

January 2007



**Friends of
the Earth**

Briefing

The Environmental Liability Directive Consultation

Ask the government to make polluters
pay for damage to the environment

A new piece of EU legislation - the environmental liability directive - offers the opportunity to implement the "polluter pays" principle in UK law. In theory it will help to prevent environmental harm and remove the burden of costs of putting things right from the taxpayer. For example a company that pollutes a river with its sewage should pay for any measures needed to restore the river to its original state.

The Department for Environment Food and Rural Affairs is currently consulting on the Government's proposals for the environmental liability legislation. It is important that as many people as possible have their say on how the environmental liability directive should be transposed into UK law to make sure it will turn into an effective piece of legislation. The deadline for the consultation is the 16th of February 2007.

Friends of the Earth inspires solutions to environmental problems, which make life better for people.

Friends of the Earth is:

- the UK's most influential national environmental campaigning organisation**
- the most extensive environmental network in the world, with almost one million supporters across five continents and over 60 national organisations worldwide**
- a unique network of campaigning local groups, working in over 200 communities throughout England, Wales and Northern Ireland**
- dependent on individuals for over 90 per cent of its income.**

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The Government's proposal

The EU directive constitutes a baseline and leaves room for national governments to add teeth to the legislation when transposing it into national law. Unfortunately the UK government is proposing a minimum approach to the transposition. An approach that threatens to weaken existing regimes for the protection of UK biodiversity as it would not cover many protected sites and species and would allow a number of exemption that threaten to make the supposed polluter pays principle so conditional as to be meaningless.

The main weak points of the current proposal are:

- **Limited scope:**
The proposed draft would only cover damage to EU protected areas and species, which means that 25 % of sites of special scientific interest (SSSIs) and 66% of all biodiversity action plan (BAP) species (including species like the red squirrel, the water vole and the corn bunting) would not be covered.
We believe the scope must be extended to cover all UK protected sites & species
- **Defences:**
The directive provides for strict liability for certain potentially hazardous activities. Strict liability means that the business undertaking the activity should not have to be shown to be at fault or negligent. The Government's proposal includes two legal defences to avoid strict liability:
 - The permit defence: This means that if an activity was given an official licence, payment for damage would not be required.
 - The state of the art defence: If the activity was not considered harmful according to the scientific and technical knowledge at the time it took place, costs should not be payable. This is dangerous, particular in relation to new technologies like GMOs and nanotech, as it could encourage a situation where is better not to know and so restrict research into environmental effects.
We believe both the state of the art defence and the permit exemption must be removed.
- **Strict liability is limited to certain activities:**
In the current proposal only certain activities (listed in Annex III to the Directive) are subject to strict liability. All other activities (including e.g. fishing, farming and land development) are not subject to strict liability.
We believe strict liability must be included for all activities.
- **Inconsistencies with EU GMO risk rules:**
Genetically modified organisms (GMOs) pose unique risks to the environment and although GMO are covered by the Annex III activities (see above), special provisions for GMOs must be made within the environmental liability legislation to avoid conflict with the EU Deliberate Release Directive and the Food and Feed regulations. These rules require an assessment of all risks to the environment, including all species (not just protected), as well as land and water. Recognising this, the Welsh Assembly has already proposed stricter rules for GMOs (amongst others removing the "permit defence") within the environmental liability legislation for Wales.
We believe the legislation must cover the unique risks posed by GMOs in a dedicated section, removing any potential conflict with EU rules on GMOs.

It is incomprehensible why the Government is opting for this minimum approach even though their own regulatory impact assessment confirms that a more robust regulatory approach would cost a mere 18% extra, an additional £2.4m to the £13m of the minimum approach, which would constitute an extra 5 pence per year for the individual tax payer.

Reply to Defra's Consultation

The Department for Environment Food and Rural Affairs (Defra) is currently consulting on the Government's proposals for the environmental liability legislation. Please respond to the consultation and demand that the Government implements more than a minimum approach to environmental liability in order not to weaken existing protection for UK biodiversity.

Point out that the current proposal for environmental liability legislation needs to :

1. Extend the scope to cover all UK protected sites & species
2. Remove the state of the art defence and the permit exemption
3. Include strict liability for all activities already covered by UK law.
4. Recognise and cover the unique risks posed by GMOs in a dedicated section, removing any potential conflict with EU rules on GMOs.

You could use examples of SSSI's local to you that would not be covered to illustrate your point. You can find a list of SSSI (names by parliamentary constituency) that would be excluded under the current proposals at

<http://www.genewatch.org/uploads/f03c6d66a9b354535738483c1c3d49e4/ExcludedSSSInamebyconstituency.xls>

As a quick and easy way to respond to the consultation you can use the Press for Change email action on Friends of the Earth's website at http://www.foe.co.uk/campaigns/biodiversity/press_for_change

You can find the government's proposals and DEFRA's consultation documents at <http://www.defra.gov.uk/corporate/consult/env-liability>

The consultation document is the same for **England, Wales and Northern Ireland**.

But the responses should be sent to the relevant authorities in each devolved nation (see below).

A separate consultation is being conducted in **Scotland**.

<http://www.scotland.gov.uk/Publications/2007/01/04155835/1>

Responses should be sent to

For England

By email - eld@defra.gsi.gov.uk

By post

ELD Consultation
Environmental Liability Branch
Environmental Regulation Policy Division
Zone 4/A1
Ashdown House
123 Victoria Street
London SW1E 6DE

For Wales

The documents can be found on the Welsh Assembly Government's website:

<http://new.wales.gov.uk/consultations/currentconsultation/envandcouncurrcons/?lang=en>

The responses should be sent to

By email - Waste@Wales.gsi.gov.uk

By post – Waste Policy Branch
Welsh Assembly Government
ELD Consultation
First Floor,
Room: 1-002
CP2
CARDIFF
CF10 3NQ

For Northern Ireland

For the Northern Ireland the documents can be found on the Department of Environment (DOE) Northern Ireland website:

http://www.doeni.gov.uk/index/protect_the_environment/local_environmental_issues/environmental_liability.htm

The responses should be sent to

By e-mail – karl.beattie@doeni.gsi.gov.uk

By post – ELD Consultation
Karl Beattie
Department of Environment
Environmental Policy Division
20 – 24 Donegall Street
BELFAST
BT1 2GP

The deadline for comments is 16 February 2007.