

February 2007



**Friends of  
the Earth**

## **CONSULTATION ON OPTIONS FOR IMPLEMENTING THE ENVIRONMENTAL LIABILITY DIRECTIVE**

### ***Response from Friends of the Earth England, Wales and Northern Ireland***

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 around 1 million supporters across five continents, and more than 70 national organisations worldwide
- a unique network of campaigning local groups, working in more than 200 communities throughout England, Wales and Northern Ireland
- dependent on individuals for over 90 per cent of its income.

Friends of the Earth is concerned that the Environmental Liability Directive (ELD) Consultation document fails to effectively apply the “polluter pays principle”, or to meet the aims of the Government's own sustainable development policy. In attempting to implement ‘better regulation’ in the ELD the government assumes that any new costs to business automatically go against the grain of better regulation, even where overall benefits to society far outweigh the additional costs to business. As it stands, the proposed transposition of the ELD also fails to protect UK wildlife, protect against the unique risks posed by harm arising from GMOs and weakens existing national environmental protection legislation.

Friends of the Earth fully supports the responses from the RSPB and GeneWatch UK, but wishes to particularly emphasise the points below.

### **A. Key Issues**

1. The “polluter pays principle” is one of the fundamental principles of EU environmental policy and it is enshrined in Article 174(2) of the EU Treaty. It is integrated into the UK Governments Sustainable Development strategy as one of its ‘Guiding Principles’.<sup>1</sup>

2. The ELD is intended to “give effect to the Polluter Pays Principle”<sup>2</sup> and this principle is treated as the fundamental objective of the ELD. Therefore, the ELD can be seen as the instrument that completes the “polluter pays principle's” effectiveness in EU and national legislation and ensures its full implementation.

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<sup>1</sup> The UK Government Sustainable Development Strategy “Securing the Future”, March 2005, Cm 6467, p.16, para 4.

<sup>2</sup> ‘Consultation on options for implementing the polluter pays principle’ Executive Summary pp6

3. This fundamental principle will only be upheld if the various discretions for example the Permit and State of the Art defences that weaken its effectiveness are not included. Additionally the principle can be strengthened if strict liability for all damaging activities, expanding the scope of the ELD to cover SSSI's and other sites of biodiversity protection and including specific measures to deal with GMOs in the directive are included.

4. The objective of the DEFRA transposition of the ELD is faulty in that it attempts to implement the directive with minimum burden to business rather than maximizing environmental protection. The approach to environmental liability seems to be turned upside down. That is, it appears to further the objective of ensuring least burden to business while ensuring environmental protection standards are not compromised. But the objective of the EC Directive is to make polluters pay. The consultation document refers to reducing the administrative burden on industry but does not consider burdens to society from not implementing the directive effectively. Further it does not take into account losses of benefits of clean, non-polluting businesses in society. For example, in relation to GMOs, the organic sector would be an important stakeholder but they have not been consulted in the run up to the consultation and were not sent the consultation document.<sup>3</sup>

5. The figures set out in the consultation document do not support DEFRA's chosen approach of minimum implementation. The document stipulates a "minimum transposition" approach, unless "there are exceptional circumstances, justified by a cost benefit analysis and following extensive stakeholder engagement". The consultation document itself contains evidence that going beyond minimal transposition of the Directive is of considerable benefit to the environment and the Treasury. According to the analysis in the report (para 10), transposition above the minimum would be expected to cover up to an extra 38 incidents of environmental damage each year (depending on the options chosen). The extra estimated costs are up to £2.4 million a year, but the benefits are greater than these costs (which might otherwise be borne by taxpayers, rather than polluters). Thus best cost estimates of DEFRA indicate that the costs associated with transposing above the minimum would lead to greater savings through environmental benefits than minimum transposition of the directive.

Article 16 of the ELD allows for national implementation of the Directive to be stricter than the directive itself. Stricter legislation is vital to ensure the Directive does not weaken existing national legislation. It is also important in those situations where the ELD shows weaknesses or gaps which could be dealt with in the implementing legislation to ensure effective transposition.

6. The ELD Consultation currently prioritises avoiding new costs for business, even if overall benefits far outweigh these additional costs, and in doing so goes against the government's own policy on better regulation.

7. The key commitments of the government's Sustainable development policy of producing an integrated policy approach for protecting and enhancing natural resources; and bringing together all the UK Government's policy frameworks, targets and strategies for natural resources will not be met if the ELD is transposed according to the principles set out in the Government's preferred approach.

8. If the ELD were implemented as the DEFRA document proposes, damage to the environment from GMOs will not be covered, even though this was the intention set out in the GMO legislation.

Taking these issues into consideration Friends of the Earth strongly recommends:

- The inclusion of SSSIs and ASSSIs in the implementing legislation in line with the Government's own targets for their protection

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<sup>3</sup> House of Commons Hansard 29 Jan 2007 : Column 12W, and the associated table placed in the House of Commons library.

- The extension of strict liability to apply to all activities causing biodiversity damage
- Removing the permit and state of the art defences
- The extension of strict liability for water and land damage to all activities, not just Annex III activities
- Keeping the NGO rights of access to justice in cases of imminent threat of damage – in order to help ensure the effective enforcement of the ELD.
- The adoption of effective and feasible interpretations of the definitions of biodiversity and water damage to be issued which are not in breach of EU laws.
- The separate consideration of damage to the environment from GMOs due to the unique nature of the risks posed.

## **B. Implementation options and questions in Section 3 of the ELD Consultation**

### **1. Key Issue:**

Extension of the ELD implementing legislation to nationally-defined biodiversity

### **Relevant Consultation 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 SSSIs is designated under national legislation?**

### **Options:**

- (i) Implement the ELD so that 'protected species and natural habitats' only includes EC protected species and habitats.
- (ii) Implement the ELD so that 'protected species and natural habitats' includes (a) EC protected species and habitats and (b) species and habitats for which any SSSI is designated under national legislation, where damage occurs within that SSSI.

Friends of the Earth strongly supports option (ii).

- Implementation of the ELD must ensure that all nationally protected biodiversity, including species and natural habitats, are covered including:
  1. Sites of Special Scientific Interest (SSSIs) and ASSSIs
  2. Any marine sites accorded protection under the Marine Act.
  3. The UK Biodiversity Action Plan (UK BAP) provides the most up to date reflection of UK biodiversity priorities. Therefore, the habitats and species subject to the UK BAP should be protected under environmental liability rules. At present this may not be possible because sufficient data has not yet been collected. However, this is set to change and there should at least be an option to include UK BAP habitats within the next 5 years.
- The extension of the ELD provisions in this way is fundamental to maintaining and advancing the conservation of important British wildlife by creating adequate incentives for businesses to prevent damage from occurring, and by requiring those which do cause damage to habitats and wildlife of national importance to remediate that damage.
- The SSSIs and UK BAP classifications provide important protection for precious UK wildlife sites and species not covered by EU regulations. Examples of BAP species which would not be included within the scope of the UK implementing legislation if only EU-protected biodiversity is covered include the water vole, the red squirrel, and the brown hare.

- It is essential for UK nature conservation that persons or organisations causing damage to all protected species and habitats should be required to pay for remediation, as will be required under the ELD for damage to EC protected species and habitats.
- Section 3.32 of the consultation document on the ELD highlights how the condition of SSSIs is lower than the Government considers desirable, with only 75% of SSSIs by area currently in a favourable condition.
- Friends of the Earth is of the view that bringing SSSIs and other nationally protected biodiversity within the scope of the ELD would help to achieve real progress in the Government's objective of bringing 95% of SSSIs up to a favourable condition by 2010, by helping to reduce the impact of environmental damage to the areas concerned.
- As highlighted in the consultation document, a significant overlap exists between the SSSI and Natura 2000 networks – with the area covered by SSSIs making up more than 70% of that forming the Natura 2000 network. Having different mechanisms in place to deal with damage to SSSIs and Natura 2000 sites would lead to differential treatment of operators causing equivalent damage, and would thus be likely to lead to uncertainty and confusion for those businesses affected.

Extension of the ELD provisions to cover SSSIs and UK BAP habitats would still leave a large proportion of UK biodiversity outside of its protection, but at least this would ensure greater protection for species and habitats that have been identified as being of particular importance for nature conservation in the UK.

- The Government's own figures show that 375 UK BAP species would not be covered.<sup>4</sup>This represents 79% of the 475 species that are included in UK BAP species action plans (some of the 391 SPAs are grouped plans covering more than one species).
- Considerable public and charitable expenditure is being invested in efforts to restore large scale habitats and to protect particularly vulnerable species of conservation importance. However, if an activity causes significant damage to any of the huge number of species that fall outside the scope of the basic ELD, there will be no requirement for the person or company undertaking the activity to pay for remediation to take place.

## **2. Key issue: whether to extend the application of strict liability for remediation of environmental damage to a wider range of activities in line with existing domestic environmental protection legislation**

### **Options**

**(i) implement the strict/fault based distinction in the ELD- that is strict liability for activities falling within the scope of Annex III that cause biodiversity damage and fault-based for all other activities that cause such damage.**

**(ii) implement a regime under which strict liability applies for any occupational activity which causes the damage to biodiversity.**

It is our view that option (ii) is the most appropriate and most in tune with the spirit of the directive, for the reasons set out in response to the specific questions below. Our comments in relation to strict liability are also subject to the points made at section C. below that in our view it is GMO consent holders rather than farmers/operators who should be made strictly liable for biodiversity damage.

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<sup>4</sup> Answers to Parliamentary Questions tabled by Alan Simpson MP: Written Parliamentary Answer 23rd May 2006 (Hansard column 1690W) and detailed information subsequently provided.

### 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**

Friends of the Earth agrees with option (ii) for the following reasons:

- It provides better environmental protection
  - It is simple to enforce and understand
  - It is the approach most in keeping with the “polluter pays” principle. As such it would encourage damage prevention activities, as well as restoration activities
  - It would ensure compliance with member state duties under the Habitats directive 1992 and the Wild Birds Directive 1979. Otherwise, in cases where no fault can be established and restoration under the Wildlife and Countryside Act is not possible, the UK will not be able to ensure compliance with the aims of both of these directives.
  - The provision is supported by the economic analysis carried out in the RIA, contrary to what is stated in the consultation paper.
  - Option (ii) provides for legal certainty and allows for the harmonisation of the various pieces of legislation in the area, such as the contaminated land regime, Water Resources Act 1991 and the Habitats and Wild Birds directives
- UK legislation provides for strict liability for water and land contamination, for example through the contaminated land regime, and Water Resources Act 1991. Biodiversity damage is not of itself addressed by strict liability rules under existing UK legislation, despite being a focus of the ELD directive. This leaves wildlife protection at a clear disadvantage despite biodiversity being one of the major areas where the ELD adds to existing legislation, and runs contrary to the Government’s commitment to saving endangered UK wildlife, protect and enhance species and habitats, and to halt the loss of biodiversity by 2010.

### Question 3.5

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

- a) **limit to activities falling within Annex III of the ELD or**
- b) **applying to any activity causing environmental damage**

Friends of the Earth agrees with option b) for the reasons set out in response to 3.4 above. In addition, it is our view that it would be contrary to the principles on which the ELD was founded for its transposition to result in the weakening of UK legislation<sup>5</sup> by diluting existing strict liability provisions through focusing on activities falling within Annex III of the ELD. This appears to us to be a possible consequence of the application of option a). In any event such an approach would have arbitrary consequences and lead to confusion in the application of the various legal provisions in this area. Instead, provisions in relation to strict liability should be applied to all environmental damage, including water and land damage.

### Question 3.6

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

Friends of the Earth disagrees with this approach for the reasons set out in our response to 3.4 and 3.5 above. It is our position that strict liability for the remediation should apply to all damage-causing activities, including activities that cause water and land damage.

<sup>5</sup> such as the Environmental Protection Act 2000 and the Water Resources Act 1991

**3. Key issue: Whether and to what extent to adopt the ‘permit’ and ‘state of the art’ defences?**

**QUESTION 3.12(a) (paragraph 3.60 3.64; page 39): The Government’s view (in respect of England and Northern Ireland) 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?**

**QUESTION 3.14 (paragraph 3.68 3.69; page 42): The Government’s view is that, on balance, this 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?**

Friends of the Earth strongly opposes the introduction of the permit and state of the art defences – as key to the practical and economic effectiveness of the ELD, to avoid weakening the effect of existing laws and to secure the restoration of environmental damage at the polluter’s cost, not at the cost of the state.

Implementing the permit defence has the effect of diluting the environmental protection legislation twice. In as acknowledged in the document it may cause even the strict liability based activities as listed under Annex III to be converted to fault based liability. Hence it is strange that the government proposes to include the permit defence. There is also the case of GMOs as discussed below.

There are no convincing reasons for including the permit defence, except opposition from the business sector. Especially in the case of GMOs where the state of knowledge is limited at this time and permits could be given at a European Level against member state agreement.<sup>6</sup> All legal and logical arguments speak against it. Friends of the Earth is against the inclusion of the two defences for the following reasons:

- Including the “permit” and “state of the art” defences provides for less certainty, because the defences introduce several elements of doubt and uncertainty in relation to the restoration of environmental damage and the application and enforcement of the regime.
- The “permit” and “state of the art” defences only apply 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.
- Although it would not be fair to “penalise” operators who adhere to their permits in the same way as operators who do not under the legislation under which the permits are issued for example the IPPC compliance, the ELD is an entirely separate piece of legislation and compliance with permits does not free companies from obligations towards liability under other general laws on liability or environmental law. Further relevant permit issuing authorities like the IPPC have regimes in place to deal with non-compliance with permits.
- Many small businesses do not operate under an Annex III permit because they either do not carry out dangerous (Annex III) activities or their activities do not meet the relevant thresholds and conditions to necessitate an Annex III permit. Even if introduced into national law, the permit defence will not be available to them. This could create an unfair competitive advantage for bigger companies who possess more resources.
- The ELD has goals of both preventing and remedying environmental damage through the application of the “polluter pays principle”. To achieve this, the Directive claims to introduce a “strict liability” regime which means that operators who cause environmental damage are liable regardless of whether they are at fault, thereby ensuring that damage is remedied by the person who causes it (the polluter) and not at the taxpayer’s expense. However, using “compliance with permit” and “state of the

<sup>6</sup> See ‘Making GMOs a special case in the ELD’

art” as a reason to release operators from all cleanup costs derogates from these principles. In fact the two exceptions directly oppose the “polluter pays” principle and undermine the principle of strict liability. Particularly, in view of the enforcement mechanism under the ELD (see below), this means that environmental damage, if remedied, will need to be remedied at the competent authority’s or taxpayer’s expense or not at all (see below).

- As ELD does appear to impose 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 under Art. 8(4). This follows from the way Art 6 is set out: It imposes an absolute obligation on the operator to take immediate control, containment and prevention measures – without consultation with the competent authority – and to take the necessary remedial measures –according to what the competent authority determines. This then raises the question of who will be responsible for reimbursing the operators in the case the defences are evoked successfully. It may result in the competent authority having to take responsibility itself for costs of remedial measures
- Making companies liable for environmental damage they cause without any get out clauses provides a strong incentive to prevent causing such damage and to improve advances in more environmentally friendly technologies. Including the defences does the opposite. In relation to the state of the art defence, in fact, “[a]nother perverse effect could be to provide an incentive to hold back developments in the state of science, as greater understanding could result in greater future liabilities<sup>93</sup>”. In addition, given the long potential latency periods of environmental damage, including the state of the art defence “would leave almost any attempt by the enforcing authorities to deal with any [environmental damage] open to litigation attempting to prove the state of knowledge in the past”.

#### **QUESTION 3.12(b)**

**The Welsh Assembly 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?**

Friends of the Earth welcomes this approach by the Welsh National Assembly and supports it. However this does not go far enough - for the reasons outlined above we do not support the application of the permit defence for any activity under the ELD. In the case of GMOs, we do not believe that on its own this measure will increase the protection against harm caused by GMOs. The measures needed to ensure protection against harm from GMOs are outlined in Section C. below.

#### **QUESTION 4.4 (paragraph 4.12 4.16; page 46)**

**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?**

Friends of the Earth strongly supports applying paragraphs 1 and 4 of Art 12 to cases of imminent threat of damage, and fundamentally opposes the exercise of the Government’s discretion to remove public rights of access to justice in such cases.

- NGO and public involvement in enforcing the ELD, would be much more beneficial for the enforcement of the ELD transposing legislation and the public purse.
- The ELD does not provide for a very strong enforcement regime. Especially if the permit and state of the art exceptions are introduced without an effective system of paying for the costs of restoring environmental damage, the rights of NGOs to request the competent authority to take action (under Article 12) will be crucial
- Far from being an additional administrative burden, given a proper framework for their participation, environmental NGOs could ease the competent authorities’ costs by assisting them in identifying real or threatened environmental damage and requiring operators to take preventive or remedial measures, particularly as they are often in a better position to identify actual or threatened environmental damage.

### **C. Special Nature Of Risks From GMOS**

In addition to the recommendations outlined above, Friends of the Earth strongly supports special treatment for environmental damage and harm arising from GMOs as the release of GMOs into the environment poses substantially different risks to the environment from other activities covered by the Environmental Liability Directive.

The inclusion of GMOs, among a whole range of potentially hazardous activities (listed in Annex III of the ELD) that are very different in nature from each other, has led to proposals which leave it very unlikely that any company or person using GMOs will be financially liable for harm that may arise. In order to ensure that companies responsible for the damage arising from the release of GMOs into the environment Friends of the Earth recommends:

- dropping the state of knowledge and permit defences
- making the GMO consent holders not farmers (operators) strictly liable
- extending the time limit on liability to 75 years.
- expanding protection to cover the widest possible area of land and water
- requiring companies releasing GMOs to have compulsory insurance.

#### **Reasons for a stricter and more robust liability regime for GMOs :**

1. The nature of the risks from GMOs is very different from other Annex III activities: GMOs are living and able to multiply in the environment.
2. The permit system for GMOs is not location specific. Permits for the discharge of pollutants to rivers and air, waste disposal and water abstraction are based on assessments of the local environment where they will occur. In contrast, the system of GMO approvals is Europe-wide, with a very generalised approach to the receiving environment.
3. It is also possible that European approval for a GMO could be given despite concerns in the UK. This is because the system operates on the basis of a qualified majority. The UK could oppose a permit because adverse environmental impacts are possible but this could be awarded either because a qualified majority of other member states is achieved, or because the European Commission makes the decision when agreement is not reached by the regulatory committee or council of ministers.
4. The scope of environmental harm covered under the ELD does not match that under GMO permitting rules. The environmental risk assessment that is conducted for the use of GMOs under the Deliberate Release Directive(2100/18) and Food and Feed Regulations (1829/2003), considers the whole environment including the soil, not just protected species and habitats. GMOs could damage farmland biodiversity or habitats that are not protected.
5. The harmful effects of the release of GMOs may take many years to arise or be detected. Experience of exotic plant introductions suggests that the 30 year time limit on liability in the ELD may not be sufficient to eliminate the possibility of unforeseen harm from the release of GMOs.
6. UK laws cover the use of GM plants and animals in laboratories, but these fall outside the strict liability regime of the ELD.
7. The public have concerns about environmental risks of GMOs and want to see firm regulation. Surveys on GMOs have repeatedly shown the public concerns on the environmental impact of GMOs (for example the '*GM Nation?*' public debate). The government needs to recognise and address these specific public concerns in its policies.
8. In the case of GMOs the provision of financial security is in doubt because to date no insurance company has been prepared to quote premiums to cover GMO cultivation because of the lack of experience and scientific data.