



Department of the
Environment
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ENVIRONMENTAL LIABILITY DIRECTIVE

**CONSULTATION ON DRAFT REGULATIONS AND GUIDANCE
IMPLEMENTING DIRECTIVE 2004/35/EC ON
ENVIRONMENTAL LIABILITY WITH REGARD TO THE
PREVENTION AND REMEDYING OF ENVIRONMENTAL
DAMAGE**

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CONSULTATION DOCUMENT

1. Introduction

This consultation document sets out the proposals of the Department of the Environment (hereafter “the Department”) for introducing Regulations to transpose the Environmental Liability Directive, 2004/35/EC, (ELD) in Northern Ireland.

The draft 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 most serious damage to certain species and habitats, water and land.

The draft Regulations will supplement existing environmental protection legislation such as the Environment (Northern Ireland) Order 2002, the Conservation (Nature, Habitats etc) Regulations (Northern Ireland) 1995 and the Wildlife (Northern Ireland) Order 1985. 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. The Regulations will include offences and penalties for failure to comply with the obligations in them.

In most cases the enforcing authority is likely to be the Department and draft guidance has been produced to complement the Regulations. The aim of the guidance is to outline the requirements of the Regulations and offer assistance on their practical application.

The purpose of this consultation is to seek the views of all interested parties on the Department's proposals. The consultation will run for 8 weeks. The Department will give due consideration to all responses and intends to make the final Regulations as soon as practicable following the consultation period.

Additional copies of this consultation document may be made without seeking permission. This document is available in alternative formats; please contact us to discuss your requirements. The Department's textphone number (028 9054 0642) has been included to assist the hearing impaired. The document is published on the Department's website at:

http://www.doeni.gov.uk/environmental_liability.htm

If you have any queries regarding this consultation please contact the ELD team at the address below (or telephone 028 9025 4744).

2. How to respond

Early responses are encouraged but all responses should arrive no later than 5pm on Thursday 21 May 2009. Responses may be sent by email to ELD@doeni.gov.uk or post to:

Dr Jennifer Stewart
ELD Consultation
Department of the Environment
Planning and Environmental Policy Group
Calvert House
23 Castle Place
Belfast BT1 1FY

When you are responding please state whether you are responding as an individual or are representing the views of an organisation. Before you submit your responses please read section 4 below – “Freedom of Information Act 2000 - Confidentiality of Consultation Responses” – which gives guidance on the legal position.

3. Equality Screening

Section 75 of the Northern Ireland Act 1998 requires that public authorities have due regard to equality issues in carrying out functions relating to Northern Ireland. We have completed an equality screening of the proposed Environmental Liability (Prevention and Remediation) Regulations (Northern Ireland) 2009 and have concluded that they do not impact on equality of opportunity on any of the 9 categories specified in section 75.

Question	Is there any evidence of higher or lower participation or uptake by different groups?
Answer	No.
Question	Is there any evidence that different groups have different needs, experiences, issues and priorities in relation to the particular policy?
Answer	No.
Question	Is there an opportunity to better promote equality of opportunity or better community relations by altering the policy or working with others in government or the community at large?
Answer	No.
Question	Have consultations with relevant groups, organisations or individuals indicated that particular policies create problems that are specific to them.
Answer	No.

The Equality Commission will receive copies of this consultation document as part of the consultation exercise. We will take into account any comments that the Commission might have.

3. Human Rights Act 1998

The Human Rights Act 1998 implements the European Convention on Human Rights. The 1998 Act makes it unlawful for any public authority to act in a way that is incompatible with these rights. Since the

implementation of the Human Rights Act 1998, all legislation must be checked to ensure compliance with the European Convention rights.

The proposals in these Regulations will have a positive impact with regard to human health and protection of the wider environment. Any negative impact will be upon operators of activities that cause environmental damage. The Department therefore considers that its proposals are fully compliant with the European Convention on Human Rights.

The Human Rights Commission will receive copies of this document as part of this consultation. We will take into account any comments that the Commission might have.

4. Rural-proofing

Rural Proofing is a process to ensure that all relevant Government policies are examined carefully and objectively to determine whether or not they have a different impact in rural areas from that elsewhere, because of the particular characteristics of rural areas. Where necessary the process should also examine what policy adjustments might be made to reflect rural needs and in particular to ensure that, as far as possible, public services are accessible on a fair basis to the rural community.

The Department has considered these draft Regulations and Guidance in relation to the rural community and has found no potential differential impacts.

5. Freedom of Information Act 2000 – Confidentiality of Consultation Responses

The Department will publish a summary of responses following completion of the consultation process. Your response, and all other responses to the consultation, may be disclosed on request. The Department can only refuse to disclose information in exceptional

circumstances. Before you submit your response, please read the paragraphs below on the confidentiality of consultations. They will give you guidance on the legal position about any information given by you in response to this consultation.

The Freedom of Information Act gives the public a right of access to any information held by a public authority – in this case the Department. This right of access to information includes information provided in response to a consultation. The Department cannot, therefore, automatically consider as confidential information supplied to it in response to a consultation.

However, it does have the responsibility of deciding whether any information provided by you in response to this consultation, including information about your identity, should be made public or be treated as confidential. This means that information provided by you in response to this consultation is unlikely to be treated as confidential, except in very particular circumstances. The Lord Chancellor's Code of Practice on the Freedom of Information Act provides that:

- the Department should only accept information from third parties in confidence if it is necessary to obtain that information in connection with the exercise of any of its functions and it would not otherwise be provided;
- the Department should not agree to hold information received from third parties “in confidence” which is not confidential in nature; and
- acceptance by the Department of confidentiality provisions must be for good reasons, capable of being justified to the Information Commissioner.

For further information about confidentiality of responses please contact the Information Commissioner's Office at:

website: www.ico.gov.uk or email: ni@ico.gsi.gov.uk

POLICY ISSUES

1. The first consultation and the approach in the Regulations

A joint consultation with England and Wales took place between 1 December 2006 and 28 February 2007. In that consultation the Department 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. The Department still intends to essentially follow this approach. However, as a result of considering consultation responses, the proposals made in the first consultation have been amended in some respects.

2. Areas of Special Scientific Interest (ASSIs)

The Department has decided to extend the scope of species and habitats protected under the Regulations to include all those for which Areas of Special Scientific Interest (ASSIs) have been declared under Article 28(1) of the Environment (Northern Ireland) Order 2002. Among the reasons put forward by stakeholders for this approach, the Department has noted in particular the following:

- extending protection to the nationally protected interest features on an ASSI 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 ASSI, with consequent confusion and complication for operators and enforcement authorities;
- the Department has committed to getting 95% of ASSIs into favourable or unfavourable recovering condition by 2016; and

- extending ELD to cover all species and habitats on ASSIs 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.

3. Approach to ASSIs

The Department has taken expert advice that it is not practicable to apply a test of environmental damage based on conservation status to nationally protected species and habitats within ASSIs. The Department does not consider that it is appropriate to apply two different tests to ASSIs 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 ASSIs 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 provide more clarity and certainty for operators and tie in more closely with the protection already afforded to ASSIs under existing legislation.

4. Non-Annex 3 activities

The Department has decided that there are no exceptional circumstances which justify an extension of strict liability to damage caused by non-Annex 3 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 most cases, if environmental damage is caused by such activities, this will be as a result of negligence in any event and will therefore already be covered 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; and
- extension of strict liability beyond Annex 3 would create an anomalous situation in which those businesses operating Annex 3 activities (which are generally subject to permits) would benefit from a permit defence, whereas those operating non-Annex 3 activities (which may not be subject to permit) would not benefit from such a defence.

5. Defences

Article 8 of the Directive allows member states to adopt a number of defences against bearing the cost of remediation.

The Department has decided to implement the “state of knowledge” and “permit” defences and, in doing so, has considered the following factors:

- 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 knowledge defences do not apply to emergency measures in any event, and do not apply if the operator is negligent or has breached any of the conditions of the permit; and

- the state of knowledge defence encourages innovation.

Where these defences are shown to apply, the operator will not be obliged to carry out remediation under these Regulations.

The Department considers that this approach achieves a fair balance between the business benefits of the defences and the need to prevent and control environmental damage.

6. Exceptions

The Department intends to apply all of the exceptions in the Directive as indicated in the first consultation, together with the five-year time limit for enforcing authorities to recover costs and the 30-year limit for enforcement action to be initiated.

The Department also proposes to apply an exception for Common Fisheries Policy (CFP) compliant fishing activities.

7. Apportionment of liability

The Department has considered the need for effective enforcement of the Regulations and does not intend to require the enforcing authority to apportion liability before requiring operators responsible 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. However, operators will be free to claim contribution or indemnity from other liable persons in civil proceedings in the normal way.

8. Water damage

In the case of the water damage thresholds, the Department has considered these further in detail and no longer intends to adopt precisely the same approach as indicated in the first consultation. The

water 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 lowering of status would qualify as damage, whereas an incident which does not bring about such a lowering of status in the quality element would not. This is considered to be a more certain and clearer approach.

9. The right to request action

In relation to the right to request action the Department 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 the enforcing authority with the need to investigate trivial or inappropriate complaints.

10. Review

The Directive requires Member States to report to the Commission on the experience gained in the application of the Directive by 30 April 2013. Information will need to be provided in accordance with Annex 6 of the Directive, including details of incidents of damage, outcome of remediation and costs incurred or recovered. The Department 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 Department intends to consider all the issues mentioned in Article 18.3 of the Directive. Full engagement with stakeholders will be an important part of that review.

THE PROPOSALS

The proposed Regulations for Northern Ireland are at Annex A and the draft Guidance is at Annex B. The partial Regulatory Impact Assessment is at Annex C.

REGULATIONS

1. PART 1 – INTRODUCTORY PROVISIONS

Regulation 1: Citation and commencement

The Regulations will apply in Northern Ireland. For the purposes of water damage, they will apply to the water out to one nautical mile around Northern Ireland (consistent with the Water Framework Directive). For the purposes of protected species and natural habitats they will apply out to 12 nautical miles.

Regulation 2: Interpretation

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

Regulation 3: Meaning of “environmental damage”

Biodiversity

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 the Regulations, wherever it is.

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.

In addition to protecting EU listed species and habitats described above, the Regulations will also protect those species and habitats on an ASSI for which that ASSI has been declared under Article 28(1) of the Environment (Northern Ireland) Order 2002.

The threshold of damage to species and habitats on and off ASSIs is set out in Schedule 1 to the Regulations.

Water

The definition of environmental damage to water is linked to the Water Framework Directive (WFD), though the precise way in which that link is envisaged to work is not specified in the Directive. 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, and it is therefore the Department's intention to apply the criteria and methods of that Directive in the context of these Regulations.

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 change 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 lowering 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.

The Department considers that this approach offers the best way forward because it is the most clear and certain. The enforcing authority and operators will be able to know relatively 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 Department considers this to be a sensible approach since an incident which entails failure of a quality standard and would cause a drop in status would be serious, whereas an incident which does not trigger such a drop would not be as serious. 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.

Land damage

The definition of land damage under the Regulations includes only contamination which gives rise to significant risk of human health being adversely affected. This includes contamination by organisms and micro-organisms. This differs from the definition in proposed contaminated land legislation (due to be implemented in 2009/10) which also includes damage to ecological systems or property.

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.

The Department 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 area plan.

Strict and fault based liability

Regulation 3(2) includes reference to strict and fault based liability. The Regulations reproduce the approach in the Directive by imposing strict liability on those engaged in the activities in Schedule 2 (which reproduces Annex 3 of the Directive). This means that there is liability without the need to prove negligence or other fault (but subject to the defences discussed below).

For cases of biodiversity damage, in addition to strict liability for Schedule 2 activities, operators of any other activities may be liable for remediation of damage if they were at fault or were negligent. This reproduces the approach in the Directive.

Regulation 5: Exceptions

Regulation 5 exempts certain activities in accordance with the requirements of the Directive. In relation to oil pollution covered by international maritime conventions, the 1992 Convention^a already imposes strict liability and compulsory insurance. 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^b.

Regulation 5 uses the term 'natural phenomenon'. The Department considers it reasonable for this to include exceptional incidents such as the 1987 hurricane, or exceptional flooding, but not, for example, regular seasonal flooding.

Commercial sea 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.

^a The International Convention of 27 November 1992 on Civil Liability for Oil Pollution Damage.

^b The Convention on Limitation of Liability for Maritime Claims 1976.

The Department 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.

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 the operators responsible or to obtain evidence linking their actions to a given case of damage.

For these reasons, and in order to achieve clarity and certainty, the Department 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.

We would welcome views on the application of an exception for CFP compliant fishing activities.

Regulation 6: Timing

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

Where an emission such as a slow leak is ongoing both before and after the coming into operation of the Regulations, then the Department 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 operation of the Regulations.

Regulation 8: Enforcing Authorities

Broadly speaking, the approach taken in the Regulations is to allocate responsibility as closely as possible to existing responsibilities.

The Department, through its Northern Ireland Environment Agency (NIEA), already has a wide remit to protect the environment with clearly defined responsibilities in respect of land-based biodiversity and water quality. It is proposed that responsibility for the enforcement of ELD in these areas will rest with the Department.

The Department's role in respect of land damage is less clear cut, although it does regulate many of the activities that may give rise to such damage. However, District Councils will assume the principal enforcing authority role under the proposed contaminated land regime due to be implemented during 2009/10, and there is a strong argument that longer term responsibility for ELD enforcement in respect of land damage should rest with them.

We would welcome views on this issue but propose that, initially, the Department should assume responsibility.

Responsibility for environmental protection in the marine environment is more complicated and is shared by a number of bodies. For example, the Department, through NIEA, is responsible for the licensing of deposits in the sea (under the Food and Environment Protection Act 1985), the Department of Agriculture and Rural Development is responsible for regulating commercial sea fishing, and the Maritime and Coastguard Agency (MCA) is responsible for regulating pollution from ships at sea. Other bodies such as the Loughs' Agency and various Harbour Authorities have specific responsibilities for certain activities in defined geographical areas. While it is proposed that MCA will assume a

primary response role in respect of areas for which they already have responsibility, the Department will be responsible for enforcement in the marine environment.

However, we would welcome views as to whether it would be appropriate or beneficial for any other bodies to assume an ELD enforcement role in the marine environment.

2. PART 2 – PREVENTING ENVIRONMENTAL DAMAGE

Regulation 9: Prevention of environmental damage

This regulation places a duty on operators of activities to take all necessary 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 necessary steps to prevent such an incident occurring.

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. 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. Chapter 4 of the draft guidance provides information on what constitutes “imminent threat” for the purposes of these Regulations.

Regulation 10: Prevention of further environmental damage

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.

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.

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 4 of the draft guidance outlines the steps required from the operator when immediate action is required.

Regulations 11 & 12: Action by the enforcing authority

Under certain circumstances the enforcing authority may take action itself. These circumstances include: in an emergency; where the operator cannot be determined; or if the operator fails to comply with a notice. Where the operator can be determined, the enforcing authority may recover all reasonable costs from that operator.

3. PART 3 – REMEDIATION

Regulations 14 & 15: Assessment of damage and determining liability to remediate.

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

In most cases, the authority will work closely with the 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. Once it has been established that environmental damage has been caused, the enforcing authority will identify the operator and notify him that he is liable and that he is required to submit proposals to achieve remediation. The operator will also be advised of the right to appeal.

Regulation 16: Appeals against liability to remediate

The operator may appeal against the notification on the basis that he did not cause or contribute to the damage concerned, or that the damage does not exceed the thresholds in the Regulations, or that one of the exceptions in regulation 5 applies.

The operator may also appeal at this stage on grounds including:

- 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);
- the damage was the result of an act of a third party and occurred despite all appropriate safety precautions being taken;

- he was not at fault or negligent, and that he had a relevant permit under Schedule 3, and that he was operating in accordance with all conditions in that permit; or
- that the emission, event or activity was not considered likely to cause environmental damage according to the state of scientific knowledge at the time.

These defences only apply to the requirement to remediate. They do not apply to the requirements to take emergency steps in regulations 9 and 10. 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 Department 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.

Where these defences do apply, the operator will not be required to carry out remediation work. The Department 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.

The Department 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 the enforcing authority to allow operators to carry out remedial works in the knowledge that the enforcing authority would have to pay for those works. The Department does not feel that this was the intention of the Directive.

Regulation 17: Remediation notice

Where there is no appeal against the notification in regulation 15, or that appeal is unsuccessful, the enforcing authority will consider the remediation proposals submitted by the operator and serve a

remediation notice specifying the steps to be taken to remediate the environmental damage in accordance with Schedule 4.

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

Regulation 18: Appeals against remediation notices.

In addition to the grounds of appeal mentioned above, an operator may also appeal against a remediation notice if he considers the contents to be unreasonable. The draft regulations designate the Court of Summary Jurisdiction (effectively a Magistrates' Court) as the appellate body although other bodies such as the Planning Appeals Commission also have considerable experience in this area. Regardless of who is responsible for handling appeals, a fee, in line with existing legislation, would be chargeable.

We would welcome your views on who should be responsible for handling appeals.

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 10 specifying emergency steps to be carried out to prevent further damage, or alternatively, it could take steps itself and recover the costs. Because of the urgent nature of these steps the Department does not propose to allow an appeal against such a notice.

Regulation 20: Further remediation notices

Further remediation notices may be served at any time during, or at the end of, the remediation period. 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, it will be necessary to carry out a further 6 months' worth of compensatory remediation which was not anticipated at the outset.

Of course, decisions by the enforcing authority under these Regulations should be made in a spirit of cooperation and discussion with the 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 found.

Regulation 21: Power for enforcing authority to take action

In some cases it will be necessary or desirable for the enforcing authority to take the steps necessary to deal with the threat or damage. The Department does not consider it is reasonable for the enforcing authority to be obliged to carry out remediation in such cases, but it will have the power to do so if required. This is because it is not necessarily sure that the costs can be recovered from the operator.

In some cases, it will be possible for the 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 operator.

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

Regulation 22: Costs

Where environmental damage is threatened, the operator will be responsible for any costs incurred in the service of a notice under regulation 9 or 10. Where environmental damage has been caused, the costs of assessing that damage, deciding the operator responsible for the damage, deciding the remedial package, and monitoring the remedial work will be the responsibility of the operator.

Costs include the cost of collecting relevant data, legal and enforcement costs and other administrative costs. This is in accordance with the Directive which defines costs very widely.

4. PART 4 – ENFORCEMENT

Regulation 23: Requests for action

This Regulation provides parties with sufficient interest with the right to request action as required by Article 12 of the Directive. Such a 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 operator and invite them to submit comments. Chapter 4 of the draft guidance sets out the procedures for how anyone with sufficient interest can request action.

It is difficult to give a clear definition of sufficient interest, since this will vary depending on the circumstances of the case. However, regulation 23(6) attempts to capture all the organisations and individuals likely to have this level of interest. For example, an established NGO will be deemed to have sufficient interest. Residents' associations and neighbourhood groups may also have sufficient interest. It is also likely that anglers, ramblers or birdwatchers might have sufficient interest if there is a threat to an area of particular concern to them. Other

organisations, such as District Councils, with an interest in environmental health issues would also be deemed to have sufficient interest.

Where action is very urgent 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. However, as a matter of good practice the enforcing authority will always endeavour to cooperate with genuine complainants as fully as reasonably possible.

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

Regulation 24: Time limit for cost recovery

Where an enforcing authority is seeking to recover costs from an operator, it must commence proceedings no later than five years after completion of remediation measures or identification of the operator, whichever is later.

Regulation 26: Entry onto land

This provision caters for cases where it is necessary for an operator to enter land belonging to a third party 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 operator. 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 financial compensation for the original damage, which is not covered by the Regulations and may have to be recovered from the operator by civil action.

Regulation 27: Powers of authorised persons

This Regulation provides authorised officers with a range of powers to allow them to fulfil their obligations under the Regulations. These include powers to enter premises; carry out examinations and investigations; take samples; and require information and production of records. These powers are similar to those contained within Article 72 of the Waste and Contaminated Land (Northern Ireland) Order 1997 and Article 19 of the Environment (Northern Ireland) Order 2002. In addition, where enforcement is in relation to the sea, an authorised person may stop and board a ship.

Regulation 29: Charge on premises

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'*.

Regulation 30: Penalties

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, the case may be referred to the County Court, which will have greater sentencing powers.

5. SCHEDULE 1 – DAMAGE TO SPECIES AND HABITATS

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 1 of the Directive, together with the definitions of conservation status in Article 2.

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

- the Department is advised that it is not possible to apply a test based on conservation status to the nationally protected species and habitats within ASSIs;
- a test based on site integrity is already in use under the Habitats Directive. In view of this, it is clearer and easier to understand if the test for all species and habitats within an ASSI is based on site integrity, rather than applying two different tests within one ASSI; and
- it is still necessary to apply a test based on conservation status to all EU listed species and habitats outside the boundaries of ASSIs in order to achieve full implementation of the Directive. Chapter 3 of the draft guidance sets out how both tests will be applied.

The Department does not intend to reproduce the last four points in Annex 1 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.

6. SCHEDULE 2 – ACTIVITIES CAUSING DAMAGE

This Schedule replicates Annex 3 of the Directive. It sets out all the activities included in Annex 3 and refers to the relevant implementing legislation for those activities. The spreading of appropriately treated sewage sludge for agricultural purposes has been excluded from the list of prescribed activities. It is not excluded from the Regulations entirely, so it could still be relevant in the case of biodiversity damage.

Annex 3 has been amended to include reference to the management of extractive waste (mining waste).

7. SCHEDULE 3 - PERMITS etc.

This sets out the permits to which the ground of appeal in regulation 16(2)(d) applies. This does not include every activity in Annex 3 of the Directive because some of those do not currently require a permit, while others do not have an environmental element to the permitting requirements.

8. SCHEDULE 4 – REMEDIATION

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.

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. 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. Compensatory and complementary remediation are not required in the case of land damage. Paragraph 2 of Annex 2 to the Directive 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 Department 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.

9. SCHEDULE 5 – COMPENSATION

This Schedule is required because regulation 26 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 to comply with the Regulations. In such a case, the Department considers that it is reasonable to provide that the landowner affected should be able to claim compensation from the operator for any damage caused.

The Department welcomes your comments on any aspect of this consultation package, including the draft Regulations, draft Guidance and partial Regulatory Impact Assessment.