, it should take effect from the date of discovery rather than the date of occurrence; 1 (10%) stated that the 30 year limit should not apply if it conflicted with other Directives; and 1 (10%) suggested that limits appropriate to each activity should be set.

Both of the business respondents expressed a preference for application of a 30 year limit.

4 of the 6 environmental NGOs responded to this question with 3 advocating no limit (one of these suggested that, if a limit was to be applied, it should be from date of discovery) and the other proposing that limits should be set appropriate to each activity.

All of the local government respondents (3) responded to this question, and all were in favour of the no limit option.

The private respondent asked if the 30 year limit conflicted with other directives and suggested that, if so, it must not be applied to ensure consistency.

### Question 4.6

**What are your views on whether appeals, for the purposes of the ELD, should go to, in England, the Secretary of State; in Wales, to the National Assembly for Wales; and in Northern Ireland to the Planning Appeals Commission.**

8 of the 16 respondents (50%) answered this question. Of these, 6 (75%) agreed with the proposal unreservedly; 1 (13%) agreed subject to the PAC remaining independent; and 1 (13%) questioned the ability of the PAC to carry out this function.

All of the local government respondents (3) answered this question and agreed with the proposal. 2 of the 6 environmental NGOs expressed a view,

also agreeing with the proposal. Both business respondents supported the proposal with one adding the qualifier that this view was subject to the PAC remaining independent of the Department.

The private respondent questioned the ability of the PAC to deal with the relevant conservation/biodiversity issues and workload and suggested that the PAC has a poor record of protecting the environment.

#### Question 4.7

**What are your views on whether an appeal against a requirement to carry out remediation should suspend that requirement for the duration of the appeal?**

8 of the 16 respondents (50%) answered this question. Of these, 2 (25%) agreed that the requirement to remediate should be suspended; 2 (25%) stated that a requirement to remediate should not be suspended under any circumstances; and 4 (50%) were of the opinion that suspension should not be automatic but that enforcing authorities should have a degree of discretion to ensure that urgent works were carried out.

#### **Particular concerns expressed by local government sector**

All 3 local government respondents answered this question and all agreed that suspension of remedial action during the appeal process should be discretionary to ensure that, under circumstances where the competent authority feels that remedial action is urgent to limit or prevent further environmental damage, this is carried out without delay.

#### **Particular concerns expressed by environmental NGOs**

Only 2 of the 6 environmental NGO respondents replied to this question. One suggested a discretionary approach so that, if there are circumstances whereby remedial action is urgent to prevent further environmental loss, there would be powers introduced whereby remediation is not suspended during the appeal. This, it is suggested, would also have the advantage in limiting remediation cost which would otherwise accrue under the Habitats Equivalence analysis application. The other environmental NGO referred to the United Kingdom Environmental Lawyers' Association (UKELA) response (not received in Northern Ireland) and suggested that to allow suspension of a requirement to carry out remediation during an appeal would be a breach of the requirements of ELD. This NGO was therefore strongly of the view that no suspension should be permitted.

#### **Particular concerns expressed by the business sector**

Both business respondents agreed that it was appropriate to allow suspension. One did not offer an explanation for this stance but the other suggested that suspension of a requirement to carry out remedial actions may ensure that no unnecessary expenditure is placed on a business that may be wrongly convicted under ELD.

### **Particular concerns expressed by private respondent**

The private respondent expressed the opinion that suspension must not be permitted as to do so could allow environmental damage to increase, resulting in greater remedial costs for either the operator or the competent authority depending on the outcome of the appeal.

#### Question 4.8

**What are your views on whether the Government should create criminal offences where the operator fails to comply with a duty under the ELD.**

10 of the 16 respondents (63%) answered this question. Of those who answered the question, 9 (90%) agreed that the criminal offences proposed in paragraph 4.32 should be created, while 1 (10%) considered that criminal sanctions should only be considered under exceptional circumstances.

Local government (3), environmental NGO (4), private (1) and leisure sector (1) respondents all agreed that criminal sanctions were desirable, if not essential, to the effective implementation of the ELD.

### **Particular concerns expressed by the business sector**

The business respondent who answered this question stated that a new criminal offence could be appropriate but only in exceptional circumstances – e.g. where the operator is flagrantly disregarding the instructions by the competent authority. The respondent felt that otherwise the current regulatory regime has adequate provision to uphold the provisions of the Directive.

### **Particular concerns expressed by the environmental NGOs**

The 4 environmental NGOs who answered this question strongly support the creation of criminal offences. They argue that the creation of a criminal record works as an additional deterrent for companies who may otherwise postpone complying with the ELD as long as possible. They also state that the ELD does not have any real teeth as such and that there are no substantive provisions to help authorities enforce its provisions, as it is a 'self-executing' Directive.

#### Question 4.9

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

5 of the 16 respondents (31%) answered this question. Of those who answered the question, 3 (60%) were environmental NGOs who felt that, in addition, the Department should consider imposing operational restrictions such as the removal of licences or ability to operate a business. 1 business

respondent did not consider any additional offences to be appropriate while a private respondent suggested the following 3 additional offences:

- (i) Failure to ensure the actions of a 3<sup>rd</sup> party were not causing environmental damage.
- (ii) Failure to ensure best available evidence.
- (iii) Failure (wilfully or through negligence) to disclose relevant facts to CA when obtaining authorisation.

#### Question 4.10

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

9 of the 16 respondents (56%) answered question 4.10. Of those who responded, 6 (67%) were in favour of giving competent authorities powers to enforce by means of injunction. 3 respondents (33%) were of the opinion that, rather than use injunctions, the relevant competent authority should instead remediate the damage and then seek reimbursement.

All 3 local government respondents and one of the environmental NGOs felt that the use of injunctions offers a fast and flexible means of tackling breaches of legislation and may be appropriate for certain ELD offences.

The other 2 environmental NGOs who responded to this question agreed with a respondent from the leisure sector that it would be preferable if the relevant competent authority instead carried out the remedial measures itself and then sought reimbursement of costs as per Article 8(2) of the Directive.

The private respondent pointed out that, to be effective, any injunction would have to have immediate effect.

The business respondent who answered this question felt that it may be appropriate to provide such powers for use in cases where there is a wilful breach of the ELD and no suitable powers are available under existing legislation.

### **The Way Forward**

The Department is currently considering the best way to effect transposition of the Environmental Liability Directive in Northern Ireland. At this stage it is proposed to issue a second consultation on draft legislation by Summer 2008.