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Environment, Food and Rural
Affairs Committee

Implementation of the Environmental Liability Directive

Sixth Report of Session 2006–07

*Report, together with formal minutes, oral and
written evidence*

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Summary

The purpose of the Environmental Liability Directive (ELD) is to make those whose activities seriously damage, or threaten seriously to damage, the environment liable for preventing or remedying the damage. It gives European Union Member State governments a wide degree of discretion in implementation. It was adopted in 2004, but formal consultation on the Government's proposals for implementation in England, Northern Ireland and Wales started only at a late stage, in November 2006. The consultation took a substantial amount of respondents' and Defra officials' time. But the Government's attitude to implementing the Directive, set out in the consultation document, appears to have made all this effort practically worthless: the Government's policy is not to go beyond the minimum requirements of a Directive "unless there are exceptional circumstances, justified by a cost benefit analysis and following extensive stakeholder engagement". In the case of the ELD, this has meant that the Government proposes not to go beyond the minimum requirements even when its own analysis found that there would be an overall societal and economic benefit from doing so. The only instances where the Government proposes to exercise the national discretion permitted by the Directive is where this would remove a burden on business.

This 'minimum implementation' approach is a pan-Government one, with the political motive of avoiding accusations of 'gold plating' of EU legislation. But in this case it has meant that the Government has felt able to avoid properly justifying its policy choices, particularly in the cases where its own analysis suggests an overall public benefit from going further than the Directive. In the case of the ELD it also risks creating an unnecessarily complex framework which will provide opportunities for legal dispute but will mean that the country misses out on some of the potential benefits of the Directive. The Government must provide a proper justification of its policy choices that does not rely simply on the blanket approach of avoiding 'gold plating'. It must show that its decisions are reasonable, proportionate and evidence-based. It is surprising that Defra has not been more robust in its defence of the environment; it appears that the DTI 'business-friendly' agenda has been predominant.

The clearest example where the minimum implementation approach is unsatisfactory is the Government's unwillingness to extend the ELD to nationally-protected biodiversity. On this point the Government is at odds with all the environmental organisations, and also with its delivery partners, the Environment Agency and Natural England. We were not satisfied with the Minister's explanation of its policy, and we recommend that the Government uses the discretion it has under the Directive to include nationally-protected biodiversity within the scope of the ELD.

The Government has promised further consultation on the draft regulations once it has finally determined its policy. We will wish to examine those regulations in due course.

1 Introduction

1. In order to improve our scrutiny of the Department of Environment, Food and Rural Affairs (Defra), we decided to undertake a new style of inquiry into Defra's implementation of the European Union Environmental Liability Directive (ELD). We announced that the written evidence received by the Committee would provide the background information upon which to base a single evidence session with the Minister. This form of inquiry is designed to allow the Committee to examine additional areas of Defra activity when time does not permit the traditional long form of inquiry with a number of evidence sessions.

2. Our terms of reference were as follows:

What consultations Defra has had on the Directive since it was adopted in 2004 and with whom, and whether Defra has listened to consultees' views. Why Defra has taken so long to consult formally on the ELD. Whether any important questions were omitted from the formal consultation.

What discretion Member States have in the implementation of the ELD, and the reasons for Defra seeking to apply the 'permit' and 'state of knowledge' defences under Article 8 (4). Which other Member States will be imposing strict liability to a wider range of activities than is Defra, and which are applying a more sensitive test of damage.

Why the Government is proposing to limit the scope of the ELD to EU-protected biodiversity, and which SSSIs would be affected.

What effect implementing the ELD in the manner proposed by the Government is likely to have on its meeting the 2010 targets under the Biodiversity Action Plan and its PSA target to bring 95% of nationally important wildlife sites into favourable condition; and whether the ELD may take resources away from achieving these targets.

The timescale for implementation of the Directive.

The capacity of organisations such as the Environment Agency, Natural England and NGOs to take action under the Directive.

3. We are grateful to those who took the trouble to send memoranda to us; the material we received was very useful in preparing for our evidence session with Ian Pearson MP, the then Minister of State for Climate Change and the Environment, on 13 June. We also express our thanks to Sandy Luk, an environmental consultant, who briefed us informally on the ELD.

2 Background

The purpose of the Environmental Liability Directive

4. The principal aim of the Environmental Liability Directive (ELD)¹ is to establish a mechanism to prevent and remedy significant environmental damage, based upon the “polluter pays” principle. Certain ‘operators’ who cause a risk of significant damage to land, water or biodiversity will have a duty to avert such damage occurring or, where damage does occur, a duty to reinstate the environment. An operator will have to notify the appropriate ‘competent authority’ of any imminent threat of such damage or of actual damage to the environment caused by it while carrying out its business and of its plans to avert or repair the damage.

5. The Directive’s preamble explains its fundamental objective thus:

The prevention and remedying of environmental damage should be implemented through the furtherance of the ‘polluter pays’ principle, as indicated in the Treaty and in line with the principle of sustainable development. The fundamental principle of this Directive should therefore be that an operator whose activity has caused the environmental damage or the imminent threat of such damage is to be held financially liable, in order to induce operators to adopt measures and to develop practices to minimise the risks of environmental damage so that their exposure to financial liabilities is reduced.²

6. The Directive was adopted on 30 April 2004. Member States were obliged to transpose this into domestic law by 30 April 2007. However, the Government has not met this deadline. The Government consultation document (covering England, Wales and Northern Ireland and published by Defra, the Welsh Assembly Government and the Northern Ireland Department of the Environment—Scotland is implementing separately) was published in November 2006. Consultation closed in February 2007. At the moment the Government is finalising its policy. There will then follow a further consultation in the second half of this year on the precise form of the regulations required to implement whatever policy is chosen.

7. The ‘competent authorities’ are likely to be existing public authorities with responsibility for the environment such as the Environment Agency or Natural England. The ‘operator’ is the person who operates or controls the occupational activity which poses a threat of damage or causes actual damage. Occupational activity is defined quite widely, extending to any activity carried out in the course of economic activity, a business or undertaking, irrespective of its private or public, profit or not-for-profit character.

What is covered by the Environmental Liability Directive

8. Environmental damage is defined in Article 2 of the Directive as:

1 Directive 2004/35/CE of the European Parliament and of the Council, 21 April 2004.

2 Recitation 2

- damage to protected species and natural habitats: “any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species”. The species and habitats covered are those in the Wild Birds Directive and in the Habitats Directive and the effect on their status will often need to take account of the impact of damage on their status across the EU as a whole. It is important to note that the ELD does not protect particular sites as such, only damage to the species and their habitats wherever they may occur, unlike the current protection offered to SSSIs. But the ELD is most likely to be relevant in cases of damage to ‘Natura 2000’ sites³, as these were designated in order to protect the species and habitats covered by those Directives. These differences give the potential for considerable legal action to determine the effectiveness of forms of protection.
- Water damage: “any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in Directive 2000/60/EEC, of the waters concerned”.
- Land damage: “any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms”.
- Damage is defined as: “a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly”.

9. Certain types of environmental damage are excluded from the scope of the Directive. These include damage arising from diffuse pollution which cannot be attributed to one or more specific operators, and damage falling within the scope of international Conventions relating to oil pollution and nuclear radiation, where those Conventions are in force in the Member State where the damage occurs. The Directive also provides for “defences” against liability such that operators would not bear the cost of remediation in certain circumstances, such as where a third party was responsible, or where environmental damage occurred despite the operator complying with the conditions of a permit.

Obligations of the ‘operator’

10. The operator must:

- take action to prevent imminent threat of damage;
- notify the competent authority if preventive measures fail;
- notify the competent authority in the event of significant environmental damage;
- take immediate action to control, contain, remove or manage any potential causes of damage;
- make proposals for taking the necessary remedial measures; and

³ A European Union network of sites designated by Member States under the Wild Birds Directive and under the Habitats Directive.

- undertake remedial measures as agreed by the competent authority (the principles for which are set out in Annex II to the Directive).

Responsibilities of the ‘competent authority’

11. In cases of imminent threats the competent authority may:

- require the operator to provide information on any imminent threat of environmental damage or in suspected cases of such a threat;
- require the operator to take, and give the operator instructions on, the necessary preventive measures; and
- take the necessary measures itself.⁴

12. In respect of environmental damage the competent authority:

- may require the operator to provide supplementary information on any damage;
- must decide which remedial measures, from among the options presented by the operator, are to be taken;
- can decide the priority for remedial measures where several instances of environmental damage have occurred which cannot all be addressed simultaneously;
- may take, require the operator to take, or give instructions to the operator in regard to immediate control, containment, removal, or management of the relevant potential causes of damage;
- must require the operator to take the necessary remedial measures; and
- may take the remedial measures itself, as a means of last resort.

13. For both imminent threats and environmental damage, the competent authority must recover its costs from the operator, although it may decide not to do so if the costs of such action would exceed the amount to be recovered or the operator cannot be identified.⁵

14. It is still not clear how the Environment Agency and Natural England will be funded to carry out their responsibilities properly, especially with regard to the monitoring of difficulties and whether they will be able to respond to disclosures of cases of environmental damage by the public.

Who is liable and how?

15. The ELD covers two types of liability: strict and fault-based. “Strict liability” applies to land and water damage and to biodiversity damage caused by the occupational activities listed in Annex III of the ELD. These occupational activities are those regulated by Community legislation which are potentially particularly damaging to the environment,

4 Article 5

5 Articles 6–8

for example waste or genetically-modified organisms (GMOs).⁶ “Fault-based liability” applies to biodiversity damage (to protected species and natural habitats) from all other occupational activities.⁷ Strict liability means that it is sufficient that there is a causal link between the occupational activity and the environmental damage; it is not necessary for there to have been fault or negligence on behalf of the operator of the occupational activity. Fault-based liability means that the operator of the occupational activity, through a deliberate action or omission, or negligence, has caused the environmental damage.

16. The liability on the operator is to avert an imminent threat of significant damage, and to remediate significant damage where this does occur. Where significant damage occurs, an operator must take all practicable steps immediately to control, contain, remove, or otherwise manage the potential causes of damage, to minimise the effects.⁸ This is not part of the longer-term remediation, which is the requirement to return the damaged biodiversity or water to its condition immediately before the damage occurred and to remove any significant risk of adverse effect on human health. In the case of land damage, the requirement is to remove the threat of adverse effects on human health.

17. The ELD provides that, in respect of biodiversity and water, remedying the environmental damage will be principally through restoration of the environment to (or towards) its baseline condition, known as ‘primary remediation’. If primary remediation does not result in fully restoring the damage, then ‘complementary remediation’ will be required, on the damaged site or elsewhere, to make good the deficit. In addition, the ELD provides, again in respect of biodiversity and water, that ‘compensatory remediation’ is required, on the damaged site or elsewhere, to compensate for interim losses of service or amenity in the period between the damage and full primary remediation.⁹

18. Liability is not retrospective: it applies only to damage done after April 2007; and will not apply to any damage where more than 30 years has passed since the cause of the damage.¹⁰

Areas of Member State discretion in implementation

19. The Directive allows several circumstances in which Member States may decide to adopt slightly different provisions to the basic requirements of the Directive.

20. Article 2.3 allows a Member State to extend the scope of ‘protected species and habitats’ to include any that are protected by national law. In effect, that could include UK Biodiversity Action Plan (BAP) species and habitats and Sites of Special Scientific Interest (SSSIs) designated by English authorities and not already protected under EU Natura 2000.

21. Article 8.4(a) of the Directive allows Member States the option of allowing operators not to bear the cost of remediation where damage arose despite compliance with a permit where the operator is not at fault or negligent (the ‘permit defence’), or damage arose from

6 Article 3 (1) (a)

7 Article 3 (1) (b)

8 Article 6 (1) (a)

9 Annex II

10 Article 17

an emission, use of a product, or an activity which according to the state of scientific and technical knowledge at the time was not considered likely to give rise to such damage (the ‘state of knowledge defence’).

22. Member States may decide not to apply the requirement in Article 12 paragraphs 1 and 4 to respond to observations or a request for action received by a competent authority from a person affected, or likely to be affected, by an immediate threat of damage, or from an environmental NGO. Under Article 16 more stringent measures in relation to prevention and remedying environmental damage may be adopted. Under Annex III, paragraph 2, Member States may decide to exclude from the list of ‘dangerous activities’ the activity of spreading appropriately-treated sewage sludge from urban waste water treatment plants for agricultural purposes. There is also general scope for Member States to implement Directives in a way that takes account of the interaction between the terms of the Directive and existing national rules, which gives a further element of flexibility.

Defra’s consultation

23. Defra identified the following discretions and choices on which it consulted as having potentially the largest impact:

- Whether to bring SSSIs (and equivalents) within the scope of the Directive.
- Whether and to what extent to adopt the ‘permit’ and ‘state of knowledge’ defences (see above).
- 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.¹¹

24. The Government’s stated general policy when implementing Directives is “not to go beyond the minimum requirements unless there are exceptional circumstances justified by a cost benefit analysis and following extensive stakeholder engagement”.¹² In the three cases listed above, the Government says that it wishes to:

- limit the scope of the Directive to EU-protected biodiversity¹³
- adopt the permit and state of knowledge defences in respect of those elements of the Directive’s requirements that are additional to those addressed by existing environmental protection legislation¹⁴
- limit the application of strict liability in line with the provisions of the Directive¹⁵

11 *Consultation on options for implementing the Environmental Liability Directive*, Defra/ WAG/DOENI, November 2006 (‘Consultation document’), p 7

12 *Ibid*

13 *Ibid*

14 Consultation document, pp 41 and 42

15 Consultation document, p 7

25. The Consultation document notes that the Welsh Assembly Government has said that it intends not to apply the permit defence for GMO-related operational activities.¹⁶

26. The Partial Regulatory Impact Assessment (RIA) is included in the Consultation document and assesses the costs and benefits of going beyond the strict terms of the Directive in certain cases against the ‘minimum transposition’ option. Its assumption is that the Directive (assuming the minimum transposition option) might apply to 2 biodiversity damage cases per year, 10 water damage cases a year and perhaps 30 land damage cases per year. It would cost about £13m per year in policy and administration costs and produce annual benefits of more than £16m. The RIA estimates that if the Government went well beyond the minimum (including imposing strict liability for all activities, extending protection to SSSIs and not allowing the permit defence), then a further 38 incidents might fall within the scope of the ELD every year, at an additional cost of £2.8m and with additional benefits of more than £4.8m.¹⁷ Given this, we find it disappointing that Defra was not more robust in seeking to extend environmental protection by means of the ELD.

3 Defra’s consultation and policy approach

The consultation process and the timetable for implementation

27. The Directive was adopted on 30 April 2004. It obliged Member States to transpose it into domestic law by 30 April 2007. At the moment the Government is reaching conclusions on its policy. There will then follow a further consultation in the second half of this year on the precise form of the regulations required to implement whatever policy is chosen.¹⁸ Defra has explained the delay as arising from the need for:

... extensive consideration. This is because the provisions of the ELD overlap with those of existing domestic regimes in a complex way. They are more stringent than existing regulations in some respects but less stringent in other respects. Most Member States are grappling with issues of this kind.¹⁹

28. Of the EU’s 27 member states only Italy, Latvia and Lithuania have reported full or partial transposition of the law to the European Commission. Others, including Spain, Germany, Poland, Austria, France and the UK, are at various stages of adoption. EU Environment Commissioner Stavros Dimas was reported recently as having warned that he would begin infringement proceedings against tardy Member States “very soon”: “I am very concerned that only three Member States have transposed this vital legislation so far”.²⁰ The Department told us that its late transposition would automatically lead to the

16 Consultation document, p 40

17 *Consultation on options for implementing the Environmental Liability Directive*, Defra/ WAG/DOENI, November 2006 (‘Consultation document’), p 8

18 Ev 2

19 Ev 1

20 Quoted in ENDS Europe Daily, 30 April.

Commission starting infraction proceedings, but did not expect that this would lead to fines from the Commission.²¹ **We express our disappointment that the Government is vulnerable to further infraction proceedings from the European Commission in addition to those already pending.**

29. The Association of British Insurers believed that Defra has carried out the transposition process in a “considered and responsive manner”.²² Water UK thought that “the Government’s consultation paper does an excellent job in explaining the issues and the options available. We have also found helpful the open and thorough manner in which Government officials have consulted and considered the views of different stakeholders”.²³ Wildlife and Countryside Link regarded the meetings with Defra informative, but said “it has not been possible for the Government to give due weight to the views of environmental NGOs because of its narrow interpretation of the ‘minimum’ implementation approach”.²⁴ The CBI thought that Defra relations with stakeholders before the Directive was agreed had been “excellent”, but that following agreement to the Directive there was very little contact with stakeholders until late 2005. Based on the Defra implementation strategy set out for stakeholders following the adoption of the ELD, the CBI was unclear why the transposition process had taken so long and why the UK would be late in implementing the ELD.²⁵ We are aware that a number of critics of the Government have claimed that they had not been properly consulted and that hard copies of the consultation document had not been made available to them.

30. The Government consultation document was published in November 2006 and responses were required to be in by 16 February (although Defra later extended this to the end of February). The British Insurance Brokers’ Association complained about the timing, as it included Christmas. It also complained about a lack of publicity by Defra.²⁶ The Institute of Ecology and Environmental Management (IEEM) believed that in early discussions it did have the chance to make its views felt, but that:

The timescale is somewhat curious and there was a long period between preliminary consultations and the publication of the final consultation document. The reasons for this were not evident to IEEM. The timing of the consultation was then unnecessarily rushed although the deadline was slightly extended. The timing over the Christmas period made it more difficult than it otherwise need have been, especially for smaller NGOs to make a response.²⁷

31. The Institute of Biology said that:

the consultation period allowed by Defra was too short. The list of consultees contained numerous omissions among learned and professional bodies and NGOs,

21 QQ 48–9

22 Ev 36

23 Ev 48

24 Ev 37

25 Ev 39

26 Ev 33

27 Ev 41

and many interested parties—including the IOB—were therefore not informed of the consultation by Defra. Given that IOB responds regularly to such consultations, we were astonished not to have been directly informed of this consultation, and only heard of it serendipitously, soon before the closing date.²⁸

32. According to Defra’s website, consultation periods normally last a minimum of 12 weeks “although there are circumstances in which shorter consultations will be unavoidable”.²⁹ The Minister told us that in retrospect “the consultation period could have been longer”, but added that ever since the Directive had been agreed Defra had been in close touch with interested parties about implementation. He had not, however, had any such meetings with stakeholders himself. He confirmed that there would also be a further consultation in the autumn of 2007 on the form of the implementing regulations themselves.³⁰

33. The formal consultation process began more than two years after the Directive was agreed. We accept that informal discussions were being held before November 2006, and that the implications of the Directive are complex. But the timetable for formal consultation appears to us to have been somewhat rushed. In addition, the Minister has not been personally involved in the consultation process with external stakeholders, and gave the impression that he was very much relying on officials to carry this work forward. **We recommend that before final decisions are taken on the policies to be adopted in transposing the Directive, the new Minister hold an open meeting with stakeholders at which they can discuss the key policy choices face to face. It is important that the list of those stakeholders consulted in this way is representative, and is published.**

34. It is not clear how much notice the Government took of those who were critical of its ‘light touch’ approach and this needs to be rectified when it goes out to consultation again so that it takes a balanced view of what needs to be done. The consultation must properly reflect opinion on the Directive and its implementation.

Were there defects with the consultation?

35. The UK Environmental Law Association (UKELA) believed that “Defra has failed to consult either appropriately or lawfully on the ELD” owing to the omission of certain questions. Referring to Articles 12 and 13, UKELA said that there was “no detailed discussion about: (a) implementation of the access to justice provisions; (b) how they will work in practice; or (c) provisions for access to a court/tribunal to review any decision by the competent authority following a request for action. The only discussion in the consultation focuses on whether the ‘request for action’ provisions should be extended to cases of imminent threats of environmental damage”. It continued:

UKELA is of the view that the Government must consult on its proposals for implementing the request for action procedure and the provisions for access to a court/tribunal and that it must do so before it issues draft regulations. If it does not

28 Ev 43

29 <http://www.defra.gov.uk/corporate/consult/default.asp>

30 QQ 3–4

do so, it will be acting unlawfully. See the recent case of *R (on the application of Greenpeace) v Secretary of State for Trade and Industry* about the legality of the Government's consultation process on new nuclear build and in particular the references to the Aarhus Convention on access to information and participation in environmental decision making.³¹

UKELA pointed out that Article 13 of the Directive says that interested parties "shall have access to a court or other independent and impartial public body" to review the actions of competent authorities. But it believed that the implications of the Consultation Document are that the status quo will continue as regards access to justice. The Association believes that there remain significant barriers to justice, including the prohibitive costs of bringing a case.³²

36. The City of London Law Society (CLLS) regarded Defra's consultation document as "fatally flawed due to its omission of many key issues". It too drew attention to the *Greenpeace* case, where it was decided that "a consultation process which fails to provide sufficient information to enable consultees to make an intelligent response is manifestly inadequate and fatally flawed". The Society felt that "Defra has failed to provide any information on the Government's proposed mechanism for ensuring access to a court or tribunal in order to seek review of the procedural or substantive legality of a competent authority's decisions, acts or failure to act, as directed by Articles 12 and 13 of the ELD".³³

37. The Minister did not think that another consultation exercise was necessary before the planned consultation on the form of the regulations.³⁴ The Head of Defra's Environmental Liability Team sought to distinguish between this and the *Greenpeace* case:

Our position would be that the first consultation raised the main significant policy issues. There are bound to be one or two additional points which are not always going to be in the consultation, and it does not mean that the consultation is completely flawed and has to be thrown in the bin and we have to start again. Furthermore, we are planning to do a second consultation and that will be with the draft regulations, and it is likely that there will be slightly different emphasis in that second consultation—more an emphasis on the mechanisms for enforcement, mechanisms for how NGOs and other interested parties will exercise their rights under Article 12, et cetera, that kind of issue. So I think there will be a slightly different emphasis and there will be another bite of the cherry for interested parties to help us with their comments on that.³⁵

She added that the costs of a judicial review case were a wider matter than just for the ELD, but said that the Government was actively considering measures to protect applicants in such cases who feared the cost implications of bringing an action.³⁶

31 Ev 28

32 Ev 28

33 Ev 30

34 Q 15

35 Q 17

36 Q 19

38. The City of London Law Society also considered that Defra had failed to consult on:

operators' duty under article 6 (1) (a) of the ELD to take 'all practicable steps to *immediately* control, contain, remove or otherwise manage the relevant contaminants and/or any other damage factors in order to limit or to prevent further environmental damage and adverse effects on human health or further impairment of services' (emphasis added); and

operators' duty under article 5 (1) to take, "without delay", the necessary preventive measures when there is an imminent danger of environmental damage.

The CLLS pointed out that Defra proposed thresholds for damage that would involve such lengthy and detailed scientific study that they would "necessarily result" in operators failing to comply with their duty under the ELD to take immediate action to control or prevent environmental damage.³⁷

39. The Marine Conservation Society (MCS) raised two matters that were omitted from the consultation document: it believed that activities covered by the Common Fisheries Policy (CFP) had a special derogation in respect of damage to marine biodiversity; and it pointed out that the ELD covers marine environment up to 200 nautical miles offshore, while the Environment Agency's jurisdiction ends at one nautical mile offshore.³⁸

40. The Department was not able to give a definitive view on the interaction between the CFP and the ELD, as this would have to be "ironed out at Community level [...] we are in the hands of Community law".³⁹ Nor was it yet able to say what would be the competent authority from between one and two hundred miles offshore: there was "a dearth of candidates", and until the new marine management organisation was created by the proposed future Marine Bill, Defra suggested that Natural England might take responsibility for assessing environmental damage, with the assistance of other organisations (for example the Marine Fisheries Authority) with the ability to operate at sea and do searching or sampling work.⁴⁰

41. We were disappointed that the Government was unable to provide complete clarity as to how the ELD will apply in the marine environment, including the distances from shore to which it will apply, or what the competent authority will be. The Department must provide that clarity in time for the next round of consultation on the draft regulations. It must also commit itself to resolving the question of how the ELD and the Common Fisheries Policy will interact.

'Temporal application'

42. Article 17 of the ELD provides that the Directive does not apply to:

37 Ev 30

38 Ev 25

39 Q 27

40 QQ 36-7

damage caused by an emission, event or incident that took place before [30 April 2007]; and/or

damage caused by an emission, event or incident which takes place subsequent to [30 April 2007] when it derives from a specific activity that took place and finished before [30 April 2007].

43. The City of London Law Society considered that “Article 17 strongly implies that the ELD applies to any damage caused by an emission, event or incident that takes place after 30 April 2007 even in the absence of domestic legislation transposing it”, and that

Defra’s failure to lay regulations to transpose the ELD before Parliament so that Parliament may bring the ELD into force by 30 April 2007 will prejudice operators. If, for example, an operator causes environmental damage subject to the ELD after 30 April 2007 but before domestic law on the ELD has entered into force, the operator will have no guidance on its duty to remediate the damage or otherwise comply with the ELD. In particular, operators will be liable for interim losses from the date that their activity caused environmental damage (Annex II, para 1(d)).⁴¹

The same concern was raised by the British Insurance Brokers’ Association [ELD 07, first page], the Association of British Insurers, who called for Defra to set out the interim measures that will apply between 30 April 2007 and actual transposition “to give certainty to all stakeholders”,⁴² and the CBI.⁴³

44. The Minister’s clear preference was for applying the obligations of the ELD to incidents which occurred after the regulations came into force not before. In the meantime existing environmental legislation would apply. This, he said, would be simpler for all concerned.⁴⁴ **In order to give complete clarity to interested parties, we recommend that the draft regulations for consultation this autumn make it clear that the ELD will only apply to incidents which occur after the regulations come into force.**

The Government’s approach to implementation

45. The Consultation Paper says that:

The Government intends to transpose the ELD in a way consistent with its wider approach to environmental protection and enforcement. In particular, it wishes:

- i. to encourage a change in behaviours so as to bring about a reduction in the risk of serious environmental damage occurring, and more effective application of the “polluter pays” principle where such damage does occur; and
- ii. to secure this change in a way which imposes minimum burdens upon business, including by having regard to the coherence and simplicity of the overall environmental protection framework taking account of the requirements of ELD.

41 Ev 31

42 Ev 36

43 Ev 40

44 QQ 50–1

In furthering these objectives through the transposition of ELD, the Government wishes to ensure that environmental protection standards are not undermined and that its approach to transposition is proportionate to the problems requiring to be addressed.⁴⁵

46. Defra told consultees that “it is the Government’s policy not to go beyond the minimum requirements of a Directive unless there are exceptional circumstances, justified by a cost benefit analysis and following extensive stakeholder engagement”.⁴⁶ In some cases the Consultation Paper’s Partial Regulatory Impact Assessment indicated likely benefits from going beyond the minimum implementation approach, but the Government did not propose to depart from that approach.⁴⁷

47. The RSPB said that “The Government intends to exercise Member State discretion where this favours business and goes against the environment, but not vice versa”, and in its opinion “the Government’s ‘minimum’ implementation approach ... has meant that the views of ‘green’ stakeholders have not been given due consideration. It was the RSPB’s view that the strength of environmental arguments has not been examined simply because they do not accord with the Government’s narrow interpretation of the minimum implementation approach, rather than being tested against a true ‘better regulation’ approach”.⁴⁸ Wildlife and Countryside Link condemned the approach adopted, arguing that:

the Government’s preferred options, as expressed in Defra’s consultation on the implementation of the ELD, will fail wildlife and the ‘polluter pays principle’, under-implement or breach the ELD and other EU Directives, over-restrict the interpretation of particular ELD articles, and weaken or conflict with existing UK laws. This is despite the Partial Regulatory Impact Assessment (RIA) showing the discussed variations as having strong overall benefits [...] it is our opinion that it has not been possible for the Government to give due weight to the views of environmental NGOs because of its narrow interpretation of the ‘minimum’ implementation approach.⁴⁹

48. The Agricultural Biotechnology Council on the other hand supported “the Government’s science-based and proportionate approach to the implementation of the ELD, which looks to avoid gold-plating existing legislation and ensure that the UK’s agricultural sector remains progressive, profitable and sustainable”.⁵⁰ The Association of British Insurers believed that the Government’s decision “to maintain the Directive as it stands is correct. The ELD is already strong and comprehensive, and further regulation in this area could seriously harm the ability of companies to get insurance against their potential liabilities”.⁵¹ The CBI supported “the decisions that the Government has taken on

45 Consultation document, p 21

46 Ev 2

47 For example, extending strict liability to all activities responsible for biodiversity damage: see Table F2, PRIA p 47, and consultation document, Annex II, p 55.

48 Ev 26 and 27

49 Ev 37

50 Ev 29

51 Ev 36

areas where discretion has been left to Member States as the best option to maintain UK competitiveness”.⁵² The NFU also supported the Government in not going further than the Directive required given the potential impact on the farming sector.⁵³

49. The Minister told us that, even though the Government “do not believe in gold plating”, it was worth consulting in an open and transparent way and “give people an opportunity to express a view”. He added that Defra had not received additional evidence during the consultation that challenged the cost and benefit estimates in the Partial RIA, although we know from seeing the RSPB response to the consultation that they at least did take issue with the RIA calculations. He believed that the additional benefits in some cases from going beyond the minimum requirements were “pretty marginal” and so did not justify “gold plating”. Although he conceded that going beyond the minimum might sometimes make the law fit together better, he saw the ELD as supplementary to the “very good” environmental protection laws that the country already had in place.⁵⁴ However the Minister was unable to give us a clear indication of the sort of result from a cost-benefit analysis that would lead him to go beyond the minimum transposition requirements of the Directive, other than to say that it would be a matter of judgement and would vary from policy area to policy area.⁵⁵

50. Defra’s ‘minimum implementation’ approach is a pan-Government one, designed to avoid accusations of ‘gold plating’ of EU legislation.⁵⁶ But in the case of the ELD it has meant that the Government has felt able to avoid properly justifying its policy choices, particularly in the cases where its own analysis suggests an overall public benefit from going further than the Directive’s minimum requirements. Because it sees the ELD as a supplement to domestic law, it will not be integrated with that law. The Government therefore risks creating an unnecessarily complex framework which will provide many opportunities for legal dispute, and the country may miss out on some of the potential benefits of the Directive. We discuss some particular cases below. **The Government must, in the cases where its own analysis show that there would be overall benefits from going beyond the minimum implementation requirement, properly explain the reasons for its policy choices. It should also make clear what sort of results a cost benefit analysis would have to show in order to justify it going beyond the minimum requirements of the Directive.**

Extent of strict liability

51. The Government discussed in the Consultation Document the interaction with existing environmental legislation, and the possible costs and benefits of extending the scope of strict liability under the ELD so that it matches the liability provided for in those rules.⁵⁷ The Partial RIA estimated that there would be a net benefit from extending strict liability

52 Ev 39

53 Ev 46

54 QQ 53–7. The RSPB comments on the RIA calculations are in paragraph 14 of its response to the consultation.

55 QQ 62–73

56 QQ 79 and 82

57 Consultation document, pp 28–31

for biodiversity damage to non-Annex III activities,⁵⁸ and that a further five cases a year would be covered as a result.⁵⁹ Nevertheless the Government's stated approach is to "limit the application of strict liability in line with the provisions of the Directive".⁶⁰

52. Natural England did not agree with the Government's approach not to extend strict liability to non-Annex III operations. It wanted liability to be identical, because "non-[A]nnex 3 operations damage biodiversity more frequently; and creating a 'level playing field' by applying strict liability to all operations would establish a more consistent and transparent regime".⁶¹ Genewatch favoured strict liability:

in relation to any environmental damage caused by any activity. This is particularly important in the GM context because of the complex issues surrounding the identity of the party who actually causes environmental damage through GMOs (e.g. the farmer/vet or the GM company). For GM damage to be covered by the Directive, it is crucial that there be strict liability.⁶²

The RSPB wished to see strict liability extended,⁶³ as did the Institute of Ecology and Environmental Management.⁶⁴ 53% of respondents to the Government's consultation argued for extending strict liability to non-Annex III operations.⁶⁵

53. According to the British Insurance Brokers' Association "the insurance market would prefer the minimum of strict liability options as opposed to fault based ones".⁶⁶ The CBI also supported the Government's approach: "proportionate liability is the most equitable means of dealing with multi-party cases and non-Annex III damage".⁶⁷ The NFU believed that the ELD's fault-based/strict liability distinction would provide the greatest certainty for farmers and growers.⁶⁸

54. Our impression is that little attempt has been made to provide for a consensual atmosphere to allow a proper discussion to take place among stakeholders. We questioned the Minister as to the reasons for his policy preference, but **we did not receive a clear answer as to why biodiversity damage from non-Annex III activities should be treated differently, other than the Minister's general preference not to over-implement "unless there is a compelling case to do so"**.⁶⁹ **The consultation document merely set out a number of pros and cons of applying strict liability in this case.**⁷⁰ The Government has

58 Annex 111 activities are those listed in Annex III of the Directive: they include waste operations, discharges into inland surface and ground water and release of genetically modified organisms.

59 Partial Regulatory Impact Assessment, Defra, November 2006 ('RIA'), Table F2, p 47

60 Consultation document, p 7

61 Ev 31-2

62 Ev 35

63 Ev 26

64 Ev 41

65 Defra Summary of responses to the consultation on the ELD, Defra, June 2007, p 15

66 Ev 33

67 Ev 40

68 Ev 47

69 QQ 81-94

70 Consultation document, p 29

also provided insufficient evidence to back up its assurance that existing controls are sufficient to protect against GM damage. In its response the Government must explain the reason for its choice not to extend strict liability for biodiversity damage to non-Annex III activities.

The 'permit' and 'state of knowledge' defences

55. As mentioned in paragraph 21, Member States may choose to implement the so-called 'permit' and 'state of knowledge' defences in law. Where they apply, these defences allow operators not to bear the cost of remedial measures. The Partial RIA showed a slight benefit from adopting the permit defence but could not arrive at figures in the case of the state of knowledge defence.⁷¹ Defra's memorandum said that:

The 'permit defence' provides a measure of certainty for businesses which is important in planning, securing investment, and facilitating securing of financial security for potential liabilities under the Directive. The 'state of knowledge' defence is important to facilitate research into and development of new products and technologies, from which society derive important economic, social, medical and other benefits.⁷²

56. The Marine Conservation Society believed that these defences "will weaken the Water Resources Act (1991), the Merchant Shipping & Maritime Security Act (1997) and the Food & Environment Protection Act (1985), and detract from UK obligations to the OSPAR and London Conventions on the prevention of marine pollution from dumping and land-based sources", and that the defences ran counter to the 'polluter pays principle', placing an added burden on the permitting authority to ensure that consented activities do not threaten the environment. This was because in a case where the consenting process was flawed, and damage occurred, it would be the taxpayer not the operator who will bear the cost of remediation. The MCS further believed that immunity from liability for selected activities was inconsistent with the ELD's general principle of environmental responsibility.⁷³ The RSPB too believed that they undermined the 'polluter pays' principle and the principle of strict liability upon which the ELD was based, as did Wildlife and Countryside Link.⁷⁴

57. The Association of British Insurers supported the defences, noting that they were not 'defences' but "mitigation factors that excuse liability". They provided, the ABI said, "clarity and certainty, and therefore contribute to an environment in which financial security instruments are more likely to develop".⁷⁵ The CBI believed that the permit defence for Annex III activities were particularly important for UK firms as permits were more costly here than in other Member States.⁷⁶ Water UK also supported the defences.⁷⁷

71 RIA, pp 52–3, tables F7 and F8

72 Ev 2

73 Ev 26

74 Ev 27; Ev 38

75 Ev 36

76 Ev 40

77 Ev 48

The NFU said that:

To disapply the permit defence would undermine the confidence in the permit authorisation system and approvals process and introduce a great deal of uncertainty for operators and competent authorities.

In addition, we believe that the state of knowledge defence is critical for those activities covered in Annex III, but not covered by the permit defence (those not expressly authorised by permit, licence or are approved) but are undertaken in good faith and according to good practice and the technical and scientific knowledge at the time.⁷⁸

Genetically Modified Organisms

58. Genewatch opposes the defence as undermining the ‘polluter pays’ principle. But it stressed that there were additional reasons related to GMOs that make these defences particularly unsuitable:

GMO authorisations are very wide, covering the whole of the EU, and are irrespective of the different conditions in different Member States or the location of the activity: “a GM company could cause environmental damage, but be protected by a licence which did not and was never intended to deal with the type of damage caused”.

Use of GMOs and GM crops is new and limited and EU risk assessments contain uncertainties and assumptions. Permits have been granted in spite of objections from some Member States about harm to environment or health, and the state of knowledge includes some opinions which predict harm from GMO release, so the extent to which such a defence could be relied on is unclear.

In addition the state of knowledge defence might reduce incentives for research into potential harm from GMOs.⁷⁹

59. The Agricultural Biotechnology Council strongly supported the two defences:

stringent regulations are already in place to militate against the possibility of ‘significant harm’ (invariably undefined) from Genetically Modified Organisms (GMOs) [...] these requirements, as well as the obligation to conduct extensive field trials to test the suitability of specific GM crops to UK conditions, provide a comprehensive framework of governing the impact of GMOs on the environment. We are, therefore, fully supportive of the Government’s proposal to implement a permit defence, as this will provide legal security for users of approved GM products who comply with the extensive legal requirements associated with such products. Failure to implement the permit defence will prevent insurers from entering the market, which runs contrary to Article 14 of the ELD. It will also serve as a barrier to innovation [...] Science is continually evolving. As with all forms of innovation, it is

78 Ev 46–7

79 Ev 34

unreasonable to expect the manufacturer or user of a GM product to be able to predict effects that may arise in the future and that were beyond the state of scientific knowledge existing at the time of sale and use. This approach is consistent with the Government's science-based and proportionate approach to policy making and regulation. It will not, as other groups have attested, prevent research into potential adverse effects of GM technologies.⁸⁰

60. The Welsh Assembly Government is proposing to disapply the permit defence for GMO-related activities in order to protect the environment.⁸¹ Defra confirmed that the National Assembly was, in its opinion, entitled to do this under devolution arrangements.⁸²

61. Natural England supported the Government's proposal to apply the defences, but not its proposal to introduce the defences before remediation is undertaken by the operator because this could result in remedial measures not being undertaken at all.⁸³ The Partial RIA showed a slight public benefit from applying the defences after rather than before remediation.⁸⁴ The Association of British Insurers, however, "believed very firmly that they must be invoked before remediation. This would avoid lengthy legal disputes during, or after, remediation work".⁸⁵

62. In oral evidence the Minister continued to support the permit and state of knowledge defences, although he conceded that this would not fit perfectly with existing environmental legislation.⁸⁶ For instance it is unclear what would happen if an individual small farmer were found guilty of major environmental damage and who would pay to try to rectify matters. **The Minister failed to provide a clear reasoning of the Government's preference for the way it has chosen to apply the 'permit' and 'state of knowledge' defences. Defra must do so by the time it embarks on its second round of consultation on the form of the regulations to implement the Directive.**

63. There remains an issue that where a supplier to an operator provides a product or a service which causes an environmental problem in the knowledge of the risk that is involved that operator will not be subject to any responsibility for that action. This needs to be looked at again on the grounds of fairness and justice.

Financial security

64. Article 14.1 of the ELD states that:

Member States shall take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators, including financial mechanisms in case of insolvency, with the aim of

80 Ev 29–30

81 Consultation document, p 40

82 Q 111–2

83 Ev 31

84 RIA, p 54, Table F9

85 Ev 36

86 Q 94

enabling operators to use financial guarantees to cover their responsibilities under this Directive.

65. The Consultation document says that the Government “is in discussion with the financial security industry to fulfil this provision and potential measures are being explored”. However it adds that “[t]he Government is not proposing to require operators to hold financial security in order to meet any liabilities that may arise under the ELD. The Government believes that businesses are best place to take decisions about all aspects of their operations, including the optimum means of covering liabilities.”⁸⁷ The Minister confirmed that the Directive placed no obligation on the state to remedy damage in cases of default, but suggested that this was something that could be left to the competent authorities to do if they saw fit.⁸⁸ However he had earlier said that “[i]f there is environmental damage caused but nobody was at fault, it is incumbent on government to look at the potential liability”.⁸⁹

66. The Government must make clear in the regulations how it will give effect to the Minister’s undertaking that the Government would be the first point of recourse for remediation in cases where the operator is not liable for any reason, and what role it will require the competent authorities to play. It must also make clear what resources will be made available to competent authorities to carry out this role, especially in the light of the expectation of a tight Comprehensive Spending Review for 2008–11.

Whether the ELD should be extended to apply to nationally protected biodiversity

67. The Government calculated that there would be a net benefit to extending the ELD to habitats and species for which SSSIs are designated.⁹⁰ The Defra memorandum says that:

[I]t is important to recognise that under the ELD, the protection afforded to EU biodiversity is not confined to that located on protected sites: *the relevant species and habitats are protected wherever they are found*. So EU biodiversity is protected within the geographical boundaries of Sites of Special Scientific Interest (SSSIs) and Natura 2000 sites and outside those sites. Moreover, it is likely that any remediation undertaken as a result of the ELD within the geographical boundary of an SSSI in order to protect those European species and habitats will also benefit geographically proximate nationally protected species and habitats.

The Government recognises that there are arguments for introducing a common protective system under the Directive covering both EU- and nationally-protected biodiversity (specifically SSSIs). However, it is the Government’s policy not to go beyond the minimum requirements of a Directive unless there are exceptional circumstances, justified by a cost benefit analysis and following extensive stakeholder engagement. The Regulatory Impact Assessment [...] estimated only small net

87 Consultation document, p 47

88 Q 132

89 QQ 108–9

90 Table F5, PRIA, p 50

benefits from extending the ELD to nationally protected biodiversity within SSSIs. Even allowing for uncertainty, it seems clear that such extension would make only a very small contribution to the Government's policy objective of bringing 95% of SSSIs (by area) into favourable or recovering condition by 2010 on which we are making good progress.⁹¹

68. Natural England did not support the Government's approach of limiting the scope of the ELD to EU-protected biodiversity in order to avoid 'gold-plating': "we strongly believe that nationally protected biodiversity should be afforded the same level of protection as internationally protected biodiversity, and that creating a level playing field for all protected biodiversity would establish a more consistent and transparent regime".⁹² The Environment Agency said it had told Defra that the ELD "should be implemented to include species and habitats for which any Site of Special Scientific Interest is designated. We also said that Ramsar sites (which cover wetlands of international importance) should be included as this is in line with the Government's policy to deal with these sites in the same manner as the European sites"⁹³ The EA adds that:

the extension to Sites of Special Scientific Interest may help maintain these sites in 'favourable condition' in the long run, because the penalties will encourage more care by operators who have the potential to damage such a site. It will also ensure that remediation of a damaged site is, as far as practicable, at the cost to the operator or polluter, instead of defaulting to the taxpayer through the PSA programme.⁹⁴

69. The RSPB said that it:

strongly advocates including [SSSIs] and Ramsar sites in the transposing regime, and also, within the next five years, Biodiversity Action Plan habitats and species. To do so would make sense logically, legally, environmentally and from an administrative point of view. To omit them will make for a cumbersome, confusing and unfair system resulting in a potential devaluing effect on nationally protected wildlife by not offering the same protection in relation to the prevention and restoration of damage [...] Omitting nationally protected wildlife will also make it harder to meet Government wildlife targets, as the incentives to prevent damage in relation to nationally protected wildlife and the likelihood of restoration if damage occurs will be much lower, especially as the Government does not appear to intend to introduce any state responsibility for restoring environmental damage where the 'polluter' does not or cannot pay. Given that Defra has a tough target to ensure that 95% of all English SSSIs are in favourable condition by 2010, it seems perverse that it will fail to use this opportunity to ensure that cost of damage to sites will be met by businesses that cause the damage rather than the taxpayer.⁹⁵

91 Ev 2

92 Ev 32

93 Ev 49

94 Ev 50

95 Ev 27

70. RSPB and Genewatch's parliamentary briefing paper of 20 March 2007 gave the following example of the effects of the Government's minimal transposition approach:

In January this year, the MSC Napoli, a 62,000-tonne container ship, was grounded a mile off Lyme Bay in Devon, a World Heritage Coast site. More than 200-tonnes of oil leaked into the sea, leading to estimates of up to 10,000 killed birds, with gannets and the critically endangered Balearic shearwater at risk.

The wreck also threatened to affect as many as 28 SSSIs, including the Exe Estuary, and Chesil Beach and the Fleet SSSI. The Fleet SSSI and Branscombe Bay are two of only three sites where the rare scaly cricket is found, while Berry Head SSSI, Brixham, hosts 400 breeding pairs of guillemots, the largest colony in the south-west. Some damage caused by this accident is expected to be paid for by the shipping company who caused it. However, public funds will be used for much of the clean-up costs, rather than the full cost being met by the polluter.

The ELD could cover such an incident, but the Government's minimal transposition plans mean that damage to SSSIs would be exempt, leaving the public to pay for the clean up, and allowing the loss of scarce species like the scaly cricket to continue.

71. Wildlife and Countryside Link (representing 37 voluntary conservation societies) criticised the Government for excluding from the consultation process the question of including UK Biodiversity Action Plan (BAP) habitats and species (the Government refers to SSSI habitats and species).⁹⁶ It strongly recommended:

the inclusion of SSSIs and Ramsar [wetland] sites in the implementing legislation. We would also like to see BAP habitats and species included within the next five years. We believe the omission of nationally protected wildlife would result in a complex, confusing, economically inefficient and unfair system.

This will make it difficult for Government to meet its own wildlife-related targets, as damage would either fail to be restored or would only be restored at the cost of the state. More importantly, if the ELD were appropriately transposed, damage could be avoided or prevented from occurring, thus protecting existing efforts to meet the Government's targets.⁹⁷

72. The Institute of Ecology and Environmental Management (IEEM) also did not want the ELD's provisions limited to EU-protected biodiversity. In view of the small proportion of England that has protected status:

this means extending the scope of the transposition legislation to include all SSSIs and Ramsar sites. From the practical viewpoint it is possible to envisage damage to closely adjacent sites being treated differently depending on whether one or the other was subject to EU protected biodiversity. This would be an administrative nightmare and no help at all to those implementing the legislation or having caused the damage. IEEM however takes the view that the protection of EU Biodiversity and SSSI's

96 Ev 38

97 Ev 38

though essential, will alone not be sufficient to meet the long term goals of biodiversity conservation, especially in the context of climate change and the need for species to migrate due to changing climatic conditions.⁹⁸

Similarly, the Institute of Biology:

reject Defra’s recommendations to limit the scope of the ELD. We believe that all Sites of Special Scientific Interest (SSSIs) and UK Biodiversity Action Plan (UK BAP) habitats and species should be covered by ELD legislation. This would unify and streamline processes, and clearly signal the Government’s commitment to prevent biodiversity loss and meet its own biodiversity targets.⁹⁹

73. The Marine Conservation Society (MCS) notes that there are no marine SSSIs, and that just 1.4% of UK waters within the 200 mile limit are designated as Natura 2000 sites. In order to meet the 2010 Biodiversity Action Plan (BAP), the MCS “strongly supports the inclusion of UK BAP species and habitats, OSPAR Marine Protected Areas, Nationally Important Marine Sites, Highly Protected Marine Reserves, and Ramsar sites within the UK provisions for the ELD”.¹⁰⁰

74. The CBI, on the other hand:

fully supports DEFRA’s position on limiting the scope of the ELD to EU designated sites and species. Businesses who are situated near to a SSSI already have this reflected in their permit conditions and are subject to an increased regulatory charge as a result. Extending the scope of the ELD would be regulatory goldplating and could be seen as a way of making businesses who are in compliance with the law pay to achieve the Government’s environmental quality targets for which they are not liable.¹⁰¹

75. The NFU also wanted the Directive’s provisions restricted to EU-protected biodiversity, as extension of the scope of the ELD would add “very significant burdens to agricultural businesses”.¹⁰²

76. The responses to the consultation on this subject were set out on pages 21–24 of the Defra summary of responses. All NGOs, private individuals and all but one local authority opposed the Government proposal. Most businesses supported it.

77. The Minister told us that the ELD would apply to only a few cases of biodiversity damage in practice, and that the main benefit from extending it to cover nationally-protected biodiversity would be to apply the provisions for complementary and compensatory remediation (see para 17 above).¹⁰³ He also reminded us that the ELD protected EU-designated habitats and species wherever they were found, and that in

98 Ev 42

99 Ev 43

100 Ev 25

101 Ev 40

102 Ev 46 and Ev 47

103 QQ117 and 119

practice a large number—he claimed some 90%—of SSSIs would thereby also receive protection.¹⁰⁴ Sandy Luk, however, told us that this 90% figure was apparently a new one and that the Defra consultation referred to a 70% overlap by area.¹⁰⁵ **We question the Minister’s claim that 90% of SSSIs will enjoy protection under the ELD and ask Defra to demonstrate how it reached this figure.** He admitted that if the ELD were extended to include nationally-protected species and habitats, those species and habitats would be protected outside designated Natura 2000 sites or SSSIs. This is because the ELD protects species and habitats, not sites as such.¹⁰⁶ But in the end the Government had decided not to extend the scope of the ELD because “we did not think there was a strong enough case to go beyond our normal better regulation principles [...] We should not get ourselves into a position of saying that there is a great deal of extra benefit here”. His assessment was that extending the ELD to cover SSSIs would be likely to add one percentage point to the proportion of SSSIs in favourable or recovering condition by 2010.¹⁰⁷ He admitted that he had concerns that there might be opportunities for lawyers to test how the ELD applied in the case of the protection of biodiversity, and that “we have potentially a directive that could be neater”. But the minister did not think that there was a “significant benefit” in rewriting existing environmental protection legislation so that it was consistent with the ELD.¹⁰⁸

78. The Minister confirmed that that all the 77 Ramsar sites would be covered by the ELD: all but three were Natura 2000 sites, and the other three had either habitats or species of Community interest.¹⁰⁹

79. We are extremely disappointed that the Government still wishes to restrict the scope of the ELD to EU-protected biodiversity. It is setting its face against the unanimous advice of environmental NGOs, Natural England and the Environment Agency in its unwillingness to extend the ELD to cover nationally-protected biodiversity. Once again, the Government’s minimum implementation policy appears to be the reason why it is unwilling to obtain these benefits. Although its own Partial Regulatory Impact Assessment estimated an overall benefit from such a course, it does not believe it “worth the effort” because the it would not offer “significant benefit”. We contest the implication of his view that a potential one percentage point improvement in the proportion of SSSIs in favourable or recovering condition is not significant: Defra’s Departmental Annual Report 2007 shows that this PSA target is showing ‘slippage’, with only 75.4% of SSSIs in such condition. Defra cannot afford to overlook measures that would help it achieve its PSA target and which it estimates would be of overall benefit.

80. The result of Defra’s attitude is that it risks missing a unique opportunity to extend and unify the system of protection afforded to the country’s natural habitats and biodiversity. It also risks creating legal uncertainty and expense, not least for Natural England and the Environment Agency, as courts determine how to treat cases where different pieces of

104 QQ 119 and 123.

105 Ev 54

106 QQ 119 and 122

107 Q 133

108 QQ 123–4

109 QQ 128–9

legislation may apply to instances of biodiversity damage that affect both an SSSI and a Natura 2000 site. **The Minister failed to make a convincing case for not extending the scope of the ELD so that, as well as protecting EU-protected biodiversity, it covers nationally-protected species and habitats too. We recommend that the Government should exercise its discretion to include nationally-protected species and habitats within the scope of the Environmental Liability Directive. In so doing it would be able to trade off any criticism of ‘gold plating’ against the gains arising from a better and more consistent implementation of the Directive.**

Conclusions and recommendations

1. We express our disappointment that the Government is vulnerable to further infraction proceedings from the European Commission in addition to those already pending. (Paragraph 28)
2. We recommend that before final decisions are taken on the policies to be adopted in transposing the Directive, the new Minister hold an open meeting with stakeholders at which they can discuss the key policy choices face to face. It is important that the list of those stakeholders consulted in this way is representative, and is published. (Paragraph 33)
3. We were disappointed that the Government was unable to provide complete clarity as to how the ELD will apply in the marine environment, including the distances from shore to which it will apply, or what the competent authority will be. The Department must provide that clarity in time for the next round of consultation on the draft regulations. It must also commit itself to resolving the question of how the ELD and the Common Fisheries Policy will interact. (Paragraph 41)
4. In order to give complete clarity to interested parties, we recommend that the draft regulations for consultation this autumn make it clear that the ELD will only apply to incidents which occur after the regulations come into force. (Paragraph 44)
5. The Government must, in the cases where its own analysis show that there would be overall benefits from going beyond the minimum implementation requirement, properly explain the reasons for its policy choices. It should also make clear what sort of results a cost benefit analysis would have to show in order to justify it going beyond the minimum requirements of the Directive. (Paragraph 50)
6. We did not receive a clear answer as to why biodiversity damage from non-Annex III activities should be treated differently, other than the Minister’s general preference not to over-implement “unless there is a compelling case to do so”. The consultation document merely set out a number of pros and cons of applying strict liability in this case. The Government has also provided insufficient evidence to back up its assurance that existing controls are sufficient to protect against GM damage. In its

response the Government must explain the reason for its choice not to extend strict liability for biodiversity damage to non-Annex III activities. (Paragraph 54)

7. The Minister failed to provide a clear reasoning of the Government's preference for the way it has chosen to apply the 'permit' and 'state of knowledge' defences. Defra must do so by the time it embarks on its second round of consultation on the form of the regulations to implement the Directive. (Paragraph 62)
8. The Government must make clear in the regulations how it will give effect to the Minister's undertaking that the Government would be the first point of recourse for remediation in cases where the operator is not liable for any reason, and what role it will require the competent authorities to play. It must also make clear what resources will be made available to competent authorities to carry out this role, especially in the light of the expectation of a tight Comprehensive Spending Review for 2008–11. (Paragraph 66)
9. We question the Minister's claim that 90% of SSSIs will enjoy protection under the ELD and ask Defra to demonstrate how it reached this figure. (Paragraph 77)
10. The Minister failed to make a convincing case for not extending the scope of the ELD so that, as well as protecting EU-protected biodiversity, it covers nationally-protected species and habitats too. We recommend that the Government should exercise its discretion to include nationally-protected species and habitats within the scope of the Environmental Liability Directive. In so doing it would be able to trade off any criticism of 'gold plating' against the gains arising from a better and more consistent implementation of the Directive. (Paragraph 80)

Formal minutes

Wednesday 4 July 2007

Members present:

Mr Michael Jack, in the Chair

Mr Geoffrey Cox	Mrs Madeleine Moon
Mr David Drew	Mr Dan Rogerson
Patrick Hall	David Taylor
Lynne Jones	Mr Roger Williams
David Lepper	

Draft Report (*Implementation of the Environmental Liability Directive*), proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 80 read and agreed to.

Summary agreed to.

Resolved, That the Report be the Sixth Report of the Committee to the House.

Ordered, That the Chairman do make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No.134.

Several papers were ordered to be appended to the Minutes of Evidence.

Ordered, That the Appendices to the Minutes of Evidence taken before the Committee be reported to the House.

Several papers were ordered to be reported to the House.

[Adjourned till Monday 16 July at Four o'clock.]

Witnesses

Wednesday 13 June 2007

Page

Ian Pearson MP, Minister of State for Climate Change and the Environment,
Mr Nigel Atkinson, Head of Environmental Regulation Policy Division and **Ms
 Caroline Connell**, Head of Environmental Liability Team, Department for
 Environment, Food and Rural Affairs

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Oral evidence

Taken before the Environment, Food and Rural Affairs Committee

on Wednesday 13 June 2007

Members present:

Mr Michael Jack, in the Chair

Mr David Drew
Lynne Jones
David Lepper
Mrs Madeleine Moon

Mr Dan Rogerson
Sir Peter Soulsby
David Taylor

Memorandum submitted by the Department for Environment, Food and Rural Affairs (ELD 18)

QUESTIONS RAISED BY THE COMMITTEE

What consultations Defra has had on the Directive since it was adopted in 2004 and with whom, and whether Defra has listened to consultees' views?

1. Up to the first public consultation—from December 2006 to end February 2007—the Government consulted extensively with members of trade and industrial associations, non-governmental organisations, local government and others. Stakeholder engagement in fact started in 2002, shortly after European Council negotiations on the Directive began—workshops and focus groups. ELD issues were also covered at various meetings not primarily concerned with the Directive and also at conferences.

2. The Committee will find, at Appendix I, a list of the organisations represented at meetings with Defra and other Government Departments since mid-2004 which either focused on ELD issues or at which the ELD was among the topics discussed.

Why Defra has taken so long to consult formally on the ELD. Whether important questions were omitted from the formal consultation?

3. How to deal with the interface between the requirements of the ELD and existing domestic environmental protection regulation has required extensive consideration. This is because the provisions of the ELD overlap with those of existing domestic regimes in a complex way. They are *more stringent* than existing regulations in some respects but *less stringent* in other respects. Most Member States are grappling with issues of this kind; only three have fully or partly implemented the Directive by the due date.

4. The Government does not believe that any important questions were omitted from the formal consultation. The purpose of the first consultation was to invite views on the key policy choices to be made. Taking account of these views, it is intended to hold a second consultation, on draft legislation, which will include consideration of more detailed matters relating to implementation.

What discretion Member States have in the implementation of the ELD, and the reasons for Defra seeking to apply the “permit” and “state of knowledge” defences under Article 8(4)?

5. The ELD discretions are as follows:

- *Article 2.3(c)—Nationally-protected biodiversity*: may bring within the scope of the Directive any habitat or species which are not included among those EU-protected natural habitats and species which are covered by the Directive but which are protected under national legislation for equivalent purposes.
- *Article 8.4—“Permit” and “State of knowledge”*: may allow an operator not to bear the costs of remedial measures taken under the Directive where he demonstrates that he was not at fault or negligent where the damage was caused by (a) an expressly authorised event or emission despite complying with the permit conditions or (b) an emission or activity which he demonstrates was not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time of the emission or activity.
- *Article 12.5—Requests for action and imminent threats*: may decide not to grant specified third parties the right to request action by a competent authority in cases of imminent threats.

- *Article 16—More stringent measures*: provides that more stringent measures in relation to prevention and remedying environmental damage may be adopted.
- *Annex III, paragraph 2—Spreading of sewage sludge, etc*: may decide to exclude from those subject to strict liability the activity of spreading appropriately-treated sewage sludge from urban waste water treatment plants for agricultural purposes

6. In the first consultation document, the Government expressed a preference to apply the so-called permit and state of knowledge defences (these expressions do not occur in the Directive). The “permit defence” provides a measure of certainty for businesses which is important in planning, securing investment, and facilitating securing of financial security for potential liabilities under the Directive. The “state of knowledge” defence is important to facilitate research into and development of new products and technologies, from which society derive important economic, social, medical and other benefits.

Which other Member States will be imposing strict liability to a wider range of activities than is Defra, and which are applying a more sensitive test of damage?

7. The Government has limited information on the detail of implementation intentions of other Member States. Although Member States are required to submit their implementing legislation for compliance scrutiny to the European Commission, the latter is not required to publish these. Care needs to be taken in comparing Member States’ approaches because of differing political, social, economic, administrative and legal practices and traditions. Of the nine Member States on which the Government has some information there is no information on extending strict liability although informal indications are that very few (perhaps no more than two to three) are intending to extend strict liability to a wider range of activities than provided for in the Directive. No information is held on the test of damage. However, four out of the nine are not intending to extend the scope of the Directive to nationally-protected biodiversity.

Why is the Government proposing to limit the scope of the ELD to EU-protected biodiversity, and which SSSIs would be affected?

8. First of all, it is important to recognise that under the ELD, the protection afforded to EU biodiversity is not confined to that located on protected sites: *the relevant species and habitats are protected wherever they are found*. So EU biodiversity is protected within the geographical boundaries of SSSI and Natura 2000 sites and outside those sites. Moreover, it is likely that any remediation undertaken as a result of the ELD within the geographical boundary of a SSSI in order to protect those European species and habitats will also benefit geographically proximate nationally protected species and habitats.

9. The Government recognises that there are arguments for introducing a common protective system under the Directive covering both EU- and nationally-protected biodiversity (specifically SSSIs). However, it is the Government’s policy not to go beyond the minimum requirements of a Directive unless there are exceptional circumstances, justified by a cost benefit analysis and following extensive stakeholder engagement. The Regulatory Impact Assessment (in the consultation document—the ELD RIA) estimated only small net benefits from extending the ELD to nationally protected biodiversity within SSSIs. Even allowing for uncertainty, it seems clear that such extension would make only a very small contribution to the Government’s policy objective of bringing 95% of SSSIs (by area) into favourable or recovering condition by 2010 on which we are making good progress.

10. The Government is confident of reaching the 2010 target by continuing to work in partnership across government and with SSSI landowning, managing or influencing bodies through a range of regulatory and incentive mechanisms. These include agri-environment measures such as Environmental Stewardship, backed up where necessary by the Wildlife Enhancement Scheme, the Heather and Grass Burning Code and Regulations, Cross-Compliance and benefits from other land management measures such as Flood Management and Coastal Realignment.

11. In addition to co-operative management using financial incentives derived from EU agri-environment measures and more specific national management mechanisms, there are strong backstop protection measures. The prime legislation here is the Wildlife and Countryside (WAC) Act 1981 as enhanced by the Countryside and Rights of Way (CRoW) and the Natural Environment and Rural Communities (NERC) Acts which protect SSSIs by setting out a range of offences, prosecution mechanisms and fines through which the Courts may also require appropriate remediation to be carried out. Under this legislation, potential and actual damage is assessed in terms of its likely impact on the nationally designated features of the site.

What effect implementing the ELD in the manner proposed by the Government is likely to have on its meeting the 2010 targets under the Biodiversity Action Plan and its PSA target to bring 95% of nationally important wildlife sites into favourable condition; and whether the ELD may take resources away from achieving these targets?

12. Paragraph 9 above indicated that, on the basis of the ELD RIA, extending the scope of the ELD to nationally-protected biodiversity within SSSI would contribute only marginally to attainment of the 95% target (the RIA suggests one percentage point). Even allowing for a degree of uncertainty which must necessarily accompany the assessment, the Government does not believe that its preferred approach to implementing the ELD will materially in any way affect the likelihood of attaining the target.

13. It is not entirely clear what is meant by “whether the ELD may take resources away from achieving these targets”. The Government has in place a programme of measures towards achieving the 2010 target. This is independent of enforcement of the ELD, which to a large extent should be self-financing. Apart from background administrative costs (competent authorities need to gear up and maintain resources to enforce the Directive), costs incurred by competent authorities in connection with preventing and remedying environmental damage are recoverable from the operator who is responsible for the threat of or actual damage.

The timescale for implementation of the Directive

14. It is expected that implementation in England will take place in late Spring 2008, following a second public consultation later this year on the draft implementing regulations.

The capacity of organisations such as the Environment Agency, Natural England and NGOs to take action under the Directive

15. The ELD requires designation of one or more “competent authority(ies)” to enforce its provisions. Final decisions are yet to be taken but it is almost certain that EA and NE, and one or two other bodies, will be designated. Both organisations have played key roles in consideration of the issues raised by and development of policy since the negotiations on the Directive. Both are fully aware of the requirements of competent authorities and, subject to decisions about the scope of their responsibilities (in particular EA) do not envisage any significant problems in terms of capacity to discharge responsibility under the Directive. Both have emphasised that the requirements of the Directive represent an extension of, rather than complete departure from, their current powers and duties.

16. The Government cannot speak authoritatively about NGOs’ *capacity* to take action under the Directive; this will depend on a number of factors within their control. NGOs and others do, however, have *rights* under the Directive. They may request the competent authority to take action where they believe environmental damage has been caused, and seek to have the competent authority’s actions or inaction judicially reviewed.

May 2007

APPENDIX

ENVIRONMENTAL LIABILITY DIRECTIVE

Table of Stakeholder meetings: 2004–07

Government officials met the following 165 organisations in 24 meetings, workshops and focus groups between July 2004 and January 2007:

2	60 North Recycling	Craigavon BC
4	ACE European Insurance Group	Crop Protection Association
6	AdvanSA (UK)	Coventry City Council
8	AES Kilroot	Crown Estate
10	AGIN Industries	Dairy Industry Association Ltd
12	AH Marks	Dart Estuary Environmental Management
14	Alcan	Dart Harbour and Navigation Authority
16	American International Group	Department of Agriculture and Rural Development—Northern Ireland
18	Anglian Water	Department of Health, Social Services and Public Safety—Northern Ireland
20	Antrim BC	Dickerson Group
22	AON—Reinsurance company	Dover Harbour Board
24	APB—Auditing Practices Board	Dunlop Motorsport
26	A&P Falmouth—Marine repairs	Dwr Cymru Cyfyngedig—Welsh Water

28	Association of British Insurers	EDF Energy
30	Association of the British Pharmaceutical Industry	Engineering Employers Federation
32	Associated British Ports	Envirolink North West
34	Association of Electricity Producers	EnviroTrade
36	AXA	Environment Agency
38	Barclays	Environmental Power Corporation
40	Bede Group Ltd	Environmental Services Association
42	Belfast Harbour Commissioners	Environment & Heritage Services
44	Belfast Hills Partnership	Environment Practice
46	Black & Veatch	Excel Insurance
48	Bridge Lawrence	Exeter City Council
50	Bridon International	Exxon Mobil Group
52	Bombardier Aerospace	Faber Maunsell
54	Business Link	Federation of Small Businesses
56	Carrington Wire Ltd	Food and Drink Federation
58	Cattewater Harbour Master	Ford Motor Company
60	Centrica	FSB/NERAF—Financial Security Assurance
62	Chemical Industries Association	Friends of the Earth
64	Chemson	GeneWatch
66	Chubb Insurance	General Motors Worldwide
68	CMS Solicitors	GM Freeze
70	Confederation of British Industry	GVA Grimley LLP
72	Confederation Of British Industry Minerals Group	Harbour Master
74	Confederation of Paper Industries	Harwich Haven Authority
76	ConocoPhillips Limited	Health & Safety Executive
78	Corus Group Plc	Herefordshire Council
80	Construction Products Association	HSBC
82	Humber Sea Terminal	Premier Waste Management
84	IBC vehicles (Society of Motor Manufacturers and Traders)	Quarry Products Association
86	Institute of Chartered Accountants	Queen's University
88	Institute of Directors	Road Haulage Association
90	Institute of Ecology and Environment Management	Rolls-Royce plc
92	International Port Holdings	Royal Society For The Protection Of Birds
94	Invest NI	Scottish Executive
96	Jaguar Cars Ltd	Scottish Power
98	John Heathcoat & Co	Scotland and Northern Ireland Forum for Environmental Research
100	LACORS—Local Authorities Coordinators of Regulatory Services	Scott Wilson Group
102	Lloyds Of London	Scottish & Newcastle Brewing Group
104	London Gateway Port Limited	Scottish & Southern Energy Group
106	Loughs Agency	Severn Trent Water
108	Lymington Technical Services	Sheffield Forgemasters
110	Marenco	Sims Group UK
112	Marine Conservation Society	SLR Consulting Ltd
114	Marsh Ltd	South Holland District Council
116	Medway Ports	South Staffordshire Water
118	Miles Smith Insurance Brokers	South West Water
120	Mills & Reeve Solicitors	Stratford DC
122	MLC—Financial Services	Sutton & East Surrey Water
124	M J Carter Associates—Environmental Consultants	Tees Valley Regeneration
126	National Farmers Union	Terra Nitrogen (UK)
128	National Trust	Tolwood Technologies
130	Natural England	UK Health and Safety Executive
132	Neil Faris Solicitors	Ulster Farmers' Union—NI
134	Newcastle University	United Utilities
136	Newquay Harbour Master	Uskmouth Power
138	Newtown Abbey Council	Vauxhall Motors
140	NFU East Anglia	Veolia Environmental Services
142	NFU Mutual	Veolia Water
144	NFU West Midlands	Ward Hadaway
146	Non Ferrous Alliance	Wardell Armstrong LLP

148 North East Chamber of Commerce	Wellstream International
150 Northumbrian Water	Welsh Assembly Government
152 Parker Domnik Hunter	Wessex Water
154 Pennon Group—Waste Management	Westminster Dredging Co
156 Poole Harbour Commissioners	West Midlands Police
158 Port of Larne	White Young Green
160 Port of London Authority	Woodland Trust
162 Portsmouth Water	Yorkshire Water
164 Power Technology	
165 Premier Mariners Limited	

May 2007

Witnesses: **Ian Pearson MP**, Minister of State for Climate Change and the Environment, **Mr Nigel Atkinson**, Head of Environmental Regulation Policy Division and **Ms Caroline Connell**, Head of Environmental Liability Team, gave evidence.

Q1 Chairman: Welcome, ladies and gentlemen, to this one-off evidence session on the Implementation of the Environmental Liability Directive. This represents the conclusion of a slightly novel approach by the Committee to this particular inquiry. We have taken written evidence from those who have been kind enough to submit it but, unusually, we have not taken oral evidence because we have let the writing speak for itself. But we do want to hear from the Minister, in this case the Minister for Climate Change and the Environment, Ian Pearson, whom we welcome again before the Committee, and who is supported today by Nigel Atkinson, the Head of Environmental Regulation Policy Team and Caroline Connell, the Head of Environmental Liability Team, who is a real glutton for the difficult because I remember that Caroline came and gave evidence and helped us to understand the Draft Animal Welfare Bill, so obviously you have recovered from that and now moved on to another very exacting area. So all three of you thank you very much for coming before the Committee and we will make a start with our questions. One of the interesting things—and perhaps, Minister, you could put this particular measure into context for us—is to help us to understand what I have called the before and after effects; in other words, when this Directive is implemented what will be the main difference in the way that environmental legislation will operate prospectively from the way that it does now?

Ian Pearson: Let me set out the context and then answer that question directly. The Directive itself is concerned with prevention and remedying of environmental damage and it defines it, as you will know, in the Directive, as damage which has caused significant adverse effects on reaching or maintaining favourable conservation status of species and national habitats protected under the legislation; damage that significantly adversely affects—and I stress those words again—ecological, chemical and/or quantitative status and/or ecological potential of waters falling within the scope of the Water Framework Directive; and land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction in, on or under land, or substances, preparations, organisms or

micro-organisms. I say that to set out the context and that the underlying principle behind the ELD is the “polluter pays” principle, which is something that we strongly support as a Government.

Q2 Chairman: The polluter pays has been a key part of the United Kingdom environmental legislation for some time and I was anxious to understand why this particular Directive almost was necessary. I could understand it for Member States who did not have a well-developed body with environmental law, rules and regulations, but for a developed country in that context, such as ours, this has clearly caused a few conflicts, has it not?

Ian Pearson: You are absolutely right to say that the UK already has a well developed environmental protection regime, which we believe provides already a high level of protection, and I think the best way to see this Directive is something that actually supplements what is already a good standard overall of environmental protection. We think it will cover a relatively small proportion of any environmental damage; we estimate less than 1% of cases of environmental damage will be covered by this, and that is why I was stressing the words “significant adverse effects” when you are looking at the Environmental Liability Directive because that is what it is designed to do, and it is pretty high level; and you are right, in countries that already have well-established environmental protection regimes there is an issue about how you ensure legislative consistency. But a large part of what the Directive is trying to achieve is already being achieved by the legislation that we have in the United Kingdom.

Q3 Chairman: There are a lot of detailed points that we want to get on to, but I want to explore the process of consultation—it is pretty impenetrable stuff in the consultation document. I can see from the responses we have had that a lot of people have laboured for a long time, bearing in mind the Directive has actually been around since 2004, to come up with the points that they are making. Your consultation document came out in November 2006 and there is always a hiatus for a couple of weeks over Christmas and the New Year, but you only allowed 11 weeks for consultation on what is

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potentially an immensely complex piece of new law. Why was it so short, taking into account that you probably lost two weeks over Christmas and the New Year?

Ian Pearson: In retrospect I think that the consultation period could have been longer, but I do believe that we have had a good level of appropriate responses engaging on all the key questions that we asked as part of the consultation exercise. It is not as if the formal consultation is the only time that we have been talking to stakeholders and other interested parties on this. Since the Directive was actually agreed we have been in quite close contact with a range of parties about how it was going to be implemented. I would also say that this is not the last consultation that we will have as well. Following the consultation exercise we are considering the Government's position in the light of all the responses that we have received, and it is our intention to hold a further consultation exercise specifically on the regulations. We anticipate holding that in the autumn.

Q4 Chairman: When did the actual process formally close? It would be quite interesting for the Committee to know how much of your time it has taken; how many meetings have you had with stakeholders on it?

Ian Pearson: I have not been having direct meetings on this with stakeholders myself; I have had meetings with stakeholders where this has been one of a number of issues that has been mentioned as part of the meetings, but officials have been fully engaged in this for some considerable time.

Q5 Chairman: So how many meetings have you had with your officials to go over how progress is going on this?

Ian Pearson: I cannot tell you off the top of my head how many meetings we have had but I have certainly had a number of submissions and had meetings in the light of some of those submissions where it was necessary to clarify what the policy direction should be. But just to stress that we are still in the process of formulating the Government's position in a number of areas in the light of the consultation responses.

Q6 Chairman: Just give us a flavour. You have had various meetings arising out of representations and the written submissions, but, for the record, when did the formal process of consultation stop? When was that; when did that grind to a halt?

Ian Pearson: The formal consultation process ended at the end of February 2007.

Q7 Chairman: So we then had March, April, May and we are now into June, so that is three months. Once you had the digest of what had been submitted what were the things at the top of your priority list to get sorted? What were the things that troubled you as a Minister where you thought, "Yes, we need to get on top of that"? What were the top three things that caused you concern?

Ian Pearson: As you will be aware, Chairman, what we do as Ministers is to manage the process, and following the end of the consultation period there is a time period required for officials to analyse all the consultation responses and that, as you can imagine, takes some detailed time, and it is from the analysis of those consultation responses that the key issues that perhaps need to be changed—

Q8 Chairman: You are circumnavigating my question, Minister. The question I asked was, bearing in mind you actually put into the public domain the replies that you had—in other words we have all had a chance to have a look at it.

Ian Pearson: Yes, that is right.

Q9 Chairman: We have had some submissions of what people are still twitched about and I am just interested to know what you were twitched about, bearing in mind that this consultation exercise closed in February and your officials have kindly published in the public domain a summary of the responses, so you will have a pretty good idea of the things that are causing people continuing concern, and I was interested to know what had caught your eye in that exercise?

Ian Pearson: I am happy to answer that question directly.

Q10 Chairman: Here you are, this is your chance—a direct answer would be appreciated.

Ian Pearson: You asked me firstly on the process, and following the end of the consultation at the end of February the consultation responses were looked at and it was the end of May when the summary was published. In direct answer to your question about the things that had come from the consultation that we have been looking at closely, I would highlight a number. There is a division of opinion that is quite clear on the issue of strict or fault-based liability, whether that should be applied. There is an issue about competent authorities, particularly with regard to contaminated land. There have been responses that suggest that we have not said enough when it comes to access to justice issues and there is a wider debate about access to justice.

Q11 Chairman: Are you reflecting in this list the things that caught your eye and that you have asked in terms of what you helpfully told us earlier, that there would be a further round of consultation in terms of the actual regulations—those are the things on which you are focusing your extra work, is that right?

Ian Pearson: Those are some of the areas where we are focusing our extra work, yes, and most definitely those are issues that caught my eye where I want to consider whether we have the appropriate policy. When it comes to the issue of strict or fault-based liability my preliminary view is that the views expressed in the consultation are the right ones and that we ought to move forward on that basis.

Chairman: We will be probing a lot of those and you will not be surprised to learn that a number of the people who wrote to us have some observations to

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make about the question of legality in this whole exercise, and so Mr Drew is going to continue our probing.

Q12 Mr Drew: Just on that, are you a wee bit concerned, and this is a parody—and I will go on record that I very much welcome the fact that we have had access to civil servants and other interested parties, which has been helpful in what is a complicated matter—that on the one hand you have business being reasonably supportive to your approach but the NGOs being really quite critical, and one of the criticisms is that because it is so complicated that a longer time should have been left for consultation, and they feel in the responses that they have made they have not been listened to. How would you respond to that?

Ian Pearson: Firstly, I would respond by saying that we have published the consultation responses and we are still in the process of looking at the policy when it comes to this as a Government and we will be producing draft regulations.

Q13 Mr Drew: So you are open-minded.

Ian Pearson: I always believe in the principle that if you have a consultation exercise you should actually listen to the consultation responses and that is exactly what we are doing. So the responses that came from the business community, the responses that came from NGOs, the responses that came from lawyers are all being considered as part of the work that we have been doing since the consultation ended.

Q14 Mr Drew: That could include and maybe should include the fact that at the moment the Government has made it clear that you are going for the lightest touch possible, the minimum level of regulation, if there is a balance of evidence which suggests that the protection should be greater, the Government is prepared to shift on that?

Ian Pearson: The general approach we adopted and was reflected in the consultation document was that we wanted to implement in a proportionate way in accordance with our better regulation principles, and that we did not want to gold plate. We did not see a case for going beyond implementing the minimum requirements of the Directive unless there was strong evidence that we should do otherwise; and we do not think that there has been strong evidence that we should go beyond the implementation of the Directive that is required.

Q15 Mr Drew: In terms of the evidence that has been submitted to us both the UK Environmental Law Association and the City of London Law Society believe that there is at least a case that the Government could be deemed to be acting illegally if you were to draft the regulations before you—again, as you mentioned—go back and consult on your proposals for implementing the request for action procedure. Is that something that you are worried about or do you have sufficient legal wriggle room to really be able to argue that they are wrong in that respect?

Ian Pearson: I think in one of the submissions they used the words that the consultation was “fatally flawed” and I reject that; I do not believe it was. What I would say on this is that I do not think that we have to have another consultation exercise before we have a consultation on the draft regulations. That would not be my opinion, but if the Committee thinks that that is something that is required we would obviously take consideration of the Committee’s reports.

Q16 Chairman: Could I just jump in—because Mr Drew is a kind and accommodating man—and let me just ask the lawyer, if I may—and I hope she does not mind me asking—these people have raised a legal point, and I am sure they have raised them with you, and are there any particular points of law which have been drawn to your attention as far as this part of the exercise is concerned, when you have said, as a lawyer, “I think they have a point”?

Ms Connell: On the access to justice issue I think UKELA has raised the question of the proposals for implementing the request for action procedure and they have relied on the recent case of *Greenpeace v. Secretary of State*, arising out of the nuclear power consultation, and they effectively tried, I think, to raise the same kind of point in this context.

Q17 Chairman: Absolutely.

Ms Connell: I do not think that we feel it is a similar kind of situation. Our position would be that the first consultation raised the main significant policy issues. There are bound to be one or two additional points which are not always going to be in the consultation, and it does not mean that the consultation is completely flawed and has to be thrown in the bin and we have to start again. Furthermore, we are planning to do a second consultation and that will be with the draft regulations, and it is likely that there will be slightly different emphasis in that second consultation—more an emphasis on the mechanisms for enforcement, mechanisms for how NGOs and other interested parties will exercise their rights under Article 12, et cetera, that kind of issue. So I think there will be a slightly different emphasis and there will be another bite of the cherry for interested parties to help us with their comments on that.

Q18 Mr Drew: If I could raise a different point, Caroline, but one that is related? The point that the UK Environmental Law Association was making was that the barrier that will no doubt be there about the cost of bringing an action and that, according to them, puts you at risk of failing to comply with Article 13 rather than Article 12, which says that they should have the access to a court or similar body if they believe that an environmental ill has occurred. Does the Minister want to answer that?

Ian Pearson: Let me start off by answering it and then Caroline can add some additional comments from a legal perspective. From a political perspective there has been a dispute for some while, as is well known, between the NGOs who think that we are not properly, as a Government, implementing the

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Aarhus Convention. We believe that we are and we have submitted a detailed analysis previously on how we are actually implementing the provisions in the Aarhus Convention. There has been some debate about protective cost orders as well, and that is something for which the Ministry for Justice has direct responsibility. Caroline, if you want to say anything more specifically on this? I just wanted to stress that the consultation document did ask a question about the implementation of Article 12 and we were very clear about that in the consultation document.

Chairman: We will come back to Article 12 in due course.

Q19 Mr Drew: I would welcome Caroline's view on that from a legal perspective. We have had the political perspective; let us hear the legal view.

Ms Connell: The Directive makes two different provisions. First of all, Article 12 gives the right to alert the competent authority and certain things flow from that, for example the duty to consult the operator and then the duty to get back to the complainant and tell them what you are going to do and give reasons for it. That is one thing; I would not really call that access to justice. In addition the provision of Article 13, which requires access to a court or other tribunal to challenge the legality of what the competent authorities are doing, at first sight that would appear to be a Judicial Review type procedure, and I think the difficulty about the costs of Judicial Review proceedings is that with the best will in the world that is a much wider question than just for the Environmental Liability Directive, it is a question across the board for all environmental cases and much wider than that for all public law cases, and that is something that is definitely being, as we understand it, actively considered as to whether there is anything that can be done right across the board to try and protect applicants in that type of case who have legitimate points to bring but where there is a fear of the costs outcome.

Q20 Chairman: Do you think Article 13 was drafted for those countries which may not have as well developed a legal approach for redressing challenge as we have at the moment through Judicial Review? In other words, I wonder if there are any Member States who have expressly said, "No, we cannot challenge this in the courts"? You do not know?

Ian Pearson: I do not know.

Q21 Mr Drew: Perhaps you could write to us when you get a legal opinion on that because that would be quite interesting.

Ian Pearson: I want to point out again that pages 46 and 47 of the consultation document specifically refer to Article 12 and question 4.4 is specifically on applying paragraphs 1 and 4 of Article 12 to cases of imminent threat and damage. So it is not as if we have failed to consult in this respect, which is the impression that is given in UKELA's letter of 17 April.

Q22 Mr Drew: If we could look at another aspect of this, which is obviously timing. If this Directive is going to be effective there is a belief that of course it has to be capable of preventing environmental damage, but again in terms of the consultation—and we will see this later in terms of what we understand by "strict liability"—the argument could go that in a sense you can take action subsequently or consequently on the basis of what damage has occurred, but there does not seem to be much evidence of how you would prevent environmental damage. What is your response to that assertion, which is made by a number of NGOs?

Ian Pearson: My understanding is that the Directive is concerned with both prevention and remedying of environmental damage and that is why there are provisions in when it comes to requests for action, that when there is information saying that there is imminent threat that should be investigated by the competent authority concerned. So I think that is important. I think it is also important to think about how this will be implemented in the real world. If we think that there is an imminent threat of a significant adverse environmental impact and damage being caused then I would imagine that the competent authorities will want to take urgent and immediate action. They will do that now in the United Kingdom and they will do it after the Environmental Liability Directive is implemented.

Q23 Mr Drew: Let us use a real example here; what about Lyme Bay? Would Lyme Bay have been prevented in terms of some of the damage that has taken place due to the activity of fishing where it led to the considerable deterioration in the bed and the scallop population. Is this something that, if the ELD had been in place, there could have been strong, preventative action?

Ian Pearson: I do not have sufficient specific knowledge of the Lyme Bay case to be able to comment on that.

Q24 Mr Drew: It has been—I will not say around the shores—something that NGOs have been lobbying on very strongly over the last six months or so.

Ian Pearson: The Directive is aimed at imminent threats, it is not aimed at something that has been occurring over a long period of time.

Q25 Mr Drew: It has not been occurring over a long period of time—and other colleagues may want to jump in—my understanding is that it is a fairly recent phenomena and it is, in a sense, where there have been weaknesses in our protection of our shoreline. My next question was going to go on to the derogation from the Common Fisheries Policy, where we have almost again got the pre-eminence of European law which says that we would not in any way want to interfere with the Common Fisheries Policy, even though this may have a huge impact on marine diversity, and I use Lyme Bay as a classic example of that.

Ian Pearson: As I say, I do not feel able to comment other than to say that my understanding of this Directive is that it is talking about imminent threats,

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so imminent threats of potentially major environmental damage events. That is what the Directive is about and I think you are trying to widen the scope for the Directive beyond that which is my understanding of what it is currently.

Q26 Mr Drew: In terms of the derogation, and it may be this will help in terms of the Lyme Bay case, but certainly again it would appear that it has no impact at all on the Common Fisheries Policy where you are between one and 200 miles offshore, and we have sought this derogation. Is that not something that the Government could have fought a stronger case to say that given that we will want to bring forward the Marine Bill—and again this has an impact on the potential Marine Bill—is this not something on which we actually have some views when the Directive was being progressed with Europe?

Ian Pearson: I am not particularly sighted on that aspect of the issue, I do not know if my officials are.

Ms Connell: Yes, could I ask to which derogation you are referring?

Q27 Mr Drew: I am talking about the derogation whereby if we are looking at the Common Fisheries Policy it would seem to have pre-eminence to allow people to fish regardless of whether that has an impact on the biodiversity, and I am questioning that. It may be that I am confusing two things because obviously one would appear to have greater clarification and protection over inshore activity, but of course if we are looking at the marine environment that will go considerably offshore.

Ms Connell: I am not sure I can be completely as helpful as you would like. Certainly our interpretation is that this Directive will extend offshore. There have been recent judgments in the context of the Habitats Directive to the effect that that legislation applies offshore. As a result there are imminent—if they have not already been made—regulations to extend the implementation of the Habitats Directive offshore, and in the context of that there has been quite a bit of discussion, I think, at the Community level, the interaction between Common Fisheries and environmental protection. It is not specifically my field but I think the difficulty is that where you have a European regime like the Common Fisheries Policy, which purports to deal with everything to do with fisheries, including the environmental consequences of that, then it is really something that has to be ironed out at Community level as to what the interaction is between that Community regime and this Community regime. So I think that the most I can probably say is that that is certainly an issue that has had to be considered in the context of the Habitats Directive implementation and, to some extent, we are in the hands of Community law on that.

Q28 Chairman: How are you going to deal with the implementation issues of that because as you were speaking the issue of the Water Framework Directive came into my mind because there is a debate about how far offshore that will apply. My last memory of it was a mile, but then there is

another 199 miles of economic zone to go and if one also takes the aspirations of the Marine White Paper in terms of providing additional perspective in the near shore areas there seem to be a number of potential bits of marine legislation or policy in the case of the Common Fisheries Policy, all of which potentially could conflict with each other. One of the questions that I wanted to know, following on from Mr Drew's argument, was whether over fishing, damaging the marine environment, spawning stock, biomass, these types of issues, the marine bed thing, all of these factors and types of fishing, whether in fact they would become subject to the Environmental Liability Directive? In other words, could somebody bring an action saying, "You are damaging this bit of the marine environment" and somebody else saying, "No, this is covered by other parts of the Common Fisheries Policy and therefore it does not apply." If you are going to be drafting regulations how are you going to give clarity to consultees about the application of this, given that area of conflict?

Ms Connell: I think we are going to have to follow the lead that has already been set in the context of habitats and they are the experts on the potential conflict between common fisheries and habitats' protection, and to a very large extent ELD follows the Habitats and Birds Directive, as you know, so whatever resolution they come to we will, I imagine, be following very closely on that.

Q29 Chairman: When you say habitats, is that going to be a piece of community clarification that will guide us nationally?

Ms Connell: There has already been because with the Habitats Directive there has already been litigation in front of the European Court considering the implementation of the Habitats Directive. As a result of that certain things became clear, for example that the Habitats Directive applies out 200 miles and as a result of that there are going to have to be new regulations, which is imminent, as I understand it.

Ian Pearson: I am keen here, chairman, to make sure that we do not get any unnecessary hares—or I should say fish—running on this. This Directive is about favourable conservation status of species and habitats obviously, and the Common Fisheries Policies and the decisions that are taken at Fisheries Council annually on TACs (total allowable catches) and quotas and other things are based on the science and based on wanting to ensure conservation as well, so I do not think there is necessarily any major asymmetry between the objectives and the Common Fisheries Policy, which is a sustainable fishery, and the objectives of this Directive.

Q30 Chairman: But it is very important, part of the implementation process is designed to bring clarity so that everybody understands what this thing covers and how it will cover it and because it is a set of words drafted in the usual fairly broad brush European terms there will be plenty of people who will want to probe and test the way it is applied. So we were trying to get a little clarity—not set hares

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running—to find out what the interaction is between these various policies, all of which have a common protection theme running through them. But in the case of ELD it is a bit more than a theme, it is a series of actions.

Ian Pearson: As I think has been clear from what Caroline has said, my officials are aware of this as an issue and this will be an area where we will need clarity, you are absolutely right, and we will need for that to be part of the regulations.

Q31 Chairman: So who is going to be the competent authority for the marine environment?

Ian Pearson: We are still discussing these issues at the moment.

Q32 Chairman: Who are the runners and riders? Who is qualified to do the other 199 miles? There are not too many choices on this.

Ian Pearson: I do not necessarily accept that the issue will be up to 200 miles and to be a UK competency; it might well lay elsewhere—I do not have any information to give to you.

Q33 Chairman: I am getting a bit confused here. Let us ask a simple question: do we have to have a competent authority to handle the issues which arise from one mile out to 200 miles out?

Ian Pearson: Yes, we do.

Q34 Chairman: We have to have one; right. Question two: does it have to be a UK-based body?

Ian Pearson: I do not know the answer to that.

Q35 Chairman: Could somebody supply it because it is quite important?

Ian Pearson: We are debating some of these issues, from my understanding, at the moment.

Q36 Chairman: If the answer to question two is yes, we do have to have a UK-based body, there are only a limited number of statutory bodies who have the capability of dealing with these issues, and what we are asking is, if you cannot tell us who—and I appreciate you may still be debating who gets it—but who is in the frame? Can you tell us that? You do not want to phone a friend and consult?

Ian Pearson: I will be more than happy to write to you about it, if that would be helpful.

Ms Connell: There is a dearth of candidates at the moment.

Q37 Chairman: Right, I think we are with you there!

Ms Connell: We are exploring at the moment who will take it on board because obviously there is a plan for a new marine management organisation in a new Marine Bill, but that timing does not help us very much because we do not have a Bill yet. In the meantime we need to consider and we have not yet been able to fully consider this; we need to consider whether Natural England, Marine Fisheries Authority, Cefas—there are various organisations with responsibility—plainly most of those are fisheries based. It may be a combination of Natural England with the overview of what would qualify as

environmental damage using other organisations for the boarding boats, searching, sampling type of on the ground enforcement. I am afraid we just do not quite know yet and I appreciate that that is not very helpful.

Chairman: It actually gives us a picture which sketches in a bit more of the background to it. David Lepper.

Q38 David Lepper: Chairman, having listened to what has been said so far, I am a bit concerned that we have established—and there is no disagreement about it—that the Directive was signed up to in 2004 and we left it until the last six months of the period leading up to the deadline, which has now passed, for its transposition into UK law, and in all that period of time so little thought seems to have been given to who the competent authorities might be, who would be responsible for different bits of this Directive. Natural England has said that you should have consulted already on competent authority allocations—it sounds as if you have not. Everything has moved up to this last six-month period and beyond the six-month period leading up to 2007. Then we have more consultation to come.

Ian Pearson: I do not think you should be that concerned about this as a matter. I think in a significant number of areas it is pretty clear who the competent authority is likely to be. There is an issue on land contamination, as to who the competent authority might be, and that clearly came out of the consultation exercise. There is, as you have just heard, very clearly a dearth of candidates when it comes to the marine environment. But it is not as if in the other areas it is not pretty clear who the competent authority is likely to be. If I may just say something on speed of implementation as well—because as you will be aware we were required to implement the Directive by April 2007—like other EU Member States we found this a complex piece of legislation, which is difficult to implement according to the timetable envisaged when the Directive was originally passed. It is my understanding that it is claimed that four countries out of the EU 27 have so far either implemented or partially implemented, or claimed to have implemented or partially implemented the ELD, and those are Latvia, Lithuania, Hungary and Italy. It is not as if we are well behind the pack here when it comes to implementation, but there are some very real challenges in getting this legislation in the best possible form.

Q39 Mr Drew: If we can get back on land and away from water. We were a bit surprised that in its evidence the CBI said that the Environment Agency had not been present at the stakeholder discussions. Is that because the Environment Agency did not have people or it has misgivings about whether it is going to become one of the competent authorities? What is your view on that?

Ian Pearson: I do not know why the Environment Agency was not present, or even whether the CBI is factually correct in stating that. Maybe that is something you will want to take up with the

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Environment Agency?¹ I do not see any reluctance on the Environment Agency's part when it comes to be a competent authority in the areas where it believes that it has competence. As I say, we are still debating the issue when it comes to land contamination, but you were referring specifically to water and the Environment Agency clearly believes that it is a competent authority and will want to play its full part in that particular element of the Directive.

Q40 Mr Drew: If we could move on from that to the issue which, to me, is really again at the kernel of whether this is going to make a real difference to wildlife sites, and that is about enforcement. As I say, it is interesting the allegations made that the Environment Agency was not present at stakeholder discussions. Certainly the Environment Agency has a view, if it becomes one of the competent authorities in terms of enforcement, whether it does that wholly or it does that in partnership with Natural England, and maybe other equivalent bodies. That is presumably something that you are looking to make a decision on following the consultation. What the Environment Agency certainly has said is that this is going to be an expensive occupation. They mentioned that they expect it to be about £700,000 per annum, assuming 15 cases a year, which does not sound like many cases. It is going to be at the front end of what the UK, playing its part within Europe, is actually introducing and that sounds like a very limited number of cases. Notwithstanding that, if those are the sorts of monies we are talking about presumably you are already engaged with the Environment Agency and Natural England to make sure that there is a funding mechanism, and presumably that there is a mechanism whereby those who transgress and cause the environmental damage will be paying for that damage, not only in terms of putting right the damage but also funding the policing of this particular operation. Is that something that you are engaged with in terms of those discussions?

Ian Pearson: Firstly on the number of cases, clearly we do not know how many cases there are likely to be in any given year, but our best estimates are that these cases will be relatively few and far between because as I explained we are talking about significant adverse effects. So these will be important cases of environmental damage and it will be right that they are addressed in a sufficiently robust way. That is why £700,000 for 15 cases maybe sounds like it is not a great amount of money, but when you compare that sum with the total Environment Agency budget, which is around about £1 billion a

year, I think you can see that we are only talking about a relatively small fraction of EA's budget overall.

Q41 Mr Drew: Are you not a wee bit worried that if the allegation is true that they did not attend the stakeholder meetings that they are saying that they anticipate—

Ian Pearson: I have to say I think that is something I think you can take up with the Environment Agency—

Q42 Mr Drew: We certainly will.

Ian Pearson: Certainly in all my dealings with the Environment Agency—and I meet them on a very regular basis—the Environment Agency is a very professional, competent body, and I have no doubt that it will want to discharge its responsibilities as a competent authority fully. It does so at the moment when it comes to the issue of environmental damage and it will do so under the ELD as well in the future, I have no doubt about that.

Q43 Mr Drew: So they have not expressed any reservations to you at all about the new responsibilities they will get under the ELD?

Ian Pearson: I have had no conversations with the Environment Agency where they have raised any significant problems with the role that they will be expected to fulfil as part of the ELD. Clearly they will make representations about the size of their budget as part of the Comprehensive Spending Review settlement; but this is in the general scheme of things, when you look at the size of the EA's budget, a relatively modest amount of expenditure that is going to be required in the future.

Q44 Chairman: I am glad that everything is sweetness and light with the Environment Agency and we will explore that a bit further when we come on to asking some questions about the scope in the United Kingdom, the application of this, because some of the evidence submitted by the Environment Agency tells a slightly different story—it goes into the depths of what they are told.

Ian Pearson: It is not a different story because we are talking about completely different questions. If you are asking did the Environment Agency have concerns about their ability to competently carry out their role then the answer is clearly no, they have not—I am sure they are completely confident in their ability to do that role. Do we have some policy disagreements with the Environment Agency from time to time on certain issues, including a few parts of the Environmental Liability Directive, yes, we have, and I am happy to discuss those with you.

Q45 Chairman: Excellent.

Ian Pearson: Particularly you will want to focus on SSSIs no doubt!

¹ *Note from the Environment Agency:* It is correct that the Environment Agency was not present at the workshops that were held by Defra to discuss implementation of the ELD with specific groups of stakeholders. However, the Environment Agency has been involved in discussions on the implementation of the ELD through a number of separate meetings with Defra on a range of specific issues. These included meetings to discuss the role of the Environment Agency as a competent authority under the ELD, at which other relevant bodies such as Natural England were also present.

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Q46 Mr Rogerson: I think we have begun to establish, given that there are some fairly crucial issues, such as who will be responsible for the dealing with areas of enforcement and so on, what the problems are that you are trying to eliminate.

Ian Pearson: Some limited areas but in lots of areas there is clear and common agreement.

Q47 Mr Rogerson: These no doubt have contributed to the fact that we have passed the April 30 deadline and have not reached implementation—and obviously you said a number of States were in the same position. Have you yet had any formal contact with the Commission about late transposition and what action they might want to take on that?

Ian Pearson: I have not as a Minister but I would not be surprised if officials have.

Ms Connell: As you probably know the Commission start automatic infraction proceedings when you do not notify your implementing measures on time.

Q48 Mr Rogerson: What sort of measures do you think the Commission would be considering? Have they given any indication of how they would react?

Ms Connell: Yes, automatic infraction proceedings; that is what they do when you do not notify them on time.

Q49 Mr Rogerson: What would be the result of those infraction proceedings? What sort of penalties can they impose?

Ms Connell: The way it goes is that first of all they invite you to explain what the state of play is. Then in due course they will take a decision on whether the case ought to be referred to the European Court for a judgment, as to whether you are in breach, and if that happens then ultimately there might be a judgment and then if that happens the Commission could take it further. But we do not anticipate that we will get to that stage.

Ian Pearson: That is the standard process, that every Member State that is late in transposing a Directive rule will go through and it does take, in many cases, a number of years, and certainly our anticipation at the moment is that we will have full implementation by May 2008, which will be a year late but I do not anticipate that we are going to have proceedings that will lead to fines or anything like that at all.

Q50 Mr Rogerson: The City of London Law Society have raised the issue that we have this interim period now between passing that deadline on 30 April to transposition and the ultimate implementation, which you are saying might be a year. What would happen to those who had been breaking the regulation in that period? The City of London Law Society seemed to be of the opinion that having passed that deadline that we should really be enforcing. So what sort of arrangements will apply in that interim period?

Ian Pearson: I am certainly aware of their opinion and I am aware of a number of different legal opinions in this area. I would like to say that my preference is for applying the obligations of the Environmental Liability Directive to incidents

which occur after the regulations come into force, not before. I think this is simpler for everyone concerned. In the meantime, I am content that remediation can be delivered through our existing legislation, which is already strong; although I appreciate that it is not an exact fit with the requirements of the Environmental Liability Directive.

Q51 Mr Rogerson: There are a number of legal opinions out there and you have just referred to one of them. Will Defra be issuing clarification to all the stakeholders along the lines that you have set out, about how you intend to handle it?

Ian Pearson: I have stated my preference, that we should not be retrospective and we should not be applying this to incidents that occur before the regulations come into force, and I am happy to make that clear today, and my anticipation is that we would make this clear in the regulations.

Q52 Chairman: One of the things that I was not clear about on this particular point was, say a factory had been continuously polluting some area of land through some deposit or other that it was pumping out through a chimney and it was causing damage, and it was not until after the ELD came into force that somebody noticed it and said, “Look, there is a problem,” how do you handle the apportionment between what happened after implementation and what happened before? Is there a mechanism for doing that?

Ian Pearson: The first thing to say is that if a factory is polluting now then it is likely that it is committing an offence under existing environmental protection laws in the United Kingdom, and I would expect to see that those laws are exercised. When you look at the financial penalty regime and the remediation requirements they are likely to be pretty much the same in the case that you are talking about, with existing law as it stands at the moment, and with the likely requirements of the Environmental Liability Directive. I think it is only in some other more specific cases where other remediation options are required that we are likely to see differences. As I say, overall we expect relatively few cases in a year, and it seems to me to be the simplest to make sure that it is only once the regulations come in place that we will enforce them.

Q53 David Lepper: On this question of implementation you made it clear in the consultation document that it is the Government's policy not to go beyond the minimum requirements of the Directive unless there are exceptional circumstances justified by cost benefit analysis and following extensive stakeholder engagement. Yet you still consulted on the discretionary elements which would allow you to go beyond that bare minimum. Why did you do that if you had no intention of pursuing any of them?

Ian Pearson: What we wanted to do as a Government is to be open and transparent about some serious policy choices that we have, and that is why you will find that when you look at the benefit

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costs assessment there is a case in some instances for actually going beyond the legal minimum implementation requirement. We think overall that is a marginal case and we do not think that there is strong and compelling evidence to go beyond it. Our policy right across Government that we do not believe in gold plating we believe is an important one, and that is why we took the decision that it should stand in this case, but we should give people an opportunity to express an alternative view.

Q54 David Lepper: Many of them have expressed alternative views but you will not take any notice of them.

Ian Pearson: We are fully assessing all the consultation and responses as part of this. I am not aware that there has come out of the consultation exercise major additional evidence that suggests there are significantly greater benefits than we have suggested as part of our draft regulatory impact assessment, that would make us want to change our mind. As we have said, yes, there is a case in some areas that you might want to go further, but it is not a very strong one. My understanding is that there were not any responses at all to the draft regulatory impact assessment, and so I think that people accept there is a marginal case for going it further. When you set that against Government policy overall of being against gold plating I do not think that that case is strong enough for us to say that we should go further and over implement, and that remains our position.

Q55 David Lepper: You say there has been no case made in the responses to the consultation, except of a very marginal nature—

Ian Pearson: No, just to be clear, I was saying that they have not disputed the benefit costs calculations of actually implementing on a sort of gold plated basis.

Q56 David Lepper: If I am right the regulatory impact assessment did say that if the Government went beyond the minimum certainly there would be more cases to deal with and could be additional benefits of some £4 million to £5 million.

Ian Pearson: Yes, it is pretty marginal overall, is it not? I do not think it justifies gold plating.

Q57 David Lepper: In the light of all that could you give us some idea of what would constitute exceptional circumstances in this case? You say that you do not go beyond the minimum except in exceptional circumstances, so there must be some notion behind that of what exceptional circumstances might be.

Ian Pearson: I think the notion would be that there would be very high benefits compared with the costs and that does not seem to be the case. We consulted and we gave people all our best views about benefits and costs and those figures have not been challenged. That is why I am saying that I do not think there is a compelling case for going further than minimum implementation of the Directive as it stands at the moment. I could conceive of other

examples where it might make law fit together better, where you would potentially over implement, but we see that the Environmental Liability Directive has very much been supplementary and sitting alongside some very good environmental protection laws that we have in the United Kingdom.

Q58 David Lepper: I think others might want to explore whether it might not give rise to some loopholes in the law, but I will leave that to other people.

Ian Pearson: Can I be clear on this? We are not changing any of our existing law at the moment, and this is in addition to it. So if there are any loopholes there they exist already.

Q59 Lynne Jones: Should you not want to close loopholes and use this opportunity to do so?

Ian Pearson: I am very interested if you want to tell me what you think the loopholes are and then I will tell you whether I think they exist.

Chairman: We are just the humble questioners; it is other people who tell us about loopholes.

Q60 Lynne Jones: You have just said that going beyond the minimum would help the law fit better together, and that is certainly what some of the submissions that—

Ian Pearson: I was saying that I can conceive of a case that you would want to go beyond legal implementation at a minimum level if we thought there was a strong case that the law would work better together by doing that. We do not believe that that case has been made during the consultation, and we were not persuaded of it prior to issuing the consultation document ourselves, which is why we are where we are today.

Q61 David Lepper: One final point on this particular issue. We have talked about consultation and I wonder what view, if any, Defra took, if any, from other departments in Government of this question of minimum implementation. Was there a strong view from elsewhere in Government as well—the DTI, for instance, the Treasury—that this was the best line to take?

Ian Pearson: There is a strong view right across Government about better regulation and we have established, as Government policy better regulation principles, that our default position is that we do not gold plate unless there is a really compelling case to do so. What I am saying to you is that we looked at those sets of principles and we applied them to this Environmental Liability Directive. We considered the case as to whether we should go further than minimum implementation, but we did not believe that that case was sufficiently persuasive enough for us to justify doing so. That is why during the consultation exercise we explained that we did not want to gold plate and we set out the policy options that we did; but we recognised at the same time that there might have been a marginal case in areas for actually implementing beyond the minimum.

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Q62 Chairman: In your evidence to the Committee in paragraph 9 you comment about the exceptional circumstances that might suggest that you go beyond the implementation terms, the basic requirements, and you say that such a decision would be “justified by cost benefit analysis and following extensive stakeholder engagement”. Can you just lift the veil a little bit upon what kind of a return as a result of a cost benefit analysis would lead you to make an exception? How is that judgment to be reached?

Ian Pearson: I think I have been pretty clear about this and what I have said is that we looked at the case for going further; we undertook cost benefit analysis on a range of different policy options and those are contained in the draft regulatory impact assessment, and they have not been challenged or disputed or debated in any way.

Q63 Chairman: Let me try and assist you, Minister, a little further, because you are quite right, you go on in the same paragraph to say that you estimated in the context of applying the ELD to nationally protected biodiversity within SSSIs as only a small net benefit. So when does small become big? How much in quantum do you have to have in terms of the return on a cost benefit analysis; or, put it this way, what would the number have had to have been in the exercise you did carry out to have convinced you that SSSIs should have been within? What is the cut-off?

Ian Pearson: I think you have to look at these things on a case-by-case basis and exercise judgment, and the judgment that we exercised as a Government, as part of the consultation exercise, was that we did not believe there was a sufficiently strong case to gold plate and to go beyond the legal requirement.

Q64 Chairman: You made that very clear and I think we have the principles clearly, but you made a statement in paragraph 9, which says that you estimated only a small net benefit. Most government investment decisions are made on the basis that numerically if the rate of return in a cost benefit analysis goes beyond a certain positive number an event occurs, and you have described in here in words “small net benefit”, so I was interested to know, in the example that you have actually done, how big would the return have to have been to convince you that it was worth going beyond the minimum implementation. You may not be able to give me that answer now but perhaps you would like to reflect on it?

Ian Pearson: I think you are trying to look for spurious precision in terms of an answer and, as I say, it is a matter of judgment as to what a significant benefit would be.

Q65 Chairman: Minister, with respect your consultation document contains some numbers and it has a fairly precise number in it, because you have written it down, which gives us the numerical answer to the question what was small. So if you can do it

for small all I am saying is, how much bigger does the benefit have to be before it becomes “we will go further”?

Ian Pearson: This will apply on a case by case basis and what I am saying is that if as a result of a benefit cost assessment exercise that we undertake, whether it be as part of this or part of any other implementation of the Directive across Government generally, we will take a full look at this.

Q66 Chairman: I am sure you will do, but I have asked a very simple question.

Ian Pearson: Yes, you are asking me a very simple question to which there is no one simple straight answer.

Q67 Chairman: You know what the answer is at the small end of the spectrum because you have already made a decision. It is Table F5 of the Regulatory Impact Assessment.

Ian Pearson: We produce figures as part of the Regulatory Impact Assessment, yes, and my judgment and the judgment of Government when we produced the consultation exercise was that we thought there were, on the basis of the RIA, some benefits but they were relatively small overall. If we thought that the benefits were more substantial, like, for instance—

Q68 Chairman: There is a reason for this approach, it is not just for the sheer entertainment value of asking you—

Ian Pearson: I don't think it is very entertaining, to be honest!

Q69 Chairman: We can always make the entertainment even better. The reason I am asking you is that people will want to probe how the decisions are made about implementation and this particular page in the RIA does give a lot of detail about the basis upon which you made your decision, but it says that the net benefit was less than £1.1 million and therefore that is deemed to be small. That accords with the words. All I am saying is that just to give us some feel of the order of magnitude as to how these decisions are made, if it had been, say, £1.5 or £2 million at what point would you have said that if the benefits had got to that level then it would have been worth going beyond it, just to give us some idea of the order of magnitude? Because what we have here is nought to 1.1 no, but we do not know 1.1 to 1.5 might be, or 1.5 to 2, yes.

Ian Pearson: I think I just have to say in response to this that this is a matter of judgment as to what is small and what is significant, and it always will be, and it will vary from policy area to policy area.

Q70 Chairman: True, but I am not asking you to speculate and I do not want to bore us any more. As Mr Drew has just whispered in my ear, these are real figures; this is an exercise which you did, and you have listed the costs and the costs here are £0.6 of a million and the benefits are less than a million. So, in other words, you could almost say crudely a two to one ratio in terms of costs versus benefit that is small,

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and you have said no. There are a lot of people who will come to you in the future and say could you extend this for the following reasons, and they might want to understand how this mechanism works. That is all I am asking.

Ian Pearson: And of course the costs and benefits bear down on different groups of people and it is the role of government to make a judgment based on an assessment of those costs and benefits as to whether it is worthwhile to pursue that particular policy benefit.

Chairman: For example, with your flood protection policies there is an entirely objective set of criteria, which you know well, which determine whether a project goes ahead, and applicants for projects have a very clear idea how the point scoring, cost benefit, everything else, worked out—it is all down there, you can work it out for yourself. All I am saying is that it perhaps might be interesting to have a bit more clarity in terms of the returns to cost ratio, which is what is down on page 50, to understand how it works. But we will not delay ourselves any more and we will move on to David Drew.

Lynne Jones: Just before you do, the Minister was about to give us a “for instance”. Some might think that a two to one cost benefit analysis was actually quite good.

Chairman: Some might.

Q71 Lynne Jones: You said “for instance” and then you were interrupted.

Ian Pearson: I just think it is impossible to apply simple metrics to policy decisions and to say that, as a Government, we will always do something if the ratio is two to one or better.

Q72 Chairman: That is me telling you statistically what this says. I appreciate that is not you.

Ian Pearson: I am suggesting to you that, as a guide to policy, that does not work. You cannot just have simple metrics. You have to exercise judgment.

Q73 Chairman: You can have order and magnitude.

Ian Pearson: My thought that I was wanting to share with you was that, if I could be convinced that as a result of a policy intervention in this area we would have a big impact on achieving some of our biodiversity targets, that would lead me to conclude that this might be significant and we might want to go further and gold plate; but I do not think that that case has been made so far.

Q74 Mr Drew: This is all quite abstract but we are not talking about abstract ideas. We are talking about SSSIs and equivalent. We are giving a further layer of protection to some of those SSSIs. Either we are prepared to protect these very important sites or we are not. What we have here is a mechanism by which that could be done. We are using a cost benefit analysis to take us in that direction. I would have thought you would be rather more robust saying, “Of course, if there is clear environmental damage we will be in there like a ton of bricks to make the offender pay.” There is an issue about how they will pay. My biggest misgiving is that they may decide

they will pay because they have already caused or are about to cause environmental damage. I want to prevent them but if they are prepared to take into account and you are prepared to effectively give them the clearance so they can do that, that is what will happen but something has to happen. Otherwise they will do it anyway. It is a very toothless tiger that is affecting the operator here.

Ian Pearson: I want to stress again that we already do protect SSSIs and we do have a strong system of environmental protection in the United Kingdom.

Q75 Mr Drew: What is different in the ELD?

Ian Pearson: What is going to be different in the Environmental Liability Directive is that in less than 1% of the environmental damage cases we are probably going to see implementation of the ELD provisions. Where they are different is potentially giving a little bit more protection on the biodiversity side and also in the requirement not just for primary remediation but potentially also in cases where there might be complementary or compensatory remediation. Those provisions are new and different but I do not envisage them being applied in most circumstances.

Q76 Mr Drew: Let me give you one. This is in the Regulatory Impact Assessment. It says that the use of DDT may be an example. For this provision however the past may not provide a reasonable guide as to how a defence might be applicable or which sectors it will apply to. In a sense, that is giving you an answer that we cannot look backwards to determine action in the future but we must have lots of examples which could be brought to mind of where the ELD, if it is going to be effective, will be able to be the mechanism by which we can take action against people who cause environmental damage. I would have thought that is something that we have to be talking about. Otherwise, no one is going to think this is worth a candle.

Ian Pearson: I do not think we should delude ourselves that the Environmental Liability Directive is going to be a huge, massive, new change. When you look at it, it is in effect a minor addition to the legal environmental protection framework that we already have in the United Kingdom. Specifically on SSSIs, the best estimate we have at the moment is that approximately 90% of SSSIs will contain some European features because of the overlap between Natura 2000 sites and the Birds and Habitats Directive and for other reasons. The additional level of protection and action that might be needed to be taken on remediation that is given by the ELD is, I believe, a useful measure but I do not think we should be pretending that it is a huge answer to all our environmental problems in the United Kingdom because I do not see the Directive in that way at all.

Q77 David Taylor: You can be frank with us.

Ian Pearson: I already have been.

Q78 David Taylor: You are not going to appear in *The Daily Mail* pillory or *Today in Westminster* or *Radio 4 Tomorrow*. To you, ELD means Entry Level

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Directive, does it not? You are the Stavros of the EFRA team, the Easyjet man. You want an ELD light, a low cost utility model, barely sufficient to comply with the EU publication. That is true, is it not?

Ian Pearson: No, it is not true. What I am doing is exactly what it says on the tin.

Q79 David Taylor: I feared that.

Ian Pearson: I am suggesting we should implement the Directive as the Directive is and where the Directive allows us to exercise discretion we ought to use that in a sensible way. We do not believe that there is a case for gold plating the Directive. Frequently across other areas of Government we get criticised for gold plating EU legislation.

Q80 David Taylor: That phrase “gold plating” is a substitute for “thought”, is it not? Do you not think so, because it is just bandied around as a means of shielding a defence from using the flexibility which was incorporated into the Directive deliberately so that countries like our own could indeed extend it rather further than they would otherwise have done.

Ian Pearson: Gold plating is not a substitute for thought.

Q81 David Taylor: The phrase “gold plating” is a substitute for thought. It is almost a knee jerk defence. I am looking at the extent of strict liability as opposed to fault based liability where a whole plethora of activities, the so called non-annex three activities, are going to be in the fault based liability camp, are they not, as opposed to a strict, automatic liability. That is correct, is it not?

Ian Pearson: I think the term gold plating is useful as a discipline.

Q82 David Taylor: No. Use an alternative phrase, not gold plating.

Ian Pearson: What it is essentially about is the Government’s better regulation principles. We think it is sensible to apply those principles to all EU legislation. We should not over-implement unless there is a compelling case to do so.

Q83 David Taylor: You want to minimise the cost of implementation?

Ian Pearson: That is what gold plating is about. Where there is a strong case for going further—

Q84 David Taylor: A compelling case, I think you said.

Ian Pearson:—than the Directive, that is something we might want to consider as part of implementing a directive; or we might want to do it through normal, UK legislation, but we will at least have the options to be able to do that.

Q85 David Taylor: Would you agree with me that one method of implementing effectively would be to have a consistent, transparent regime across the piste in how the ELD is implemented? That would be true, would it not: not to pick and choose, not to make fish of one and fowl of another, not to identify

the annex three activities as sheep and everything else as goats, particularly when it is the goats, according to Natural England, the non-annex three operations, that damage biodiversity more frequently than the annex three ones where there is a strict liability? Do you agree with that assessment on that front?

Ian Pearson: Firstly, the Directive enables Member States to make choices in certain areas. I think it right that we exercise that right and choice. We have to choose one thing or the other. When it comes to the issue of fault based liability, I happen to believe that that is a sensible way forward. If I am a chemicals company based in Coventry that is fully applying the PPC regulations that have been imposed on it by the Environment Agency at some significant cost to it but it is acting—

Q86 David Taylor: In the interests of the environment, the people who live in and around Coventry and the workers at that factory?

Ian Pearson: Yes, indeed. It is acting in a responsible manner and it should be able to rely on that competent authority. If something goes wrong and it is a result of negligence or the fault of the company, then rightly that company should be liable for prosecution and we need to undertake remediation. If however that company has been fully following the guidance and working within the PPC regulations and something happens that was completely beyond its control, I do not think necessarily we should say that it is the company’s failure. I think we should say it is the failure of the competent authority and the failure of the regulation. In those circumstances I think it right to say that the burden of responsibility should fall with the competent authority.

Q87 David Taylor: You prefer consistency and transparency to be obtained by levelling down to a fault based liability for all activities. In other words, the annex three operations which are linked to strict liability. The inference I draw from what you say is that you rather regret that they are being categorised as strict liability operations, where no fault needs to be demonstrated.

Ian Pearson: There is the ability in Article 8.4 to have what is called a permit defence or a state of the art defence. I think that is a very sensible way to go and that is one of the reasons why we have consulted on that.

Q88 David Taylor: Are we not just caving in to pressure from the commercial sector? The British Insurance Brokers’ Association, the CBI, the NFU? Are we not just pandering to them pursuing the standard of living and totally ignoring the quality of life which can be associated with some of their harmful operations? That is the reality, is it not?

Ian Pearson: No, it is not the reality at all. I think you have it completely wrong. If a company is negligent, if it causes environmental damage, it should be pursued under legislation, whether it be the Environmental Liability Directive or whether it be through our own domestic legislation.

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Q89 David Taylor: If it is because of neglect, omission or commission but not strict liability?

Ian Pearson: I use the example of a chemicals company in Coventry. If it has been completely fulfilling all the requirements that have been imposed on it by a competent authority, it should be able to rely on that. If it has been negligent in any way, it is perfectly legitimate that it would face prosecution.

Q90 David Taylor: It will have a strict liability for some activities?

Ian Pearson: If it has not been negligent in any way, I do not think it reasonable to blame the company for what is in effect potentially a deficiency in the PPC regulations. In other cases, you can envisage a farmer spreading fertilizer as an example, fertilizer which has been approved and licensed and certified as safe and has gone through all the normal statutory processes. If you envisage a situation in the future where the application of that fertilizer suddenly, unexpectedly caused environmental damage that was significant, I do not think it right to pursue the farmer.

Q91 Mr Drew: That is exactly what the Directive says. It is the person who actually applies the action, if you like, rather than the supply chain who knowingly may have supplied that farmer with something which could cause environmental damage.

Ian Pearson: The Directive in 8.4 talks about the ability to apply what we call a permit or state of the art defence. I think that is a sensible thing to do. We have to stress here that we are talking about very unlikely events. I am confident that our PPC regime is robust and that it is fit for purpose. I am confident that our product licensing regime that we have in the United Kingdom and throughout Europe is robust. What we are talking about is the very unlikely cases where something might happen.

Q92 David Taylor: Natural England are a creature of your department to an extent but they do argue that non-annex three operations, the exempt operations if you like, are the ones which damage biodiversity more frequently. Should we not be focusing on that in a more effective way?

Ian Pearson: That is true but they damage it through negligent activity. That is a very different point to the point about whether it would be right or not to have a permit or a state of the art defence.

Q93 David Taylor: We are not selling the environmental pass under pressure from commercial interest groups then?

Ian Pearson: No, we are not at all. In those cases where environmental damage is caused—again, in the overwhelming number of cases my understanding is this will be as a result of negligence or some other activity—there are legislative remedies there at the moment under UK law. Permit and state of the art defences are quite narrow and technical.

Q94 Chairman: We accept the point. Mr Taylor quoted Natural England. In their evidence to us they say they want liability to be identical because non-annex three operations damage biodiversity more frequently. Creating a level playing field, by applying strict liability to all operations, would establish a more consistent and transparent regime. Why does Defra disagree with Natural England on that point?

Ian Pearson: For the reasons that I have just outlined. I think it right that, where we have the discretion to exercise a permit or state of the art defence in those circumstances, it is right to do so. There is probably a separate point about how the two regimes fit together and how the Environmental Liability Directive regime would fit with UK domestic legislation. I have to be honest. This is not a perfect fit. Frequently our law in the United Kingdom can be a little bit jumbled and this is one instance where it is not as clear and transparent as it perhaps could be. Chairman, you will be aware of some of the company law project and the massive reforms we undertook there to try and put more company law in one place. Sometimes these things do not fit together as well as they should do.

Q95 David Taylor: Your inclination would be to level down rather than level up?

Ian Pearson: That is not my inclination at all. What I am explaining to the Committee is why we think, in the very few cases where it is likely to be exercised, a state of the art or a permit defence is appropriate and is in the best interests of everyone.

Q96 Mr Drew: Let us use a specific area of concern which is obviously going to be GMOs. I know there is a view that GMOs are protected under a different piece of legislation but it does seem somewhat unclear as to whether GMOs will be a key part of a potential liability offence. Is that something that you welcome or is it something that you are going to serve a pass to and hope that our existing controls for GMOs are sufficient?

Ian Pearson: We have one crop trial of a GM product taking place in the UK at the moment and we will probably have two trials next year. No GM crops are being grown commercially in the United Kingdom. It does not seem likely to me that they are going to be for a while. Having said that, it is right that we look very carefully at the issue of crop separation distances which is why we have been consulting on that. We want to move that debate forward. That is why as a Government we should judge each application for crop trials on its merits and make decisions about commercial growing based on the scientific evidence. The licensing of GMOs, whether it be for research or for general use, is governed by some very strict European legislation at the moment. Each application for consent to release is judged on its own merits based on potential risks to the environment. In the United Kingdom we would not allow a crop trial to take place and we certainly would not allow commercial growing unless we were confident, based on all the scientific evidence, that there was no threat to human or

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animal health or to the environment. That remains our position. If we are relating what I have just said to the discussion we have just been having about permit defences, if in the future—and this is speculation—we were in a situation where a farmer was being pursued because a crop did cause environmental damage and it was directly as a result of its genetic modification, we do think that permit defence would be allowed with respect to the farmer. The problem would be with the company providing the product and with the licensing regime. We should not be penalising the farmers for doing things that they have been given explicit approval to do.

Q97 Mr Drew: I go back to my original perception of this. Unless I have it wrong, the ELD impacts on the immediate transgressor, even though they may be doing something in good faith. If they have a permit they are exonerated but up the line, the supply chain, there is no way that a company that supplied something that subsequently was proven to be environmentally damaging would ever be liable, come what may.

Ian Pearson: In the circumstances you describe, if an individual or company is causing environmental damage, the immediate responsibility is on that individual or company to stop it.

Q98 Mr Drew: That is something slightly different. They have caused the damage. Are they liable for the damage they have caused?

Ian Pearson: They have caused the damage. They should stop it immediately and that is what we would all want to see, regardless of whatever legislation we are talking about.

Q99 Mr Drew: Who makes good the compensation in terms of the damage?

Ian Pearson: That is the issue. If for instance a farmer has been using fertilizer that is an approved, licensed product that everybody has been happy with for a number of years or if a farmer is growing a crop where he has been given explicit approval to be allowed to grow that crop, I do not think it should be the responsibility of the farmer to take the remediation activity that is required because it is not the farmer's fault. That principle of fault based liability is an important one. We would obviously need to look at avenues to pursue those whose fault we believe it is. Whether that would be through the Environmental Liability Directive or through other routes that might be available we would have to look at.

Q100 Mr Drew: Either the Environmental Liability Directive is applied to the person who causes the offence, maybe innocently, or it is applied to someone who supplies that person with the material or both. It has to be applied to someone, surely?

Ian Pearson: It is applied to the individual in the first place but the individual would have the right to use—

Q101 Mr Drew: How? That is not what the Directive says.

Ian Pearson:—the permit or state of the art defence.

Q102 Mr Drew: Have I got that wrong? The Directive does not say that the farmer can say, "I am sorry. It is not my fault. It is the supplier's fault." He would have to take legal action against the supplier.

Ms Connell: The Directive imposes liability on the operator which is the person in control of the occupational activity and it imposes liability on the activity which causes the damage. Take for example pesticide licensing. You might have a factory that is producing a pesticide. If there is a leak from that factory, obviously in the context of that damage the operator might be the factory. If you are marketing the pesticide, that would be under a permit that applies to the pesticide. If it turns out that the pesticide ultimately causes damage in the hands of the end user, it might well be, if the permit defence is applied to that, that the person who produces the pesticide would be able to pray in aid the permit defence. He would say, "I had a permit to market that pesticide." Then you look at the farmer who sprays the pesticide. Can he pray in aid the permit defence? In the case of pesticides, the permit also goes into a lot of detail about conditions of use, how you use them, so it is possible the permit defence would also apply to the farmer in that situation. Alternatively, perhaps more likely, the state of the art defence would apply because the product had been permitted for use and therefore the end user might be able to say that the current state of knowledge witness statement that it was okay for me to use it. Outside that example, the person who is the operator of the activity which causes the damage will probably vary from case to case. It might be the factory that produces it. It might be the person who uses it.

Ian Pearson: If you have a pesticides manufacturer producing a product that has gone through all the approvals process and there has been no problem with it for years but they produce a dodgy batch of product and a farmer, not knowing this, spreads it on his premises and causes environmental damage, I do not think we should be pursuing the farmer. I think we should be pursuing the pesticide manufacturer. That seems to me to be the clear and common sense approach. The farmer ought to be able to rely on the state of the art defence in that case.

Q103 Chairman: In the real world—

Ian Pearson: That is pretty real world.

Q104 Chairman: I appreciate that. If the two defences which Caroline outlined are successful and liability is not to either the manufacturer or the farmer but you still have environmental damage, who cleans it up? Who bears the cost for that operation?

Ms Connell: In the example of the pesticide which has been licensed for use and then is used in accordance with those conditions, it is very unlikely that environmental damage would occur. The most likely environmental damage arising out of that would be unauthorised use. For example, if you flush some extra pesticide into a river, that would not

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be covered by the permit defence. That is not an authorised activity. In addition, do not forget that the permit defence and the state of the art defence also require the operator to show that he was not at fault or negligent. Say, for example, someone flushes out extra pesticide. Not only is that not authorised but it is probably negligent as well so no permit defence there.

Q105 Chairman: I do not want to get too much into the realms of the hypothetical. It is the unknown consequences of a permitted action where you could have some kind of environmental damage that resulted from a perfectly legitimate manufacture of a product and totally in accordance with rules use of it. There are rules and regulations, for example, about spray drift and wind speed and all those factors. If all of those have been complied with but unwittingly your next door neighbour had a crop in a field that was destroyed by that particular material floating over the hedge, so you have some environmental damage or maybe not even that—maybe there is a biodiversity issue—I am interested in the theory. If the two defences are sustained but you still have some example of environmental damage, whose job is it to remediate the situation? Does somebody have a liability to go in and clean up, sort out, compensate? Who does that? Is it the competent authority? Is it the Government?

Ian Pearson: It is a grey area if you are talking about farmer A as opposed to farmer B. The farmer has done absolutely nothing wrong. I do not think it fair to penalise as a matter of law people who have done absolutely nothing wrong.

Q106 Chairman: As I have understood these defences, if an event occurs that is in accordance with procedures, rules, regulations and the law but an unplanned for consequence results which is environmental damage—

Ian Pearson: It would have to be significant, adverse damage.

Q107 Chairman: There is a problem and somebody has to clear it up. If the defences do not work and somebody was prosecuted for that damage, there would be consequences. They would have to pay the bill: polluter pays, but in a way the defences knock out polluter pays. In other words, you have two ways of saying, “Not me, gov” but you still have pollution. Under those circumstances, who would be expected to deal with the consequences, in financial terms, of such outcomes. The defences work but there is still a problem so who pays?

Ian Pearson: We are getting into quite hypothetical areas here so it is difficult to respond to some of these. Can we be clear that we are not talking about an instance of somebody having their crop damaged as a result of wind spray. That is not something that would count, in terms of my understanding, when it comes to significant adverse environmental impact.

Q108 Chairman: It can have an emission that is allowed. It has a consequence that was not anticipated when the rules for that emission were

agreed. In other words, it might have complied with the then best environmental practice and somebody would say, “Yes, you can emit that to the atmosphere” but then a consequence occurs. Some pollution occurs. Somebody says, “Oh, I did not know about that when we said you could do it.” I am asking the simple question: if that situation occurs, who is the body that says, “Okay, we have to deal with the financial consequences of it”? Is it the competent authority? Is it the Government? Who?

Ian Pearson: Depending on the circumstances, if nobody was at fault it is very difficult to apportion blame. If there is an environmental damage caused but nobody was at fault, it is incumbent on Government to look at the potential liability.

Q109 Chairman: The Government would be the first point of recourse.

Ian Pearson: Yes.

Mr Drew: The Welsh Assembly have said that they want to disapply the permit defence in the case of GMO related activities. Are you supporting them in that or are you disagreeing with them?

Q110 Chairman: Can they do it?

Ian Pearson: This is a devolved matter.

Q111 Mr Drew: They can do it?

Ian Pearson: They have the ability to take different decisions in these areas. You have heard my views about why I think a permit defence is appropriate. They are perfectly entitled to make their own decisions.

Q112 Mrs Moon: When this was raised when we met earlier with some of your officials, it was suggested that the Welsh Assembly Government did not have the power to do that. You are quite clear that the Welsh Assembly Government does have the powers to take this different step?

Ian Pearson: My understanding and the advice I have from officials is that it certainly has. The advice I have had all along is that they have the ability to take different decisions in this area.

Ms Connell: It is a devolved matter. If they want to take a different approach on implementation they can. I am not quite sure on what basis the Welsh Assembly Government would not be entitled to do this particular thing. I cannot really help on that.

Q113 Chairman: God help the farmer who has half a field in England and half in Wales.

Ms Connell: That is one of the joys of devolution, I suppose, in lots of different contexts.

Q114 Mr Drew: In terms of the idea of the two defences being invoked before any remediation, I go back to this original perception. If someone knows that they have transgressed—you said a minute or two ago, Ian, that you would want to stop them but the event has happened—as the event has happened, a lot of people will feel, “We are going to get away with it and we are not going to stop until someone makes us.” What real powers—we have talked about who the enforcers are—are there to stop someone

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from transgressing and more particularly to really make sure that they do remediate the damage they have done?

Ian Pearson: My understanding of this is that the powers are there under Articles 5 and 6 of the Directive, Article 5 about preventative action and Article 6 about remedial action. The responsibility is on the operator in the first instance. The expectation is that the operator will take all practical steps to immediately control, contain, remove or otherwise manage any contaminates and deal with the environmental damage. Also, a competent authority may at any time take or require the operator and give him operator instructions in terms of taking steps, so there are powers there. The powers will be there as we transpose the legislation that will give the competent authority the means to be able to step in and deal with the issue. Clearly, that will be an important part of the implementing regime.

Q115 Mrs Moon: You have talked about this legislation being to supplement what is already in place in terms of environmental protection legislation in this country. You are very keen to listen. You have had the consultation. What I do not understand is why did the consultation on the tests for significant biodiversity damage restricted itself to Natura 2000 sites. Why did you limit yourself so much? What was the reasoning behind that?

Ian Pearson: The reasoning behind that goes back to the earlier discussion that we have been having about the minimum level of implementation, so that we should implement what the Directive requires us to implement. It requires us to implement with regard to species and habitats covered under the EC Birds and Habitats Directive. It does not require us to implement with regard to SSSIs. I think there are some practical difficulties if we were to try and implement with regard to SSSIs and pretty small benefits if we were to extend the scope, given that something like 90% of SSSIs at the moment will have some sort of European element and be covered in some way already. Specifically on SSSIs, if I think of some of the sites I have in my own constituency, there is a site with a lot of great crested newts. I can see how somebody could damage the integrity of that site but not alter the favourable conservation status of the great crested newts because they are pretty prevalent in lots of other areas. That would be an instance where you can cause significant environmental damage and not have a remedy under the Environmental Liability Directive because you would not be having a significant, adverse effect on the favourable conservation status of the species.

Q116 Mrs Moon: What if that was a biodiversity action plan species for your area and the great crested newt was in fact an endangered species within your area? They may well be prevalent in other parts of the country but that might be the one place they existed in your part of the country.

Ian Pearson: That is why we have SSSIs but the Environmental Liability Directive does not help them on that.

Q117 Mrs Moon: You have got yourself into a position where Natural England, the Environment Agency, the RSPB, the Institute of Ecology and Environmental Management—I would like to put on the record that my husband is a member of the Institute—the Institute of Biology, all NGOs who responded to the consultation, private individuals and all but one local authority opposed your stance on this and urged extension of the Environmental Liability Directive to cover SSSIs, including species habitats and species. They also wanted strict liability imposed. You have ignored all of that evidence, so you are ignoring the environmental lobby in favour of supporting the CBI and the NFU who support your position. Can you explain to me why, given the volume of people who say, “No, we think you are taking the wrong stance on this”, you are taking the least protective measure that you can in law, when others within the EU are going to take the higher level? I still do not understand why you are taking the line of least resistance.

Ian Pearson: Firstly, we are not ignoring the environment lobby. We have been listening very carefully to what they have been saying to us about this and other issues with regard to the Environmental Liability Directive. We have been considering carefully their responses. We are still considering the responses. The main difficulty when it comes to this issue is that the main protection for SSSIs is through management agreements with owners and occupiers. The Environmental Liability Directive is probably going to apply to only a few instances in practice. With the real life example I have just given you about great crested newts, it does not really help at all either there. It is difficult to know what test of damage to apply, whether it should be based on site integrity or on conservation status across the range. The Directive says that we ought to be looking at conservation status across the range. When you look at it from a site integrity perspective, I like my great crested newts in Pensnet and I want to see them protected.

Q118 Chairman: They probably have a fond affection for you too.

Ian Pearson: The ELD does nothing to protect them on that particular site.

Q119 Chairman: Help me to understand because I start to get into a slightly theoretical world here. Could you explain to me what practical things beyond the current protections for Sites of Special Scientific Interest would you have to do if you were to implement the terms of the Directive in those areas which are not currently covered? What would be the difference in practical terms?

Ian Pearson: My understanding of this is that the potential difference in practical terms is not to do with fines that would be imposed on the transgressor. It is not about penalties. It is not about primary remediation because whatever piece of legislation, whether you are talking about the ELD, the Environmental Protection Act, the Water Resources Act or the Wildlife and Countryside Acts, primary remediation would take place if a

transgressor was convicted and found guilty. The differences potentially, as I understand it, are to do with compensatory remediation and complementary remediation. There might be examples, for instance, where it is not possible to remediate an existing site because the damage has been so severe, in which case under the ELD you could be required to ensure that a complementary site was brought into being so that there was not that sort of habitat loss. That is different from what we have at the moment. In terms of primary remediation—in most instances we would be talking about primary remediation—I do not think there is any substantial difference between what the ELD would deliver and what would be delivered through our legislation under SSSIs. There is a far higher level when it comes to the ELD because here we are talking about favourable conservation status of a species; whereas, when it comes to an SSSI, we are talking about that particular site. To go back to my example of the great crested newts, that site would definitely be protected and there would be legal remedies under existing legislation but if the favourable conservation status is not threatened—and that is a high level thing that needs to be achieved—then the ELD would not necessarily be triggered.

Ms Connell: It is sometimes easy to think that all the ELD requires you to protect is Natura 2000 designated sites, but that is not the position. The ELD requires you to protect all the species and habitat that are listed in the Birds and Habitats Directives in the relevant annexes. That is wherever they are found, whether they happen to find themselves on a designated Natura 2000 site or whether they find themselves on an SSSI or whether they find themselves somewhere completely different. As I understand it, you can have habitat and species and resting places for species, everything that has to be protected under Article 2.3 of the ELD. Only a small proportion of that finds itself on Natura 2000 sites. Therefore, a very large proportion of what is now SSSI will contain species and habitat that are within the scope of the ELD already. It is important to remember that because the mismatch does not look quite so stark as if you just assume that the ELD covers only Natura 2000 sites, because it is not a site based test. It is a species and habitat based test. That is going to be quite difficult to apply in practice because you are not just looking at the sites; you are looking at what has happened to the species and habitat wherever they are and then you are going on to look at what the Directive requires. You then have to analyse what the effects are on reaching or maintaining favourable conservation status of that species or habitat across whatever the range should be. The range might be just a field, it might be the south east of England or it might be the whole of the UK or more. That is quite a difficult exercise. The upshot of that is that the remaining species and habitat on SSSIs which are purely domestic and which do not already come within ELD protection potentially are probably not as great as may originally have been thought.

Q120 Chairman: Those examples of habitats or species in the areas not covered: if a catastrophic event were to occur, the message I am getting if I have understood it correctly is that there is no requirement for some kind of remedial action to take place. In other words, the event occurs. There is a loss of biodiversity in a location unprotected by the ELD, so that is a consequence and we just sit back and say—

Ian Pearson: Who caused the event to occur?

Q121 Chairman: It would be the same argument that a polluter would cause an event to occur. I am trying to be clear in my mind. You made it clear in your exposition—I apologise if I am cutting across your thinking—and you said that in the event of an SSSI for example being part of a Natura 2000 site there would be a liability on remedial activity if environmental damage took place. I adduced from that—tell me if I have it wrong because it is quite complicated—that if the damage occurred outwith an area protected by the Environmental Liability Directive there was no liability for anybody to do anything about it. In other words, the event occurred; the damage occurs and that is it.

Ian Pearson: Are you talking specifically with reference to the ELD now?

Q122 Chairman: With reference to areas that are not protected by the ELD. You gave me the impression that the plus point for the ELD was the obligation for remedial activity if there had been environmental damage. It appeared, in the way you explained it to me, that that was different from the consequences of something that was simply protected by existing UK law.

Ian Pearson: The plus points for the ELD are that there is protection if there are significant, adverse effects on the conservation status of species that are outside Natura 2000 sites or outside SSSIs. The other plus points are with regard to complementary and compensatory remediation.

Q123 Mrs Moon: Can I come back to the response I had to my question about why did you consult on the test for biodiversity damage restricting itself to Natura 2000 sites? The response was, “It was not a site based test.” If it was not a site based test, why did you consult on it?

Ian Pearson: The consultation has been about implementation according to sites and species. The sites are those that are in the Birds and Habitats Directive, which are principally if not exclusively Natura 2000 sites. There was consultation on that because we are required to do that under the Directive. As part of the consultation exercise, there has been this debate that we have been having about whether it should be extended to SSSIs that are not Natura 2000 sites. Obviously there is quite a strong degree of debate at the moment. Our best estimate is that about 90% of SSSIs will have some sort of environmental component anyway because they will have a species probably that is covered by the Directive’s requirements. What happens in those other cases where they might be governed, the

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debate is around: should you go beyond minimum transposition and put these SSSIs into the same regime as the Environmental Liability Directive or not? Our argument has been that we did not think there was a strong enough case to go beyond our normal better regulation principles. I admit it is very much a matter of debate and other people can and have come to other conclusions on this.

Q124 Mrs Moon: I still struggle to see why you reached that decision. You say that 98% of SSSIs would be covered. If you are talking about those figures and you are saying that in less than 1% of cases the ELD would be implemented, why would you not want to seek to give the best protection possible to the widest range of sites of habitats and species that we possibly could? We have a good record in this country of protection. Why are we not maintaining that? Why are we creating a field day for lawyers to argue that that is covered but that is not? It seems to me that what we are going to do is create a huge potential to spend large sums of money for lawyers—and in particular lawyers who are going to have to be employed by Natural England and the Environment Agencies—to argue, where there are cases covered by the Environmental Liability Directive, as to who is responsible for what. Why are we doing this? Why are we not protecting and giving the highest, simplest level of protection for our enforcement agencies to enforce? I still do not understand the reasons for this.

Ian Pearson: We are giving a high level of protection now and have been for a considerable period of time. The regime that we have through our own domestic legislation is very strong indeed. We then face the situation where the Environmental Liability Directive comes along and cuts across in a little way some of what we do in the United Kingdom already. When it comes down to it, you look at the requirements of the ELD and, in a lot of cases, they are no different to the regime that we have at the moment. There are potentially some additional biodiversity benefits and there are issues about complementary and compensatory remediation. We welcome the Directive and what it does on that. When, for instance, you look at the penalties under the ELD regulations, they are talking about a £5,000 fine and/or three months' imprisonment in the magistrates' court. Under the Water Resources Act, it is £20,000 in the magistrates' court or three months' imprisonment. The Wildlife and Countryside Act as well has a similar sort of regime when it comes to penalties. We should not get ourselves into a position of saying that there is a great deal of extra benefit here when it comes to implementing the Environmental Liability Directive. As we have shown in Regulatory Impact Assessment, there are some additional benefits but I do not think we should over egg the pudding here. My assessment of this is that, because this is at such a high level, we have yet to see how lawyers—you are right to raise the point about lawyers; that concerns me as well—will interpret significant, adverse effects and favourable conservation status. I would imagine that the burden of proof here is going to be quite

high. In those circumstances, the situation is that we have potentially a directive that could be neater. We could try and rewrite all our existing environmental protection legislation so it is completely consistent with the ELD. We do not really think that that is worth the effort at the moment. We do not think that going beyond the minimum implementation really offers a significant benefit. That goes back to a definition of what is "significant".

Q125 Chairman: What is the definition of the word "significant" in all this?

Ian Pearson: I do not have my dictionary in front of me.

Q126 Chairman: I know what the dictionary definition is. All of the terminology is about significant levels of damage. I was interested as to how the judgment was made between damage and significant damage. In other words, is it a statistical assessment of a loss of species in biodiversity on a piece of land that is damaged, or what? How do you determine the meaning, within ELD terms, of "significant"?

Ian Pearson: I would defer to the lawyers as to how they are going to interpret this. You are right to say that when it comes to the Directive itself it is talking about significant effects on maintaining conservation status, on ecological or chemical status of water bodies and it is talking about land contamination that has a significant effect on human health.

Q127 Chairman: In your consultation you asked about this significant issue. How do we define "significant" in this?

Ms Connell: I do not think it is a legal question. I think it is a scientific question. The question of significance of damage arises in the context of contaminated land already under the Environmental Protection Act. It is already something that local authorities have to grapple with and it is not easy. Somebody is going to have to take a value judgment in an individual case. At the end of the day, you can write all the guidance you want but some individual is going to have to take a view whether the impacts that they have found, compared with the background information that they have, are significant in their opinion. I do not think that is going to be an easy thing to do. Once that judgment has been made, it seems entirely possible that people will then want to challenge that judgment, but it is the kind of judgment that we have already.

Q128 Mrs Moon: Are you going to include the RAMSAR wetland sites within the ELD?

Ian Pearson: 74 out of 77 in England and Wales are already Natura 2000 sites. For those that are not—

Q129 Chairman: That is three, is it?

Ian Pearson: Yes. They are Rosburnmere, Esthwaite Water and the Pevensey Levels. I am told that they will host either habitats or species of community interest so therefore they will be covered by the ELD.

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Q130 Mrs Moon: You said that the Habitats Directive is to be implemented offshore, up to 200 miles. Is there therefore going to be ELD protection for nationally protected marine biodiversity?

Ian Pearson: This is an area that I am not familiar with. I am happy to write to the Committee.

Ms Connell: At the moment, if one takes a minimum implementation stance, the biodiversity which is protected is the biodiversity that is listed in the Directive, whether that finds itself on land or out to sea. To the extent that it is not listed in the Habitats or Birds Directives, on the minimum implementation stance, it would fall outside ELD protection. The same goes for marine habitat and species as for land based. It is the same issue.

Q131 Mrs Moon: There will be no protection under the ELD for our marine nature reserves?

Ms Connell: Not unless they are European listed or unless a decision is made to extend protection.

Q132 Chairman: You have made it clear that the Government is not proposing to require operators to hold financial securities in order to meet liabilities that may arise. They may want to cover those risks by other instruments but you are not going to specify how they do that. Have you identified any potential unfunded liabilities—in other words, things that are not covered by anybody—that could occur in this field as a result of this legislation for which the Government would be liable?

Ian Pearson: I am not sure there is anything else that has not been considered as part of the Regulatory Impact Assessment.

Mr Atkinson: There is nothing in the Directive that places subsidiary liability on the state in cases of default. If there was damage which arose for which somebody could not be held responsible there is no absolute requirement on the state to remedy it. Having said that, the competent authorities at the moment, the regulators at the moment, make

decisions every day in those situations about where they think it is important to take action themselves to remedy damage and they would take those decisions also no doubt in the case of the Environmental Liability Directive.

Q133 Lynne Jones: One of your public service agreement targets is to have 95% of your SSSI sites in favourable or recovering condition by 2010. Would you expect the ELD to assist in this? If you do not improve on your current performance, which I think is 23% that are not recovering or are in decline, would you consider whether your no gold plating attitude should be reconsidered?

Ian Pearson: Obviously we looked at extending the Directive to SSSIs that will not be covered anyway. Our conclusion would be that this would have only a very small benefit indeed in terms of meeting our 95% target. I think the figure was one percentage point. Based on that, I do not think extending the ELD produces a significant benefit. We have to look to other measures that we might want to take as Government and through our agencies and regulators to help meet our PSA target.

Q134 Chairman: Thank you very much indeed Minister, Ms Connell and Mr Atkinson, for being here for quite a long time, but it is a detailed area. The Committee are interested to learn that there will be further consultation before the regulations are drawn up.

Ian Pearson: Can I correct you, Chairman? My current intention is that there will be consultation on the regulations themselves rather than consultation before the regulations are drawn up.

Q135 Chairman: There is another bite at the cherry for those who want to have their two penn'orth and a chance for you to reflect on this.

Ian Pearson: There certainly is.

Chairman: Thank you very much indeed for your contribution.

Supplementary memorandum submitted by the Department for Environment, Food and Rural Affairs (ELD 18a)

IMPLEMENTATION OF THE ENVIRONMENTAL LIABILITY DIRECTIVE

I am writing following my evidence to the Committee on the implementation of the Environmental Liability Directive (ELD) on 13 June. The Committee requested a written response to a question on access to justice; Article 13 of the ELD. It was asked whether Article 13 was drafted for Member States who do not have as well developed a legal procedure for redressing challenges, as the UK has through the Judicial Review process, or if any Member State has expressly said they cannot challenge in court.

It is not possible to obtain his information without extensive inquiries. We have however established that the text in Article 13 is largely as originally drafted by the Commission. Arguably, because Article 13 was merely expressing the requirements of the Aarhus Convention, no Member State should have a problem with it. We believe there were discussions to ensure it did not require going beyond Aarhus. It was perhaps the slightly novel aspects of the remedies under the ELD that made the Commission want third party rights explicitly set out in the Directive.

The Committee may be interested to know that in a recent survey my officials conducted on Member States' proposed approach or decision on discretions and other key provisions of the Directive, 6 Member States (11 responses were received) said they were not proposing to adopt the discretion in Article 12(5). This is a discretion allowing Member States to decide whether or not to apply the request for action to cases of imminent threat of damage.

Ian Pearson MP

22 June 2007

Written evidence

Memorandum submitted by the Marine Conservation Society (ELD 01)

1. INTRODUCTION:

1.1 The Marine Conservation Society (MCS) is the charity dedicated to the protection of UK seas, shores and wildlife. Since 1987, MCS has campaigned to improve coastal and estuarine water quality in the UK, to stop the degradation of the marine environment from pollution, and to protect vulnerable marine species and habitats.

1.2 MCS welcomes this opportunity to give a written submission to the EFRA Committee enquiry into Defra's implementation of the European Environmental Liability Directive (ELD). We have focused our response on the ELD implementation as it relates to the UK marine environment.

2. EXECUTIVE SUMMARY:

2.1 MCS believes that the Defra consultation published in November 2006 failed to address a fundamental conflict between the ELD and the European Common Fisheries Policy as it relates to activities causing biodiversity damage in UK seas.

2.2 MCS also believes that the Government's preferred options for transposition failed to meet existing UK commitments to the protection of marine biodiversity, did not give sufficient weight to the ELD's underlying "polluter pays" principle, and that the consultation failed to address the question of who will stand as competent authority in UK waters at one to 200 nautical miles from territorial baseline.

3. KEY POINTS:

3.1 *Conflict between the European Common Fisheries Policy (CFP) and ELD provisions covering marine biodiversity damage:* It is MCS' understanding that activities covered by the CFP presently have special derogation from the ELD, and that any damage caused to marine biodiversity as a result of CFP activities is exempt from the ELD, regardless of the behaviour of the operator. This fundamental legislative conflict should have been addressed in the ELD consultation.

3.2 *Competent offshore authority:* The ELD covers the marine environment between one and 200 nautical miles from territorial baseline in respect of biodiversity and morphological damage. The Environment Agency (EA) is Defra's preferred competent authority for ELD regulatory enforcement. The EA's jurisdiction ends at one nautical mile offshore. Defra's consultation offers no proposals for an offshore competent authority.

3.3 *Natura 2000 sites:* The Government's preferred minimum transposition option restricts biodiversity and morphological protection under the ELD to Natura 2000 sites. It should be noted that there are no marine SSSIs, and just 1.4% of the UK's waters to 200 nautical miles are designated as Natura 2000 sites.

3.4 Given the statutory obligations of public office holders under the Natural Environment & Rural Communities Bill (2006), MCS believes that restricting protection to Natura 2000 sites in the marine environment fails to meet minimum transposition requirements.

3.5 In order to meet 2010 targets under the Biodiversity Action Plan, MCS strongly supports the inclusion of UK BAP species and habitats, OSPAR MPAs, Nationally Important Marine Sites, Highly Protected Marine Reserves, and RAMSAR sites within the UK provisions for the ELD.

3.6 We further note that Defra failed to consult on how Environmental Management System restrictions within offshore protected sites will be integrated with the ELD.

3.7 MCS believes that the *Greenpeace v UK Government* ruling (1999) on the application of the European Habitats Directive (1992) to waters beyond 12 nautical miles also has bearing on the ELD transposition. We understand that Defra has consulted with the Joint Nature Conservation Committee (JNCC) on progress with the Offshore Marine Regulations, and we are therefore surprised that the ELD consultation makes no reference to these regulations.

3.8 Following two public consultations by the JNCC, the Offshore Marine Regulations are likely to be published before ELD transposition is complete, and should therefore be integral to the ELD provisions for offshore marine biodiversity protection.

3.9 *Introduction of the permit and state of knowledge defences:* Introduction of the permit and state of knowledge defences was rejected by the Government in relation to Part II A of the Environmental Protection Act (1990). In addition, compliance with a permit does not free operators from liability under the Habitats Directive (1992).

3.10 MCS believes that the introduction of the permit and state of knowledge defences will weaken the Water Resources Act (1991), the Merchant Shipping & Maritime Security Act (1997) and the Food & Environment Protection Act (1985), and detract from UK obligations to the OSPAR and London Conventions on the prevention of marine pollution from dumping and land-based sources.

3.11 We also believes that these defences run counter to the “polluter pays principle”, placing an added burden on the permitting authority to ensure that consented activities do not threaten the environment. Where the consenting process is flawed, and damage occurs, it is the taxpayer not the operator who will bear the cost of remediation. MCS further believes that immunity from liability for selected activities is inconsistent with the ELD’s general principle of environmental responsibility.

3.12 *The capacity of organisations such as . . . NGOs to take action under the Directive:* MCS believes that the removal of the right of natural or legal persons to request action in cases of an imminent threat of damage to the environment is not compatible with the Environment Act (1995) or the Natural Environment & Rural Communities Bill (2006). We also believe that it would contravene the Aarhus Convention (2005) on access to justice in environmental matters.

3.13 In addition, the ELD does not provide a strong enforcement regime, with a tendency toward operator self-regulation. The rights of NGOs in particular to request the competent authority to take action would bolster the enforcement provisions of the ELD.

3.14 *Timescale for implementation:* Given that the Water Framework Directive (WFD) is integral to the ELD in respect of water damage, MCS does not believe that sufficient regard was paid in the ELD consultation to the timescales for WFD implementation.

3.15 For example, Defra has stated that a formal classification instrument for WFD standards and conditions will not be available until 2008 at the earliest, and yet Defra is relying on this classification instrument to assess water damage under the ELD.

3.16 There is also, of course, the wider question as to why Defra will miss the ELD transposition deadline of 30 April 2007.

April 2007

Memorandum submitted by the Royal Society for the Protection of Birds (ELD 02)

SUMMARY

In the RSPB’s opinion the “minimum” implementation approach taken by the Government in relation to the transposition of the Environmental Liability Directive (ELD) is fundamentally flawed. It prioritises avoiding cost increases for polluting business, even when they are outweighed by overall benefits to society and the environment, and result in increased administration costs for non-polluting businesses. Thus the minimal implementation approach clearly contradicts the Government’s own Better Regulation principles. The RSPB is concerned by the narrow application of this approach and believes that the following issues for consideration by the EFRA Committee are affected by this:

- *Some important issues have been omitted from the Consultation.*
- *The Government intends to exercise Member State discretion where this favours business and goes against the environment, but not vice versa.*
- *The concept of extending strict liability is rejected despite being of net benefit.*
- *The definitions of water and biodiversity damage are to be overly restricted—by applying thresholds at too high a level and by focusing on Natura 2000 sites.*

The RSPB would like to see the “environmental” options set out in Defra’s consultation implemented, for example by including SSSIs, by extending strict liability and by not applying the “permit” and “state of knowledge” defences. All these options are shown to have an overall net benefit to society in Defra’s partial Regulatory Impact Assessment (the “RIA”). Unless addressed, the transposing legislation will fail to adequately protect wildlife, as well as undermine the “polluter pays principle” and risk weakening, or at least being in conflict with, existing UK laws and potentially under-implementing the ELD and breaching other EU Directives.

STAKEHOLDER CONSULTATIONS AND CONSIDERATION OF STAKEHOLDER VIEWS

1. The RSPB attended stakeholder meetings with Defra in London on five occasions after 30 April 2004. Two of these were joint NGO/industry workshops. In addition representatives of the RSPB attended four regional workshops organised by Defra in January 2007.

2. In the RSPB's opinion the Government's "minimum" implementation approach (see paragraph 2.5 on page 22 of Defra's consultation) has meant that the views of "green" stakeholders have not been given due consideration. It is the RSPB's view that the strength of environmental arguments has not been examined simply because they do not accord with the Government's narrow interpretation of the minimum implementation approach, rather than being tested against a true "better regulation" approach.

IMPORTANT QUESTIONS OMITTED FROM THE FORMAL CONSULTATION

3. Important areas omitted are:

- the inclusion of liability for damage to UK Biodiversity Action Plan habitats and species;
- a discussion of financial security instruments, markets and mechanisms;
- more discussion on the effective enforcement of the Directive; and
- the application and effectiveness of the transposing legislation to damage caused by genetically modified organisms ("GMO"s) and to the marine environment.

THE "PERMIT" AND "STATE OF KNOWLEDGE" DEFENCES

4. The RSPB strongly disagrees with the introduction of the "permit" and "state of knowledge" defences. Doing so would effectively undermine the "polluter pays principle" and the principle of strict liability, upon both of which the ELD is built. Also, according to the RIA, not introducing the defences carries a net social benefit.

SSSIs, BIODIVERSITY ACTION PLAN HABITATS AND SPECIES AND GOVERNMENT WILDLIFE TARGETS

5. The RSPB strongly advocates including Sites of Special Scientific Interest (SSSIs) and Ramsar sites in the transposing regime, and also, within the next five years, Biodiversity Action Plan habitats and species. To do so would make sense logically, legally, environmentally and from an administrative point of view. To omit them will make for a cumbersome, confusing and unfair system resulting in a potential devaluing effect on nationally protected wildlife by not offering the same protection in relation to the prevention and restoration of damage, and in "double-banking" according to better regulation rules.

6. Omitting nationally protected wildlife will also make it harder to meet Government wildlife targets, as the incentives to prevent damage in relation to nationally protected wildlife and the likelihood of restoration if damage occurs will be much lower, especially as the Government does not appear to intend to introduce any state responsibility for restoring environmental damage where the "polluter" does not or cannot pay. Given that Defra has a tough target to ensure that 95% of all English SSSIs are in favourable condition by 2010, it seems perverse that it will fail to use this opportunity to ensure that cost of damage to sites will be met by businesses that cause the damage rather than the tax-payer.

7. Implementing the ELD should not affect the resources available for meeting wildlife targets. The ELD regime will need to be properly and separately resourced if it is to be effective. If damage to SSSIs, for example, occurs, then this damage will need to be dealt with to meet Government targets, irrespective of whether the ELD applies or not. The ELD regime may even help authorities to fulfil some of their existing tasks as regards wildlife targets, for example in relation to establishing "favourable conservation status" for protected wildlife.

THE CAPACITY OF COMPETENT AUTHORITIES AND NGOS TO TAKE ACTION UNDER THE DIRECTIVE

8. The capacity of competent authorities to take action under the Directive will be hampered if there is an ineffective and vague enforcement mechanism and by a lack of funding for the restoration of environmental damage, in particular where there is "orphan damage" (where no-one responsible for the damage can be found or can pay), or where operators are not obliged to pay for damage under the "permit" and "state of knowledge" defences. This could lead to a situation where the Directive is simply not enforced.

9. Removing the right of NGOs to request the competent authority to take action in cases of imminent threat of damage would remove the most important right that NGOs have in respect to protecting the environment under the ELD. It is always better—and it is a fundamental aim of the ELD—to prevent damage, rather than to wait until it has happened and then take action. There is in any case a gap in the Directive in relation to the identification of environmental damage, which this right would help compensate for.

Memorandum submitted by the UK Environmental Law Association (ELD 03)

INTRODUCTION

The UK Environmental Law Association (UKELA) aims to make the law work for a better environment and to improve understanding and awareness of environmental law. UKELA's members are involved in the practice, study and formulation of environmental law in the UK and the European Union. UKELA attracts both lawyers and non-lawyers and has a broad membership from the private and public sectors.

UKELA prepares advice to Government with the help of its specialist working parties, covering a range of environmental law topics. This response has been prepared with the help of the Insurance and Liability and Environmental Litigation working parties.

UKELA makes the following comments to the Committee's inquiry into the implementation of the Environmental Liability Directive ("ELD") by the Department for Environment, Food and Rural Affairs ("Defra") in respect of the issue of whether any important questions were omitted from the formal consultation.

EXECUTIVE SUMMARY

UKELA considers that Defra has failed to consult either appropriately or lawfully on the ELD due to its omission of the following crucial questions from the consultation paper issued by it.² In particular, UKELA considers that Defra has failed to consult on the access to justice provisions in articles 12 and 13 of the ELD of sanctions for breaching the domestic law transposing the ELD. In addition, the absence of any proposals on access to justice puts the Government at risk of being in breach of the Directive's requirements.

COMMENTS

Access to justice

1. There is no detailed discussion about: (a) implementation of the access to justice provisions; (b) how they will work in practice; or (c) provisions for access to a court/tribunal to review any decision by the competent authority following a request for action. The only discussion in the consultation focuses on whether the "request for action" provisions should be extended to cases of imminent threats of environmental damage.

2. UKELA is of the view that the Government must consult on its proposals for implementing the request for action procedure and the provisions for access to a court/tribunal and that it must do so before it issues draft regulations. If it does not do so, it will be acting unlawfully. See the recent case of *R (on the application of Greenpeace) v Secretary of State for Trade and Industry* about the legality of the Government's consultation process on new nuclear build and in particular the references to the Aarhus Convention on access to information and participation in environmental decision making.

3. The implications to be drawn from the consultation paper are that the status quo will continue as regards access to justice. Yet the status quo contains significant barriers to justice. These include prohibitive costs of bringing an environmental action before the Courts. It is not clear whether protective costs orders will be granted for review of cases brought under the Directive. Even applications for protective costs orders have the potential to incur significant costs. Whilst this barrier to justice remains in place, most individuals/environmental groups will not even be able to risk applying for a protective costs order.

4. It is UKELA's view that the current barriers to justice puts the Government at risk of failing to comply with Article 13 of the Directive ("The persons referred to in Article 12(1) shall have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts of failure to act of the competent authority under this Directive").

Criminal sanctions

5. The Government appears to assume that only criminal sanctions would apply to implementation of the ELD and does not discuss whether it has considered civil sanctions and, if so, its conclusion.

April 2007

² See *R (on the application of Greenpeace) v Secretary of State for Trade and Industry* (Times Law Reports, 16 February 2007) (consultation process which failed to provide adequate information on which consultees could respond was seriously flawed and manifestly inadequate).

Memorandum submitted by the Agricultural Biotechnology Council (ELD 04)

1. INTRODUCTION

1.1 The Agricultural Biotechnology Council (abc) welcomes the opportunity to respond to the Environment, Food and Rural Affairs Select Committee's inquiry on the Implementation of the Environmental Liability Directive.

1.2 abc is the umbrella group for the agricultural biotechnology industry in the UK. The companies involved include BASF, Bayer CropScience, Dow Agrosiences, DuPont/Pioneer, Monsanto and Syngenta.

1.3 abc's goal is to provide information and education about the use of Genetically Modified (GM) technology in the UK and around the world, based on respect for public interest, opinions and concerns.

1.4 abc supports an approach of actively engaging with all stakeholders in the public policy arena on issues relating to the use of GM technology. As such, the group submitted a response to the Government's consultation on the Environmental Liability Directive (ELD), which closed on 28 February 2007. The following submission to the Environment, Food and Rural Affairs Select Committee builds on our response to the consultation in a manner that aims to answer the specific terms of reference set by the Committee. We have, therefore, limited our responses to the Committee's questions relating to the defences the Government is seeking to apply under Article 8 (4) of the Directive.

2. EXECUTIVE SUMMARY

- abc backs the Government's moves to enshrine the ELD into National law as a means of protecting, conserving and enhancing the UK's biodiversity.
- abc is supportive of the Government's science-based and proportionate approach to the implementation of the ELD, which looks to avoid gold-plating existing legislation and ensure that the UK's agricultural sector remains progressive, profitable and sustainable.
- abc fully supports the use of "permit" and "state of knowledge" defences as they relate to the use of GM technology in the UK. We believe their introduction is wholly appropriate due to the stringent regulations already in place to ensure that only when Genetically Modified Organisms (GMOs) have been assessed to be safe to human health and the environment are they allowed to be grown or consumed. We also believe the defences are critical to secure continuing innovation in the agricultural sector which can be deployed in a manner sensitive to the natural environment.

3. THE "PERMIT" AND "STATE OF KNOWLEDGE" DEFENCES

3.1 abc agrees with the Government's general approach of the ELD into UK law. In particular, we welcome its preference for:

- Carefully managing the interface between EU and UK environmental law in accordance with the principles of Better Regulation;
- Ensuring evaluations of liability are proportionate, underpinned by sound science, and assessed on a case-by-case basis; and
- Introducing the "polluter pays" principle into UK law in a sensitive manner, which secures the protection of the natural environment whilst ensuring that the UK's agricultural sector remains progressive, profitable and sustainable. It is essential that the concept of "polluter" is used rationally, consistently and uniformly by all groups involved in the use, maintenance and protection of the natural environment.

3.2 abc believes that stringent regulations are already in place to militate against the possibility of "significant harm" (invariably undefined) from Genetically Modified Organisms (GMOs). EC Directive 2001/18 EC ensures a step-by-step, case-by-case assessment of potential risks to the environment before any GMO can be released or placed on the market. This includes an environmental risk assessment, as well as a post-market monitoring plan including the monitoring of the long-term effects of that GMO on the environment.

3.3 abc believes that these requirements, as well as the obligation to conduct extensive field trials to test the suitability of specific GM crops to UK conditions, provide a comprehensive framework of governing the impact of GMOs on the environment. We are, therefore, fully supportive of the Government's proposal to implement a permit defence, as this will provide legal security for users of approved GM products who comply with the extensive legal requirements associated with such products. Failure to implement the permit defence will prevent insurers from entering the market, which runs contrary to Article 14 of the ELD. It will also serve as a barrier to innovation.

3.4 abc also strongly supports the Government's view that the "state of knowledge" defence is justifiable. Science is continually evolving. As with all forms of innovation, it is unreasonable to expect the

manufacturer or user of a GM product to be able to predict effects that may arise in the future and that were beyond the state of scientific knowledge existing at the time of sale and use. This approach is consistent with the Government's science-based and proportionate approach to policy making and regulation. It will not, as other groups have attested, prevent research into potential adverse effects of GM technologies.

April 2007

Memorandum submitted by the City of London Law Society (ELD 05)

The City of London Law Society (CLLS) represents approximately 12,000 City solicitors, through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to Government inquiries and consultations on issues of importance to its members through its 17 specialist committees. These comments have been prepared by the CLLS Planning and Environmental Law Committee, which is made up of solicitors who are experts in their field. The comments respond to the invitation by the House of Commons Environment, Food and Rural Affairs Committee (Committee) inquiry into the formal consultation by the Department for Environment, Food and Rural Affairs (Defra) on the implementation of the Environmental Liability Directive (ELD).

The CLLS comments on only two questions raised by the Committee as indicated below.

1. EXECUTIVE SUMMARY

1.1 The CLLS considers that Defra's formal consultation on the ELD is fatally flawed due to its omission of many key issues.

1.2 The CLLS further considers that the ELD applies to environmental damage which is caused after 30 April 2007 and, therefore, Defra's failure to propose legislation to transpose the ELD by that date will prejudice operators.

2. IMPORTANT QUESTIONS WHICH WERE OMITTED FROM THE FORMAL CONSULTATION

2.1 The CLLS considers that the formal consultation by Defra on implementation of the ELD is fatally flawed due to its omission of many key questions.

2.2 The CLLS bases its conclusion, in part, on *R (on the application of Greenpeace) v Secretary of State for Trade and Industry* (Times Law Reports, 16 February 2007), in which the Administrative Court concluded that a consultation process which fails to provide sufficient information to enable consultees to make an intelligent response is manifestly inadequate and fatally flawed.

2.3 In particular, the CLLS considers that Defra has failed to provide any information on the Government's proposed mechanism for ensuring access to a court or tribunal in order to seek review of the procedural or substantive legality of a competent authority's decisions, acts or failure to act, as directed by articles 12 and 13 of the ELD.

2.4 Further, the CLLS considers that Defra has failed to consult on how operators will comply with:

- (a) their duty under article 6(1)(a) of the ELD to take "all practicable steps to *immediately* control, contain, remove or otherwise manage the relevant contaminants and/or any other damage factors in order to limit or to prevent further environmental damage and adverse effects on human health or further impairment of services" (emphasis added); and
- (b) their duty under article 5(1) to take, "*without delay*", the necessary preventive measures when there is an imminent danger of environmental damage.

2.5 Instead of seeking comments on how operators will comply with these self-executing duties which arise simultaneously with their occupational activities having caused actual, or an imminent threat of, environmental damage, respectively, Defra has proposed thresholds for damage which will necessarily result in operators failing to comply with the ELD.

- (a) Defra has proposed that environmental damage to protected species and natural habitats will not occur unless the damage has a significant adverse effect on the "conservation status of the habitat or species over its natural range" (Consultation, paragraph 3.5). Such a threshold necessarily requires a lengthy and detailed scientific study, thus precluding operators from complying with their self-executing duties under the ELD.
- (b) Defra's proposed threshold for water would also require a lengthy and detailed scientific study. In this respect, Defra has proposed issuing guidance which will include criteria such as whether "effects are reversible, the length of time the water will be affected, the size of the affected area of

water, the loss of amenity, impact on groundwater or surface water resources and impact on aquatic ecosystems” (Consultation, paragraph 3.10). Again, such a threshold would preclude operators from complying with their self-executing duties under the ELD.

3. THE TIMESCALE FOR IMPLEMENTATION OF THE ELD

3.1 Article 17 of the ELD provides that the ELD does not apply to:

“damage caused by an emission, event or incident that took place before [30 April 2007]” and/or
 “damage caused by an emission, event or incident which takes place subsequent to [30 April 2007] when it derives from a specific activity that took place and finished before [30 April 2007]”.

3.2 Article 20 provides that the ELD entered into force on 30 April 2004.

3.3 The CLLS considers that article 17 strongly implies that the ELD applies to any damage caused by an emission, event or incident that takes place after 30 April 2007 even in the absence of domestic legislation transposing it.

3.4 The CLLS bases this conclusion, in part, on the ELD not containing any provision which would allow a Member State to apply the ELD to emissions, events or incidents at any date after 30 April 2007.

3.5 The CLLS, therefore, considers that Defra’s failure to lay regulations to transpose the ELD before Parliament so that Parliament may bring the ELD into force by 30 April 2007 will prejudice operators. If, for example, an operator causes environmental damage subject to the ELD after 30 April 2007 but before domestic law on the ELD has entered into force, the operator will have no guidance on its duty to remediate the damage or otherwise comply with the ELD. In particular, operators will be liable for interim losses from the date that their activity caused environmental damage (Annex II, paragraph 1(d)).

April 2007

Memorandum submitted by Natural England (ELD 06)

1. INTRODUCTION

Natural England is a new organisation which has been established under the Natural Environment and Rural Communities Act 2006. Its purpose as outlined in the Act is to *ensure that the natural environment is conserved, enhanced, and managed for the benefit of present and future generations, thereby contributing to sustainable development.*

2. RESPONSES TO QUESTIONS

(a) *What consultations Defra has had on the Directive since it was adopted in 2004 and with whom, and whether Defra has listened to consultees’ views. Why Defra has taken so long to consult formally on the ELD. Whether any important questions were omitted from the formal consultation.*

Defra has engaged with Natural England on a wide range of ELD related issues since 2004, including the contents of the first Public Consultation document (November 2006). The consultation paper was thorough on the transposition options, but should have also asked for stakeholder views on competent authority allocations.

(b) *What discretion Member States have in the implementation of the ELD, and the reasons for Defra seeking to apply the “permit” and “state of knowledge” defences under Article 8 (4). Which other Member States will be imposing strict liability to a wider range of activities than is Defra, and which are applying a more sensitive test of damage.*

The Government’s preferred option is to apply the “permit” and “state of knowledge” defences to the remediation requirements of the Directive that do not currently exist in environmental law. This is designed to create a more consistent and transparent regime, by avoiding undermining the existing legislation that regulates environmental damage caused by Annex 3 operations, where such defences do not exist. We support this approach. However, we do not support the Government’s proposals to introduce these defences before remediation is undertaken by the operator, because we believe this would result in remedial measures not being undertaken at all. This would be below the minimum requirements of the Directive, and therefore could lead to infraction proceedings.

The Government’s preferred option is to apply fault rather than strict liability to non-annex 3 operations. This was on the basis that better regulation principles do not endorse gold-plating of European Directives as this increases the burdens on business. Natural England does not support this approach. In summary, we believe that liability should be identical for both annex 3 and non-annex 3 operations, because non-annex

3 operations damage biodiversity more frequently; and creating a “level playing field” by applying strict liability to all operations would establish a more consistent and transparent regime. We are unaware of the position in other Member States.

The Government’s preferred option is not to apply a more sensitive test of damage. We support this approach because we believe the test of damage should be transposed exactly as it is written within the Directive.

We are unaware of the position in other Member States.

(c) Why the Government is proposing to limit the scope of the ELD to EU-protected biodiversity, and which SSSIs would be affected.

We understand that the Government wishes to limit the scope of the ELD to EU-protected biodiversity so as to conform with better regulation principles and avoid “gold-plating”. Natural England does not support this approach. In summary, we strongly believe that nationally protected biodiversity should be afforded the same level of protection as internationally protected biodiversity, and that creating a level playing field for all protected biodiversity would establish a more consistent and transparent regime.

Not applying the ELD to nationally protected biodiversity would affect 2477 of 3195 biological SSSIs, or 30% of SSSIs by area.

(d) What effect implementing the ELD in the manner proposed by the Government is likely to have on its meeting the 2010 targets under the Biodiversity Action Plan and its PSA target to bring 95% of nationally important wildlife sites into favourable condition; and whether the ELD may take resources away from achieving these targets.

The ELD is particularly relevant to halting biodiversity loss by 2010, as its provisions effectively ensure against any biodiversity loss due to damage covered by the ELD. Where biodiversity damage is repairable, operators are required to undertake primary remediation (to directly remediate the damage) and compensatory remediation (to provide replacement biodiversity during the period of recovery). Where biodiversity damage is irreparable, operators are required to undertake complementary remediation (to permanently provide replacement biodiversity). Provisions to provide compensatory and complementary remediation do not exist in current legislation.

74.7% of SSSIs are currently in favourable or recovering condition. The remaining SSSIs are in an unfavourable condition due to either damage or inappropriate management. The ELD addresses the problem of future damage but not inappropriate management.

On a case by case basis, the ELD may provide cost savings for competent authorities. Currently, competent authorities can only achieve remediation through expensive prosecutions. The ELD is an administrative rather than judicial regime, and places operators under duty to carry out remediation. However, the current remediation provisions are used at competent authorities’ discretion. Under the ELD, competent authorities must respond to cases of biodiversity damage that fall within its thresholds, and must also respond to requests for action from third parties. Both of these factors are likely to increase the frequency of biodiversity damage casework and therefore the resources that competent authorities would need to deploy to carry out their duties under ELD.

(e) The timescale for implementation of the Directive

Defra has kept Natural England informed of the likely transposition dates.

(f) The capacity of organisations such as the Environment Agency, Natural England and NGOs to take action under the Directive.

The ELD does not give NGOs the provisions to take action. However, they are able to formally request action from competent authorities. Our comments on our capacity to take action are covered in (d) above.

April 2007

Memorandum submitted by the British Insurance Brokers’ Association (ELD 07)

ENVIRONMENT LIABILITY DIRECTIVE: OPTIONS FOR IMPLEMENTING IN ENGLAND, WALES AND NORTHERN IRELAND

The British Insurance Brokers Association (BIBA) is the UK’s leading general insurance intermediary organisation. We represent the interests of insurance brokers, intermediaries and their customers, and have partner members from leading companies in the insurance industry.

BIBA decided that it should not attempt to co-ordinate a response from its membership to the specific 24 questions set out in the consultation document. The main reasons for reaching that decision were as follows:

-
- (a) The unfortunate timing of the release of the consultation document and the deadline for responses to be received by. This period in part taking place over the Christmas holidays but more relevant, bridging what is still a very heavy renewal period for many of our members' Client's policies.
 - (b) BIBA's ability to co-ordinate a response was further impacted by the lack of publicity sought by DEFRA to encourage responses.
 - (c) At BIBA we believed our key role was in encouraging our members' clients, the potential insured, to engage in the consultation as opposed to attempting to represent or co-ordinating their response. This is because our clients span all services and industries so it would be unlikely that we would provide a single clear input and we did not wish to belittle the impact of numerous submissions by presenting these as a single vote. In addition to encouraging our members clients to respond as individuals we suggested to those that could not that they consider responding through an appropriate trade association's submission or through AIRMIC.

BIBA represents brokers from throughout the UK and we believe that the discretions allowed to Member States under the directive itself will already result in diversity in laws between different member states rather than to bring about a harmonised approach to environmental matters. Whilst we appreciate that Scotland, Wales and Northern Ireland, due to devolution legislation, can elect to embrace different options, diversity in law makes it difficult for an insurance product to emerge to respond to the risks and potential liabilities which our clients face. It would be preferable if a consensus could be reached, particularly as many companies are now multi national.

Given the statute will not be finalised until after 30 April 2007, is it intended that the law, once passed, will have a retroactive date?

We were disappointed that no specific questions were put into the consultation in regard to Article 14(2) such as to seek opinion as to whether the time and period was adequate to measure the matters for which 14(2) requires a report returned, or to mention that statutory environmental insurance had been a facet of earlier drafts of the ELD and to ask respondents if they would favour this approach in order to create a level playing field in regard to them and their competitors?

On the subject of financial security we would like the Government to share with DEFRA and the ABI what their intended approach will be to discharge their duties in regard to Article 14(1). At this time we do not believe that Government appreciate that only a few entities consider environmental risk management to identify, assess and control their real potential and perceived environmental risks and liabilities to known and unknown issues. This applies to large organisations as well as SME's. BIBA encourages the Government to maintain a dialogue with the specialist insurers in this field (currently represented by ACE, AIG, Chubb and XL) through the ABI and with potential insureds through BIBA, and appropriate trade associations, to work on increasing awareness of environmental risks and liabilities, and through this to take steps to develop appropriate instruments for financial security and risk transfer thereof.

Many of the questions require answers on issues that are so basic to financial security instruments including insurances, that it is impossible for the insurance market to develop products until these are finalised. Examples include decisions of a strict and fault based liability, proportionate versus joint and several liability and permit defences. We have however addressed our comments from the point of view of encouraging an insurance market to develop.

Of the options we believe the insurance market would prefer the minimum of strict liability options as opposed to fault based ones, so we are largely in favour of the preferred options.

Consequently, BIBA call upon the Government to ensure that as a minimum, the following areas fundamental to successful operation of the Directive are incorporated:

- (a) Same options across the whole of the United Kingdom.
- (b) Proportionate liability rather than joint and several liability.
- (c) Liability based upon fault where this is an option.
- (d) Some controls on remediation work and therefore on costs.

In summary BIBA, through its members, are anxious to promote environmental liability insurance and assist in creating markets where appropriate. BIBA would be happy to discuss the content of this report in due course.

April 2007

Memorandum submitted by Genewatch UK (ELD 08)

GeneWatch UK is a not-for-profit organisation based in Derbyshire that monitors developments in genetic technologies from a public interest, environmental protection and animal welfare perspective. GeneWatch believes that the implementation of the Environmental Liability Directive (ELD) provides an important opportunity to improve environmental protection in the UK by implementing the “polluter pays principle”.

Because GeneWatch’s expertise is in genetically modified organisms (GMOs), our comments on the options for implementing the ELD are concerned with its relationship to activities using GMOs only but we support the submissions to this inquiry from the RSPB and from Wildlife and Countryside Link.

Many of our concerns about GMOs and the ELD have been covered by our submission to the DEFRA consultation which is included with this submission (Annex 1).³ We are calling for implementation to include:

- all sites of Special Scientific Interest and biodiversity action plan habitats and species;
- all water courses and bodies regardless of size;
- strict liability;
- removal of the permit and state of the art defences; and
- an extension of the time period for liability to 75 years for GMOs.

1. OMISSION OF GMOs FROM THE DEFRA CONSULTATION

In the late 1990’s one of the concerns which gave rise to the *de-facto* moratorium on GMOs was the issue of environmental liability. In paragraph 16 of the preamble to EU Directive 2001/18 on the deliberate release of genetically modified organisms, promises the Environmental Liability Directive will cover environmental liability for GMO damage:

“... Community legislation in this field needs to be complemented by rules covering liability for different types of environmental damage... To this end, the Commission has undertaken to bring forward a legislative proposal on environmental liability... which will also cover damage from GMOs”.

Despite this, the DEFRA consultation did not fully address genetically modified organisms in its consultation.

2. ARTICLE 8(4) “PERMIT” AND “STATE OF THE ART” DEFENCES

2.1 General

GeneWatch disagrees with the Government’s intention to introduce the “permit” and “state of the art” defences, as they undermine the application of the “polluter pays principle”. They were also considered inappropriate for introduction under Part IIA of the Environmental Protection Act 1990 (on contaminated land).

However, GeneWatch wishes to stress that there are additional factors in relation to GMOs which make these two defences particularly unsuitable for use in cases of environmental damage caused by GMOs.

2.2 Contained use of GMOs

Legislation covering the contained use of GMOs⁴ differs to that of other activities in Annex III of the ELD. Those operations considered the safest, “Class 1 activities”, only require an initial notification to the authorities of the centre carrying out the work. There are no actual specific authorisations for individual activities. Moreover, contained use consents, where they do exist (for the more pathogenic GMOs), do not deal in detail with waste other than imposing general requirements for how it is handled. There are no quantitative waste discharge consents and no independent waste monitoring activities.

2.3 Risk Assessment of GMOs and Uncertainty

One of the central problems in this context is GM authorisations are very wide compared to other permits, such as those allowing discharges of hazardous substances from factories. They can cover the whole EU, irrespective of differing conditions in the various Member States or of the location of the ultimate use of the GMO (eg close to a nature reserve), unless specific conditions are imposed, which has never been the case to date. Therefore, a GM company could cause environmental damage, but be protected by a licence, which did not and was never intended to deal with the type of damage caused.

³ Not Printed.

⁴ Directive 90/219/EC on the contained use of genetically modified micro-organisms.

The use of GMOs and particularly GM crops is still relatively new and limited. Currently, almost all commercially grown GM plants utilise just two types of herbicide tolerance and one type of insect resistance. Even with these relatively simple crops, the EU risk assessment process contains uncertainties and assumptions. These have led to more than a decade of disagreement amongst Member States despite the introduction of a new environmental Directive in 2001 and new food and feed safety Regulations in 2003⁵ By way of example, GeneWatch would like to draw the Committee's attention to the minutes of the EU Environment Council Meeting of 20 February 2007 (Annex 2)⁶ in which the council:

- upheld the position of Hungary to provisionally prohibit the use and sale of *Zea mays* L. line MON 810, justifying the decision the Council stated "*the different agricultural structures and regional ecological characteristics in the European Union need to be taken into account in a more systematic manner in the environmental risk assessment of GMOs.*"
- rejected the Commission proposal to place on the market Carnation *Dianthus caryophyllus* L., line 123.2.38, genetically modified for flower colour. This was based, in part, on concerns about allergenicity and toxicity.

Since, 2004 the EU Commission has used its executive powers to authorise GM crop commercialisation despite Member State disagreement.

This means that, for example:

- Permits are being granted for GMOs despite objections from member states that they will cause harm to the environment or health;
- The "state of the art" includes a range of opinions, some of which predict harm to the environment or health as a result of deliberate releases of GMOs. If the harm predicted by some member states subsequently occurs it is unclear whether a court would accept that a company is exempt from liability. Hence, if the permits and "state of the art" defence were to be implemented it would not be clear if and how far either would be applicable and this is likely to lead to confusion by both Competent Authorities and industry.

Additionally the state of the art defence may provide a disincentive for companies to conduct research into potential harm.

3. STRICT LIABILITY

GeneWatch favours the imposition of strict liability in relation to any environmental damage caused by any activity. This is particularly important in the GM context because of the complex issues surrounding the identity of the party who actually causes environmental damage through GMOs (eg the farmer/vet or the GM company). For GM damage to be covered by the Directive, it is crucial that there be strict liability.

There is undoubtedly public scepticism about the benefits of GM crops and foods in particular in the UK. It is extremely unlikely that the British public would welcome anything other than strict liability for GMOs in the UK. Although there has been no specific research on this subject (this is something that could usefully have been conducted by DEFRA to inform the decision about where the balance of interests should lie), the findings of the Government's public debate "GM Nation?" revealed that although people were not opposed to GM in principle they wanted, among other things, "firm regulation".⁷

GeneWatch believes the Government's proposed approach does not provide the firm or clear regulation and fails to implement the important principle that the polluter should pay for environmental damage.

April 2007

Memorandum submitted by the Association of British Insurers (ELD 10)

KEY POINTS

1. The Environmental Liability Directive (ELD) is a complex piece of legislation and requires careful implementation. Transposition has been protracted across Europe, and the ABI believes that clear, detailed implementation is imperative.

2. The ABI supports the Government's current method of transposing the ELD. It strikes the correct balance between environmental responsibility and the importance of adequate risk management. Transposing the Directive beyond its current scope could impact upon the ability of companies to obtain insurance cover.

⁵ Directive 2004/18/EC on the deliberate release into the environment of genetically modified organisms and Regulation (EC) 1829/2003 on genetically modified food and feed.

⁶ Not Printed.

⁷ http://www.gmnation.org.uk/ut_09/ut_9_6.htm#download

3. The “permit” and “state of knowledge” defences are factors in mitigation against liability, and make insurance easier to acquire. They are important in the efficient implementation of the ELD as they help speed up claims and clean-up processes.

INTRODUCTION

4. The Association of British Insurers (ABI) represents nearly 400 member companies, which between them provide 94% of the UK’s domestic insurance. It works on behalf of the UK insurance industry to keep standards high and to make its voice heard.

5. The ABI responded to DEFRA’s consultation in February 2007. Its joint response with Lloyd’s Market Association is appended as Appendix A.⁸

6. The ABI has been working with partners in the CEA, the trade body for EU insurers, to ensure a successful transposition of the ELD across Europe. The CEA produced a “white paper” on the insurability of environmental liability, which is available at <http://www.cea.assur.org/cea/download/publ/article255.pdf>

CONSULTATION PROCESS

7. The ABI considers that DEFRA has carried out the transposition process thus far in a considered and responsive manner. By January 2007, few member states of the EU had transposed the ELD, and of those of a similar size to the UK, only Italy had completed transposition, although the Government elected in April 2006 was reviewing the detail.

8. This is a complex piece of legislation, overlapping considerably with other environmental law, and including very technical aspects, particularly in the area of damage remediation. The ABI considers that it is crucial to ensure a transposition that is as clear as possible to all concerned, which could avoid lengthy legal argument at a later date.

DISCRETION AND DEFENCES UNDER THE ELD

9. The UK Government had discretion to move beyond the scope of the ELD, but its decision to maintain the Directive as it stands is correct. The ELD is already strong and comprehensive, and further regulation in this area could seriously harm the ability of companies to get insurance against their potential liabilities.

10. The UK insurance industry supports the “defences” outlined in the Directive. However, it should be noted that these proposals are not “defences” but mitigation factors that excuse liability. Article 8.4 of the Directive states: “The member states may allow the operator not to bear the cost of remedial actions taken pursuant to this Directive where he demonstrates that he was not at fault or negligent and that the environmental damage was caused by . . . [an emission or event authorised by a permit, or an emission or event caused by something not considered to cause environmental damage according to the state of knowledge at the time]”.

11. The “defences” provide clarity and certainty, and therefore contribute to an environment in which financial security instruments are more likely to develop.

12. The consultation paper asked whether the “defences” should be invoked before or after remediation is undertaken. The insurance industry believes very firmly that they must be invoked before remediation. This would avoid lengthy legal disputes during, or after, remediation work.

TIMESCALES

13. The ABI believes that the timescale for implementation is acceptable given the complexity of the measures. However, it is important for DEFRA to promptly set out the interim measures that will apply between the original transposition date of 30 April 2007 and the actual transposition, to give certainty to all stakeholders.

April 2007

⁸ *Not Printed.*

Memorandum submitted by the Wildlife and Countryside Link (ELD 11)

1. INTRODUCTION

1.1 Wildlife and Countryside Link (Link) brings together 37 voluntary organisations concerned with the conservation and protection of wildlife and the countryside. Our members practise and advocate environmentally sensitive land management and food production and encourage respect for and enjoyment of natural landscapes and features, the historic environment and biodiversity. Taken together, our members have the support of over eight million people in the UK.

1.2 Link believes that the “minimum implementation” approach to the transposition of the Environmental Liability Directive (ELD) has been applied too narrowly and we greatly welcome the opportunity to submit written evidence of our concerns to this inquiry. This document is supported by the following organisations:

- Bat Conservation Trust
- Buglife—The Invertebrate Conservation Trust
- Friends of the Earth
- Marine Connection
- Marine Conservation Society
- Plantlife
- Pond Conservation—The Water Habitats Trust
- Ramblers’ Association
- Royal Society for the Protection of Birds (RSPB)
- The Wildlife Trusts
- Whale and Dolphin Conservation Society (WDCS)
- Woodland Trust
- WWF-UK

2. SUMMARY

2.1 Link is concerned that the Government’s preferred options, as expressed in Defra’s consultation on the implementation of the ELD, will fail wildlife and the “polluter pays principle”, under-implement or breach the ELD and other EU Directives, over-restrict the interpretation of particular ELD articles, and weaken or conflict with existing UK laws. This is despite the Partial Regulatory Impact Assessment (RIA) showing the discussed variations as having strong overall benefits.

2.2 Link is also concerned that rules on better regulation have not been applied correctly either because an error has occurred in both the interpretation of the ELD and of the relevant figures, resulting in policy costs accidentally being double-counted, or because a qualitative judgement has been made to avoid increased costs to business even where such costs achieve net benefits to society and the environment.

2.3 Link believes that the “minimum implementation” approach has been applied too narrowly and hopes that this inquiry will seek answers to questions regarding;

- important issues omitted in Defra’s consultation, eg the possible inclusion of Biodiversity Action Plan (BAP) habitats and species;
- the way Member State discretions are exercised against the stronger environmental options;
- the extension of strict liability;
- the application of thresholds at too high a level in relation to the definitions of water and biodiversity damage; and
- the focus on Natura 2000 sites in relation to the definition of biodiversity.

2.4 Link urges the Government to consider options which are shown (in the RIA) to have a net benefit. These include the extension of strict liability, the inclusion of SSSIs, and the omission of the “permit” and “state of knowledge” defences.

3. STAKEHOLDER CONSULTATIONS AND CONSIDERATION OF STAKEHOLDER VIEWS

3.1 Link attended Defra stakeholder meetings on numerous occasions after 30 April 2004, two of which were joint NGO/industry workshops. Although these were found to be informative, it is our opinion that it has not been possible for the Government to give due weight to the views of environmental NGOs because of its narrow interpretation of the “minimum” implementation approach.

4. IMPORTANT QUESTIONS OMITTED FROM THE FORMAL CONSULTATION

4.1 We believe that a number of important areas were omitted from the formal consultation and include:

- the possible inclusion of UK BAP habitats and species;
- any discussion of financial security instruments, markets and mechanisms;
- sufficient detail of the enforcement regime for the Directive; and
- the application and effectiveness of the transposing legislation to:
 - (a) damage caused by genetically modified organisms (GMOs); and
 - (b) to the marine environment.

5. THE “PERMIT” AND “STATE OF KNOWLEDGE” DEFENCES

5.1 Link strongly disagrees with the introduction of the “permit” and “state of knowledge” defences as they would undermine the “polluter pays principle” and the principle of “strict liability”. The RIA states that omitting these defences would be a net benefit to society. Furthermore, “inadvertent” state liability would be less likely if the defences are not introduced⁹.

6. SSSIs, BAP HABITATS AND SPECIES, AND GOVERNMENT WILDLIFE TARGETS

6.1 Link strongly recommends the inclusion of SSSIs and Ramsar sites in the implementing legislation. We would also like to see BAP habitats and species included within the next five years. We believe the omission of nationally protected wildlife would result in a complex, confusing, economically inefficient and unfair system.

6.2 This will make it difficult for Government to meet its own wildlife-related targets, as damage would either fail to be restored or would only be restored at the cost of the state. More importantly, if the ELD were appropriately transposed, damage could be avoided or prevented from occurring, thus protecting existing efforts to meet the Government’s targets.

6.3 We believe that implementing the ELD should not have negative effects on monies available for meeting wildlife targets. The burden for paying for prevention and restoration of the relevant damage would lie with “polluters”—not the state—and would be in addition to monies already committed. It is also noted that introducing the “permit” and “state of knowledge” defences would shift some of the financial burden back on the state and ultimately back on the taxpayer.

7. THE TIMESCALE FOR IMPLEMENTATION

7.1 Link would prefer a slightly delayed timescale for implementation if this would allow all underlying environmental issues to be given full and fair consideration. However, Link understands that this will mean that the UK, like most other EU states, will be in breach of EU legislation.

8. THE CAPACITY OF COMPETENT AUTHORITIES AND NGOS TO TAKE ACTION UNDER THE DIRECTIVE

8.1 The capacity of competent authorities, such as Natural England and the Environment Agency, to take action under the Directive will be strongly impacted if there is no effective enforcement regime of the ELD, or if no provision is made for the restoration of damage in relation to which no polluter can be found, or if the polluter does not have to pay, eg should the “permit” defence apply.

8.2 Furthermore, Link is concerned that the rights of NGOs to take action under the Directive are affected by the Government’s decision to remove the right to request the competent authority to take action in cases of imminent threat of damage. This would amount to removing the essential role (and right) of NGOs in respect to protecting the environment under the ELD.

April 2007

⁹ For further details on the issue of “defences”, please see the Joint Link’s response to the formal consultation at www.wcl.org.uk/downloads/2007/Joint_link_response_ELD_19Feb07.pdf

Memorandum submitted by Friends of the Earth (ELD 09)

EXECUTIVE SUMMARY

Friends of the Earth Supports the LINK submission of written evidence to the EFRA committee and in addition submits the following:

The Aarhus Convention on Access to Justice, to which the UK Government is a signatory, guarantees members of the public, including NGOs the right to participate in environmental decision-making. The preamble to the convention states that in the area of environment, access to information and public participation in decision-making improve the implementation of decisions. For this reason the right of request in relation to “imminent threats” envisaged in the Directive should be retained. NGO expertise and involvement is likely to lead to better enforcement and reduced costs.

We also submit that the Government should have consulted on Article 13 of the ELD which should be read in accordance with the provisions of the Aarhus Convention. Consultation would demonstrate that the UK legal system is in breach of Article 13 and the Aarhus Convention.

1. KEY ISSUES IN RELATION TO ACCESS TO JUSTICE

1.1 We would point out that the Aarhus Convention on Access to Justice, to which the UK Government is a signatory, guarantees members of the public the right to participate in environmental decision-making. NGOs are specifically included in this context. The Preamble to the Convention states that, in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns. It goes on to acknowledge that this furthers accountability and transparency in decision-making and strengthens public support for decisions on the environment.

1.2 It is for precisely these reasons that the right of request in relation to “imminent threats” envisaged in the Directive should be retained. Given that many of the NGOs making requests in this capacity are likely to have expertise in relation to the issues on which they are making complaints, there is no reason to suppose that their requests are likely to fall outside the scope of the ELD. In addition, NGO involvement is likely to lead to enhanced protection of the environment and better decision-making, and may indeed result in reduced costs to competent authorities. In addition, there is a practical point to be made in that only providing NGOs with a right of request after damage has occurred is inevitably of far less benefit than providing an opportunity to prevent such damage occurring in the first place.

2. REVIEW PROCEDURES—IMPORTANT QUESTION OMITTED FROM THE FORMAL CONSULTATION

2.1 We believe that the Government should have consulted on Article 13 of the ELD, which guarantees access to a court to natural and legal persons, including NGOs. The right contained in Article 13 should be understood in the context of the Aarhus Convention, which guarantees access to a court procedure that is fair, equitable, and not prohibitively expensive. We believe that the UK legal system breaches the requirements of both Article 13 of the ELD and the Aarhus Convention as far as access to a court is concerned. This is because it is not possible for NGOs and members of the public to bring judicial review proceedings against competent authorities without incurring the risk of massive costs liability. Consulting on the implementation of Article 13 would have enabled respondents to put forward suggestions as to how to ensure that its provisions are met in practice.

April 2007

Memorandum submitted by the Confederation of British Industry (ELD 12)

EXECUTIVE SUMMARY

1. The Confederation of British Industry (CBI) has been involved in the policy debate about the Environmental Liability Directive (ELD) since early in its development and has worked with DEFRA to see that the UK position reflects business concerns.

2. DEFRA’s support for the ELD and ensuring that it contained many elements favourable to business was good. However, there is still uncertainty as to the details of the ELD implementation and the liabilities that could occur in the interim.

3. The CBI supports the decisions that the Government has taken on areas where discretion has been left to Member States as the best option to maintain UK competitiveness.

4. There are other regulatory developments such as the proposed Soil Framework Directive which will have implications for the future implementation of the ELD and therefore should be considered by this inquiry.

CBI EVIDENCE

1. The Confederation of British Industry (CBI)—with a direct company membership employing over four million and a trade association membership representing over six million of the workforce—is the premier organisation speaking for business in the UK. Our members represent a wide range of industry sectors, including those covered by Annex III of the Environmental Liability Directive (ELD).

POINTS ON THE COMMITTEE'S PARTICULAR INTEREST AREAS

DEFRA consultations

2. The CBI has been involved in DEFRA's stakeholder consultation on the ELD since the Directive was being discussed in Brussels. Prior to the agreement of the Directive, DEFRA's consultation with stakeholders was excellent: stakeholders were kept up to date of the progress of discussions in Brussels and information to support the Government's position was sought regularly. DEFRA's input at all levels led to the agreement of a Directive which included many elements needed to make implementation fit with good business practices.

3. Following the adoption of the Directive there was very little contact between DEFRA and stakeholders until late 2005, when a draft consultation document was discussed. Based on the DEFRA implementation strategy which was set out for stakeholders following the adoption of the ELD it is unclear why the transposition process has taken so long and why the UK will be late in implementing the ELD.

4. In other regulatory areas within DEFRA, the Environment Agency (EA) is invited to engage with the stakeholder group at an early stage. The EA has not to our knowledge been present at stakeholder discussions on the ELD, even though it would have been useful to have their input on issues such as the permit defence and the extension of the scope to cover UK designated sites and species. The CBI raised this concern at the stakeholder meetings and at the Committee's inquiry on the Environment Agency in 2006.

5. The CBI supports the Government's proposed approach to implementing the ELD, however, we are still unclear as to many of the details as these were not included in the recent consultation and will be determined through guidance.

Member State discretion

6. The CBI fully supports DEFRA's intention to adopt the permit and state of knowledge defences. DEFRA was instrumental in ensuring that the defences were included in the ELD.

7. The permit defence is particularly important for businesses whose activities are covered by Annex III of the ELD as they are already highly regulated. The cost of obtaining an IPPC permit for a complex site in the UK, for example, is well over £100,000, with annual subsistence charges of many tens of thousands of pounds. This does not include the internal cost to companies of dealing with the permit and its maintenance, reporting etc. In other Member States the costs associated with such permits is significantly lower. Not adopting the permit defence could impact the competitiveness of the UK based companies compared to those in other Member States.

8. The CBI has always supported DEFRA's intention of limiting strict liability under the Directive to Annex III activities. Proportionate liability is the most equitable means of dealing with multi-party cases and non-Annex III damage.

SSSIs

9. The CBI fully supports DEFRA's position on limiting the scope of the ELD to EU designated sites and species. Businesses who are situated near to a SSSI already have this reflected in their permit conditions and are subject to an increased regulatory charge as a result. Extending the scope of the ELD would be regulatory goldplating and could be seen as a way of making businesses who are in compliance with the law pay to achieve the Government's environmental quality targets for which they are not liable.

ADDITIONAL POINTS

10. There is still a lack of clarity as to how cases of environmental damage which meet the ELD thresholds will be dealt with between 30 April 2007 and the adoption of the UK regulations. In our response to the recent consultation we asked DEFRA to provide advice as to whether the existing regulations will apply, or if the ELD will be applied retrospectively to any such cases. As yet we have received no clarification from DEFRA on this matter.

11. The European Commission published proposals for a Soil Thematic Strategy and accompanying Soil Framework Directive (SFD) in September 2006. The SFD is closely linked to the ELD as it will in effect apply to soil contamination which occurred at a site before the ELD came into effect, and in the future to cases where the ELD limitation of liability of 30 years has expired. In addition, the SFD requires the revision of the ELD. The CBI is concerned that the SFD has none of the risk-based, proportional elements of the ELD and could have significant implications for business. For example, under the current proposal, sites which are identified as contaminated must be remediated, regardless of the potential risk posed, or the associated costs and benefits. Due to close linkages between the ELD and the SFD we feel that the Committee should look at the implications of the SFD on the implementation of the ELD as part of this inquiry.

12. It is important that the implementation of the ELD be considered within the context of the Better Regulation agenda, and in particular the Davidson and Macrory Reviews and DEFRA and the EA's proposed Environmental Permitting Programme (EPP).

April 2007

Memorandum submitted by the Institute of Ecology and Environmental Management (ELD 13)

The Institute of Ecology and Environmental Management (IEEM) welcomes the opportunity to comment on the implementation of the Environmental Liability Directive.

IEEM WELCOMES FOUR KEY PRINCIPLES OF THE DIRECTIVE:

- That operators who cause environmental damage (to biodiversity, to water and waterways and to land through contamination that is hazardous to health) should be held financially liable—the “polluter pays principle”.
- That operators of specified activities (largely those already subject to environmental permitting and regulation) have strict liability for remediation regardless of fault or negligence.
- That prevention is better than cure and competent authorities will have power to intervene and require remedial action by an operator when there is risk of damage.
- That time is often material to successful remediation and that the most successful outcomes will result from close and co-operative relationships between operators and competent agencies (eg regulators) (while not precluding enforcement through courts).

With reference to the specific points of interest to the Committee, the IEEM comments are as follows:

1. CONSULTATIONS

1.1 IEEM was pleased to have been involved with some of the earlier discussions with officials of Defra. From the outset the view of IEEM was that the SSSI's should be included as this was seen as a very useful contributory factor in achieving the 2010 targets. IEEM considers that it did have a chance to make its views felt. In respect of the inclusion of the SSSI's not subject to EU protection, while Defra officials may have listened, this viewpoint did not prevail as was made clear in the declared government's preference. It is assumed that this relates to the concept of not “Gold Plating” the transposition of EU directives into UK Law.

1.2 The timescale is somewhat curious and there was a long period between preliminary consultations and the publication of the final consultation document. The reasons for this were not evident to IEEM. The timing of the consultation was then unnecessarily rushed although the deadline was slightly extended. The timing over the Christmas period made it more difficult than it otherwise need have been, especially for smaller NGO's to make a response.

1.3 IEEM is not aware of any important questions being omitted.

2. MEMBER STATE DISCRETION

2.1 IEEM is aware of the variation in the application of strict liability across Member EU States and is disappointed in the proposed adoption in England and Wales of the permit and state of knowledge defences. It takes the view that strict liability should apply in all situations of biodiversity damage regardless of the class of activity which causes it.

3. EU PROTECTED BIODIVERSITY AND SSSI'S

3.1 The Government's viewpoint that that the ELD should be limited to EU protected biodiversity has never been supported by IEEM. This is on the grounds that a significant proportion of sites (SSSIs) in England and Wales are not included in EU protected biodiversity. The achievement of Favourable Conservation Status in these areas is an essential part of meeting the 2010 targets and not to include them discards a potentially very useful tool.

The UK approach historically has been to create a rather large number of protected sites which are small in area but nonetheless significant for Biodiversity.

Certain European countries have very large areas of SPA/SAC designated land—eg Slovakia (c30% of territory) and Spain (c25%). Only about 6% of England (10.3% of UK) has SAC designation. At the very least this means extending the scope of the transposition legislation to include all SSSIs and Ramsar sites.

From the practical viewpoint it is possible to envisage damage to closely adjacent sites being treated differently depending on whether one or the other was subject to EU protected biodiversity. This would be an administrative nightmare and no help at all to those implementing the legislation or having caused the damage.

3.2 IEEM however takes the view that the protection of EU Biodiversity and SSSI's though essential, will alone not be sufficient to meet the long term goals of biodiversity conservation, especially in the context of climate change and the need for species to migrate due to changing climatic conditions. In particular, ecological connectivity is recognised as essential in this process but Britain has so far failed to provide any effective response to this Article 10 of the Habitats Directive.

4. TIMESCALE

4.1 The timescale for the implementation of the Directive of 30 April 2007 will clearly not be met. This is assumed to be due to the delay in publishing the consultation document in 2006.

5. CAPACITY

5.1 IEEM concurs with the view that there may not be sufficient capacity within the organisations concerned to take action under the Directive. IEEM in a wider context is concerned that there appears to be an overall skills gap in carrying out much ecological work which has become more apparent in recent years. The Institute is instigating a major project to assess the scale of the problem and how it might be addressed.

IEEM

IEEM was established in 1991 and currently has around 3,000 members drawn from local authorities, government agencies, industry, environmental consultancy, teaching/research, and voluntary environmental organisations.

The objectives of the Institute are:

- To advance the science, practice and understanding of ecology and environmental management for the public benefit in the United Kingdom and internationally;
- To further the conservation and enhancement of biodiversity and maintenance of ecological processes and life support systems essential to a fully functional biosphere;
- To further environmentally sustainable management and development;
- To promote and encourage education, training, study and research in the science and practice of ecology, environmental management and sustainable development; and
- To establish, uphold and advance the standards of education, qualification, competence and conduct of those who practise ecology and environmental management as a profession and for the benefit of the public.

IEEM is a member of SocEnv (The Society for the Environment), EFAEP (The European Federation of Associations of Environmental Professionals) and IUCN (The World Conservation Union). IEEM has also signed up to the Countdown 2010 agreement to halt the loss of biodiversity.

April 2007

Memorandum submitted by the Institute of Biology (ELD 14)

SUMMARY

The Institute of Biology (IOB) welcomes this inquiry and is pleased to present its views to the Committee.

There are three specific points to which the Institute wishes to draw the Committee's attention.

1. In light of the scope, significance and history of the ELD, the consultation period allowed by Defra was too short. The list of consultees contained numerous omissions among learned and professional bodies and NGOs, and many interested parties—including the IOB—were therefore not informed of the consultation by Defra. Given that IOB responds regularly to such consultations, we were astonished not to have been directly informed of this consultation, and only heard of it serendipitously, soon before the closing date. This placed considerable strain on our efforts to collate specific facts and canvas detailed opinion. However, over a wide and diverse membership it is clear that IOB, and a number of our affiliated societies, disagree with much of Defra's strategy.

2. We reject Defra's recommendations to limit the scope of the ELD. We believe that all Sites of Special Scientific Interest (SSSIs) and UK Biodiversity Action Plan (UK BAP) habitats and species should be covered by ELD legislation. This would unify and streamline processes, and clearly signal the Government's commitment to prevent biodiversity loss and meet its own biodiversity targets.

3. The Institute fully supports and promotes the involvement of civil society in environmental matters. We encourage government departments to develop working relationships with NGOs in line with the established principles of EU governance. Many environmental NGOs are sources of valuable data and opinion and adhere to policies of reasoned and responsible environmental stewardship. We would be dismayed if NGOs were denied the right to challenge competent authority decisions not to act on reported damage.

INSTITUTE OF BIOLOGY

The Institute of Biology (IOB) is an independent and charitable body charged by Royal Charter to further the study and application of the UK's biology and allied biosciences. We have around 14,000 members and over 50 specialist learned Affiliated Societies. We are a founder member of the Biosciences Federation.

OPENNESS

The Institute of Biology is pleased for this response to be publicly available and will place a version on www.iob.org when the Committee allows.

AFFILIATED SOCIETIES REPRESENTED BY THE INSTITUTE OF BIOLOGY

Anatomical Society of Great Britain & Ireland

Association for Radiation Research

Association for the Study of Animal Behaviour

Association of Applied Biologists

Association of Clinical Embryologists

Association of Clinical Microbiologists

Association of Veterinary Teachers and Research Workers

British Association for Cancer Research

British Association for Lung Research

British Association for Tissue Banking

British Crop Production Council

British Ecological Society

British Inflammation Research Association

British Lichen Society

British Marine Life Study Society

British Microcirculation Society

British Mycological Society

British Society for Ecological Medicine

British Society for Cell Biology

British Society for Medical Mycology

British Society for Neuroendocrinology

British Society for Parasitology

British Society for Plant Pathology
British Society for Proteome Research
British Society for Research on Ageing
British Society of Soil Science
Fisheries Society of the British Isles
Freshwater Biological Association
Galton Institute
Institute of Horticulture
Institute of Trichologists
International Association for Plant Tissue Culture & Biotechnology
International Biodeterioration and Biodegradation Society
International Biometric Society
International Society for Applied Ethology
Laboratory Animal Science Association
Marine Biological Association of the UK
Nutrition Society
Primate Society of Great Britain
PSI—Statisticians in the Pharmaceutical Industry
Royal Entomological Society
Royal Zoological Society of Scotland
Scottish Association for Marine Science
Society for Anaerobic Microbiology
Society for Applied Microbiology
Society for General Microbiology
Society for Low Temperature Biology
Society for Reproduction and Fertility
Society for the Study of Human Biology
Society of Academic & Research Surgery
Society of Cosmetic Scientists
Society of Pharmaceutical Medicine
UK Environmental Mutagen Society
UK Registry of Canine Behaviourists
Universities Federation for Animal Welfare

April 2007

Memorandum submitted by the Joint Nature Conservation Committee (ELD 15)

1. INTRODUCTION

1.1 The Joint Nature Conservation Committee (JNCC) is the statutory adviser to Government on UK and international nature conservation. Its work contributes to maintaining and enriching biological diversity, conserving geological features and sustaining natural systems.

1.2 The JNCC delivers the UK and international responsibilities of the Council for Nature Conservation and the Countryside, the Countryside Council for Wales, Natural England and Scottish Natural Heritage. The functions that arise from these responsibilities are principally to:

- advise Government on the development and implementation of policies for, or affecting, nature conservation in the UK and internationally;
- provide advice and disseminate knowledge on nature conservation issues affecting the UK and internationally;
- establish common standards throughout the UK for nature conservation, including monitoring, research, and the analysis of results; and
- commission or support research which it deems relevant to these functions.

1.3 These functions are pertinent to the implementation of the Environmental Liability Directive because JNCC has a key role in advising government on the implementation and interpretation of the EC Birds Directives and EC Habitats Directive.

1.4 The JNCC responded to Government's consultation paper of November 2006.

2. ENVIRONMENTAL LIABILITY DIRECTIVE AND SITES OF SPECIAL SCIENTIFIC INTEREST (SSSIs)

2.1 The Environmental Liability Directive defines the threshold for biodiversity damage as having a significant adverse effect on protected natural habitats and species and their ability to reach or maintain favourable conservation status. Protected habitats and species are defined as being those habitats and species listed in Annex I of the EC Birds Directive and Annexes I, II and IV of the EC Habitats Directive. Under the Environmental Liability Directive, Member States may add to the list of protected natural habitats and species. The concept of conservation status is also defined in the Directive and mirrors that found in the EC Habitats Directive.

2.2 SSSIs are the national series of statutory sites hosting the best areas for biodiversity and geodiversity. Their identification and notification is undertaken by the statutory nature conservation agencies. Whilst there are guidelines for the selection of SSSIs which are produced on behalf of the agencies by the JNCC, their identification and notification is undertaken on a territorial basis taking account of regional and local representivity and value. There is no national or territorial assessment of the conservation status of SSSI interests.

2.3 The concept of conservation status of natural habitats and species addresses their status within Member States and the relevant biogeographical region, and is not a site assessment. (*Note:* The United Kingdom is within one biogeographical region, the Atlantic.) The network of sites make a contribution towards conservation status but this will vary considerably dependent upon the proportion of the total extent of natural habitat or species population found within the site network.

2.4 There is a requirement to report on the conservation status of natural habitats and species listed in the Annexes to the EC Habitats Directive. The report for the period 2001–06 is currently being prepared. Under the EC Birds Directive there is no requirement to establish or report on the conservation status of birds although the Environmental Liability Directive would appear to require that this be done.

2.5 All sites designated under the EC Birds Directive (Special Protection Areas -SPA) and EC Habitats Directive (Special Areas of Conservation-SAC) which form the Natura 2000 network, are underpinned by SSSI. A high percentage of the SSSI series by area (c70%) host natural habitats and/or species listed in the Annexes to the Directives and thus the provisions in the Environmental Liability Directive support existing SSSI protection and management measures, ultimately contributing towards securing the PSA target to bring 95% of the site series into favourable or unfavourable improving condition. (*Note:* That favourable condition and favourable conservation status are very different concepts.)

2.6 In the Government's consultation paper of November 2006 views were sought as to the application of a site integrity test to judge biodiversity damage. This is very different test to that of conservation status, focusing on the site and not on the contribution made to the conservation status of the EC interests it hosts. The application of the site integrity test is undoubtedly easier to apply than the making of judgements on local impacts on conservation status, but is not consistent with the provisions of the Environmental Liability Directive. The proportional impact on biodiversity at site level and at conservation status level being different. For example a site hosting Great crested newts, a species listed in the EC Habitats Directive, could be affected by the application of the site integrity test but may have little impact on its conservation status because the species is so numerous and widely dispersed. Conversely it may be possible that a very scarce species may not be affected by applying the site integrity test but the possible impact on its conservation status could be disproportionately high.

2.7 Were Government to add SSSI interest features to those protected species and natural habitats listed in the Environmental Liability Directive, given that there is no assessment of conservation status for such features, apart from those listed in the EC Habitats Directive, and it would be difficult to establish such values given territorial and local variations and priorities, the site integrity test would be the most logical option to determine the threshold for biodiversity damage.

April 2007

Memorandum submitted by the National Farmers' Union (ELD 16)

1. The National Farmers' Union (NFU) welcomes the opportunity to submit written evidence to the Environment, Food and Rural Affairs Committee inquiry on Implementation of the Environmental Liability Directive. The NFU represents some 55,000 agricultural and horticultural businesses across England and Wales, all of which will be affected by the Directive implementation to some extent.

2. Set in the context of the implications for agricultural businesses, our written submission covers the following points within the terms of reference of the Committee's inquiry:

- Application of the “permit” and “state of knowledge” defences;
- Limiting the scope of Directive to EU-protected biodiversity; and
- The capacity of organisations to take action under the Directive.

SUMMARY

3. Even limiting the scope of implementation strictly to the Directive requirements, the Government estimates that up to 42 significant environmental damage incidents are expected to occur per year and that 40% of the anticipatory and remediation costs could fall to agriculture.

4. Agricultural businesses are potentially more greatly affected by the Directive implementation than other businesses in that they are often operating in very close proximity of (or within) EU protected habitats, close to watercourses, and perhaps uniquely undertaking a range of activities where liability for any significant environmental damage under the Directive will be strictly applied.

5. Agriculture has made a number of significant improvements in its environmental performance recently¹⁰, but given the potential impact of the Directive on our sector; we very much welcome and support the Government in its preferences to:

- adopt the permit defence in respect to those elements of the Directive’s requirements;
- limit the scope of the Directive to EU-protected biodiversity; and
- limit the application of strict liability in line with the provisions of the Directive.

AGRICULTURAL CONTEXT

6. Agriculture has made significant improvements in its environmental performance recently and recognises its responsibilities in continuing to demonstrate change. Evidence from the joint Environment Agency and NFU publication “Good Farming, Better Environment” indicates that the pressures from farming practices are reducing:

- The number of pollution incidents from agriculture has fallen;
- Ammonia emissions have fallen;
- The efficiency of nitrogen use is increasing;
- Numbers of farmers participating in agri-environment schemes is increasing; and
- Farmland bird numbers have stabilised.

7. Even where the scope of implementation is limited strictly to the Directive requirements, Government estimates that up to 42 significant environmental damage incidents (to land, water or biodiversity) are expected to occur per year.

8. The potential costs to the agriculture sector are expected to be high and in comparison to other business sectors will face the highest proportion of costs. Government estimates that 40% of the anticipatory and remediation costs to businesses could fall to agriculture.

9. Agricultural businesses are potentially more greatly affected by the Directive than other businesses as they are often operating in very close proximity of (or within) EU protected habitats, close to watercourses and undertaking a range of activities, many of which may fall within the Directive Annex III where liability for any significant environmental damage is strictly applied.

10. Extension of the scope of the Directive provisions would only add very significant additional burdens to agricultural businesses.

11. In addition, given that agriculture has a number of critical roles to play in the future in terms of food production and food security, in helping mitigate the effects of climate change through renewable fuel production and in maintaining a central and defining role in our rural communities, placing too many high level risks onto our land managers will be detrimental to the extent to which these important roles can be fulfilled.

APPLICATION OF THE PERMIT AND STATE OF KNOWLEDGE DEFENCES

12. Although Member States do have the discretion whether to apply the permit and state of knowledge defences, our view is that their application is justifiable.

13. To disapply the permit defence would undermine the confidence in the permit authorisation system and approvals process and introduce a great deal of uncertainty for operators and competent authorities.

¹⁰ State of Farmed Environment “Good Farming, Better Environment”—Environment Agency and NFU joint publication <http://publications.environment-agency.gov.uk/pdf/GEHO0406BKEP-e-e.pdf>

14. In addition, we believe that the state of knowledge defence is critical for those activities covered in Annex III, but not covered by the permit defence (those not expressly authorised by permit, licence or are approved) but are undertaken in good faith and according to good practice and the technical and scientific knowledge at the time.

15. Given the range of activities covered under Annex III, there will have to be a discussion as to the possible interpretation of “product” in this defence. Farmers and growers use a number of “products” such as pesticides, which have guidelines (based on good practice and the scientific and technical knowledge at the time). But they also use materials such as composts but spread in according to good practice and the latest scientific and technical knowledge. We believe that activities such as the spreading of composts according to the latest guidelines should be just as defensible as the use of products.

LIMITING THE SCOPE OF DIRECTIVE TO EU-PROTECTED BIODIVERSITY

16. In discussions with Government and in our formal response to the recent Government consultation we have favoured implementation:

- of the strict/fault-based distinction in the ELD (rather than one based on strict liability no matter which activity caused the damage); and
- to include only EC protected species and habitats (rather than including habitats and species designated under national legislation).

17. These are our preferred options as these most closely follow the intention of the Directive and provide greatest certainty for farmers and growers.

THE CAPACITY OF ORGANISATIONS TO TAKE ACTION UNDER THE DIRECTIVE

18. Our biggest concern about the capacity of organisations such as the Environment Agency and Natural England to take action under the Directive relates to any application of paragraphs 1 and 4 of Article 12 to cases of imminent threat of damage.

19. Questions arise as to how the competent authorities can make an assessment of an “imminent threat”, but also whether they have the capacity to respond to requests for action made by third parties, particularly if repeated requests are made by those with a grievance against a business, company or individual.

April 2007

Memorandum submitted by Water UK (ELD 17)

OVERVIEW—EXECUTIVE SUMMARY

1. The Environmental Liability Directive (ELD) contains broad and not always clear requirements for the enforcement of EC environmental law, which could have major financial implications for many industrial and utility sectors across the UK.

2. We therefore believe it is important that the Government, in consultation with all affected stakeholders, transposes the ELD into UK law in a manner which:

- (a) is clear, and integrates the requirements of the Directive with existing domestic legislation without duplication and in an unambiguous manner; and
- (b) is cost-effective, and balances costs and benefits, so as to protect consumers from being burdened with costs that are not strictly necessary for achieving the purposes of the Directive.

WATER UK COMMENTS—EVIDENCE

Water UK

1. Water UK represents all the water and sewerage companies and authorities of the United Kingdom. It tries to ensure that EC and UK policies and legislation affecting the water industry are developed and implemented in ways that are cost-effective, and balance costs and benefits.

2. The purpose of this is to try and ensure that the water and sewerage charges payable by customers, and the resulting costs that have to be borne by consumers, are no higher than are strictly necessary.

Consultations

3. The transposition of the ELD into UK law gives rise to difficult issues on how its requirements can best be integrated into existing UK environmental law without duplication and in a cost-effective manner. Taking these very real difficulties into account, we believe that the Government's consultation paper does an excellent job in explaining the issues and the options available. We have also found helpful the open and thorough manner in which Government officials have consulted and considered the views of different stakeholders.

Discretion, Permit and State of the Art Defences

4. The ELD allows member states a discretion in relation to a number of issues, which include whether to provide a permit and/or state of the art defence:

Permit Defence

5. We believe it is right that there should be a permit defence for the following reasons:

(a) the purpose of permits is:

- to enable the competent/enforcement authority to determine the extent to which it is acceptable for water to be abstracted and polluting discharges to be effected, taking into account all the elements of sustainable development—economic, social and environmental; and
- this so that abstractors and dischargers may know what they may do without incurring liability under directives;

(b) it would therefore be wrong for businesses and others to incur liability under the ELD when complying with a permit issued by a competent authority.

State of the Art Defence

6. Similarly it would seem wrong that a business should be held liable under the ELD for using a substance or process which at the time did not appear to pose any threat to the environment.

EC Protected Biodiversity and SSSIs

7. We believe that the way in which the Government proposes transposing the ELD into UK law accurately reflects the requirements of the Directive –

- (a) the ELD imposes liability for “damage” to “protected species” and “natural habitats”;
- (b) it defines protected species and natural habitats by reference to the Birds Directive 79/409/EEC and the Habitats Directive 92/43/EEC;
- (c) these Directives require the creation of special protection areas (SPAs) and special areas of conservation (SACs) for the protection of specified birds (including their migratory requirements), animals and habitats (“Natura 2000 Sites”);
- (d) these requirements have been transposed into UK law by the Conservation (Natural Habitats etc) Regulations 1994 and the Wildlife and Countryside Act 1981, with (in relation to Natura 2000 Sites) the Habitats Regulations building on the Act's requirements for the creation, maintenance and protection of sites of special scientific interest (SSSIs) and their adjoining areas;
- (e) the ELD thus supplements (and does not derogate from) the requirements of existing legislation; and
- (f) further the way in which the Government proposes transposing the ELD into UK law by reference to “damage” to Natura 2000 Sites, including the effect that such damage may have on the conservation status of species and habitats outside Natura 2000 Sites, seems accurately to reflect the requirements of the ELD and the Directives to which it refers.

Biodiversity Action Plans and SSSIs

8. For the above reasons, implementation of the ELD in the manner proposed by the Government ought not to adversely affect the Government's target for the improvement of SSSIs, but rather assist by increasing the ability of competent authorities to recover compensation from those who pollute SSSIs.

Timescale for Implementing the ELD

9. We believe that the Government should also consult on the regulations by which the ELD will be transposed into domestic law, this with a view to ensuring that the transposition is effected in a practical and cost-effective manner.

10. However, subject to this, we believe that every effort now needs to be made by all Government Departments to transpose the ELD into UK law as soon as practicable.

Environment Agency, Natural England and NGOs

11. The ELD of course requires member states to enforce its provisions through nominated competent authorities (CAs), which in England are likely to include the Environment Agency and Natural England. The ELD also enables NGOs to make complaints against CAs in relation to CAs' enforcement of the ELD.

12. In this connection, the ELD further requires CAs to recover their costs from polluters; therefore the CAs should be able to recover a major part of their costs from polluters. Nevertheless, the ELD requires Governments to ensure that the CAs are funded in relation to those costs (including remediation costs) that they are not able to recover from polluters.

May 2007

Memorandum submitted by the Environment Agency (ELD 19)

EXECUTIVE SUMMARY

- most of the Committee's issues apply to Defra;
- we think the Directive should apply to Sites of Special Scientific Interest;
- the Directive may cost us £700,000 per year. This depends on how many cases are caught and excludes options to make us the competent authority for land. We have some reservations about this.

1. The Committee is looking at Defra's implementation of the Environmental Liability Directive under six headings, several of which fall totally under the remit of Defra. The Environment Agency offers a response to three of the Committee's issues:

- (c) Why the Government is proposing to limit the scope of the Directive to EU-protected biodiversity, and which Sites of Special Scientific Interest would be affected.
- (d) What effect implementing the Directive in the manner proposed by the Government is likely to have on its meeting the 2010 targets under the Biodiversity Action Plan and its PSA target to bring 95% of nationally important wildlife sites into favourable condition; and whether the Directive may take resources away from achieving these targets.
- (f) The capacity of organisations . . . to take action under the Directive.

(c) *Why the Government is proposing to limit the scope of the Environmental Liability Directive to EU-protected biodiversity, and which Sites of Special Scientific Interest would be affected*

2. In our response to Defra's consultation, we stated that the Environmental Liability Directive should be implemented to include species and habitats for which any Site of Special Scientific Interest is designated. We also said that Ramsar sites (which cover wetlands of international importance) should be included as this is in line with the Government's policy to deal with these sites in the same manner as the European sites. Our reasons are set out in our response to Defra's consultation,¹¹ a copy of which is sent with this response to the Committee.¹²

3. Questions about which Sites of Special Scientific Interest are affected are the domain of Natural England. We understand that about a quarter of the total area covered by Sites of Special Scientific Interest is not in a European site, although they may contain species and habitats protected at the European level. In addition, we believe that the European network of sites does not protect about seven Ramsar sites.

¹¹ Annex 1 of our responses: Section 7.

¹² *Not printed.*

(d) *What effect implementing the Directive in the manner proposed by the Government is likely to have on its meeting the 2010 targets under the Biodiversity Action Plan and its PSA target to bring 95% of nationally important wildlife sites into favourable condition; and whether the Directive may take resources away from achieving these targets.*

4. We suggest that extending the scope of the Directive to Sites of Special Scientific Interest would contribute little to meeting the target of 95%. Indeed the small scale of this particular issue was one of the reasons that we supported the extension of the cover to these sites in our response to Defra's consultation. But we suggest also that the extension to Sites of Special Scientific Interest may help maintain these sites in "favourable condition" in the long run, because the penalties will encourage more care by operators who have the potential to damage such a site. It will also ensure that remediation of a damaged site is, as far as practicable, at the cost to the operator or polluter, instead of defaulting to the taxpayer through the PSA programme.

5. As part of the Regulatory Impact Assessment we estimated the costs to the Environment Agency of the Directive at £700,000 per year.¹³ Without extra resources we might spend less, for example, in confirming that permit conditions are sufficiently protective, or on monitoring the condition of sites and the pressures on them. But we would strive to allocate our resources in a way that reflected risks across the range of our responsibilities.

(f) *The capacity of organisations such as the Environment Agency . . . to take action under the Directive*

6. Should we become a competent authority in accordance with our response to Defra's consultation, the requirements of the Directive represent an extension of our duties and skills. There will be new duties and new extra work, particularly to assess the damage and to select remedial options.

7. We shall need to provide resources. As noted above, we gauge the cost at around £700,000 per year. This is for up to 15 cases a year. This could change, depending on how many cases are actually caught, and once it is clear how the Directive will work.

8. This estimate is based on us being the competent authority only for activities and damage that we currently regulate and for water damage. It excludes the option to make us the competent authority for damage to land and the competent authority for more aspects of damage to biodiversity. These would have big implications for our resources.

9. In our response to Defra's consultation we expressed reservations about the Government's proposals for land,¹⁴ in particular on the "strong case for designating the Environment Agency as the competent authority for land damage".

10. We believe that the Environment Agency should be the competent authority for damage to biodiversity in water, and for damage to biodiversity caused by the activities that we currently regulate.

Memorandum submitted by Sandy Luk (ELD 20)

KEY ISSUE COMPARISON BETWEEN UK LAWS AND ELD

<i>Issue</i>	<i>ELD</i>	<i>UK Law</i>	<i>Comment</i>
Water damage		Water Resources Act 1991	
Strict liability	Yes, but only in relation to Annex III activities, but subject to permit and state of the art defences; and no liability in relation to other activities.	All activities caught—criminal offence, unless permit to discharge.	UK law is stricter.
Potential liable parties	Only operators of Annex III activities.	Any person.	UK law is stricter.
Remediation requirements	Primary, complementary and compensatory.	Only "primary" in certain cases. Restoration limited in practice to restocking salmon or trout.	ELD is stricter.
What is "water"	Potentially excludes small, but environmentally significant water bodies, eg ponds.	"Controlled waters" include ponds etc.	UK law is stricter.

¹³ Paragraphs 2.20–2.23 of our response to Defra discusses this.

¹⁴ Paragraphs 2.14–2.19 of our response to Defra's consultation.

<i>Issue</i>	<i>ELD</i>	<i>UK Law</i>	<i>Comment</i>
What is “water damage”	Significant adverse effect of water “status” under Water Framework Directive, includes physical/morphological damage.	Entry into water of “poisonous, noxious or polluting matter or other solid waste matter— includes substances that may stain or dirty water—very low threshold.	UK law is stricter, except in relation to physical/morphological damage.
Temporal limitation	ELD only applies to damage caused after 30 May 2007.	No such limitation.	UK Law is stricter. <i>Danger that ELD may weaken application of Water Resources Act 1991.</i>
Biodiversity damage		Wildlife and Countryside Act 1981 Habitats Regulations 1994, Environmental Impact Assessment Regulations 1999	
Strict liability	Yes, for Annex III activities. Fault-based liability for non-Annex III activities.	SSSIs: No strict or fault-based liability. Test of intention/recklessness under Wildlife and Countryside Act. Preventive planning legislation (environmental assessments) not about liability anyway. BAP habitats and species: no liability.	ELD is stricter.
Potentially liable parties	All “operators” (businesses and undertakings, could include public authorities, as long as “undertakings”).	SSSIs: People committing wildlife crimes, developers only in relation to planning, persons who enter into management agreements etc in relation SSSIs. BAP habitats and species: n/a.	ELD is stricter.
Remediation requirements	Primary, complementary, compensatory.	Mitigation in exceptional circumstances in planning laws, restoration in very exceptional circumstances under Wildlife and Countryside Act (hardly even used).	ELD is stricter.
Biodiversity covered	Most habitats and species protected/listed in the Habitats and Wild Birds Directive on and outside Natura 2000 sites.	Natura 2000 sites if they are SSSIs under Wildlife and Countryside Act. Only Natura 2000 sites under Habitats Regulations. The environment under the environmental assessment rules. [BAP habitats and species—but no liability provisions.]	Mixed, but net effect because of previous points and lack of liability rules re UK wildlife: ELD stricter.
Type of damage covered	Significant adverse effects on reaching or maintaining favourable conservation status.	Significant effects and adverse effects in relation to planning legislation, criminal destruction and disturbance under wildlife crimes and intentional/reckless damage of SSSIs etc. [BAP habitats and species—no liability provisions.]	Mixed, but net effect because of previous points and lack of liability rules re UK wildlife: ELD stricter. <i>The ELD will improve wildlife protection laws, but it would make sense to include nationally protected wildlife as well—for the sake of wildlife protection, legal certainty, and practical effectiveness and predictability.</i>

<i>Issue</i>	<i>ELD</i>	<i>UK Law</i>	<i>Comment</i>
Land damage		Part, IIA, Environmental Protection Act 1990	
Strict liability	Yes, in relation to Annex III activities, and subject to permits and state of the art “defences”; and no liability in relation to other activities.	Yes, any person (Parliament rejected permit and state of the art defences).	UK law stricter.
Potentially liable parties	Operator of Annex III activities.	Knowing permitters, owner/ occupier and others (eg developer).	UK law broader.
Remediation requirements	Remove risk to health, restore to suitable for use standard.	Restore to suitable for use standard.	Broadly equivalent, subject to restriction to human health.
Type of damage covered	Damage which has significant risk of human health being adversely affected, includes damage from micro-organisms.	Significant possibility of significant harm, but not limited to human health, can include damage to protected biodiversity, but no damage from micro-organisms.	Mixed, but overall EU law stricter.
Temporal application	No retroactive application (only damage which happens after 30 April 2007).	Retroactive application.	UK law stricter.
Extent of “land”	Limited to land with human health connection.	Includes certain types of property (buildings, crops, certain animals).	Both exclude wider “environment”.
			<i>Here both laws are stricter in some aspects and less strict in others. Care needs to be taken not to weaken either law by creating a confusing and uncertain system full of over-lapping and conflicting provisions.</i>
General	30 year long stop limitation period for claims.	No limitation in UK law.	UK law stricter

June 2007

Supplementary memorandum submitted by Sandy Luk (ELD 20a)

IN RESPONSE TO EVIDENCE SESSION OF 13 JUNE 2007

Please note that the text in italics reflects the author’s understanding only of the evidence given by Mr. Ian Pearson, MP, Mr Nigel Atkinson and Ms Caroline Connell to the EFRA Committee on 13 June 2007.

1. THE HIGH DAMAGE THRESHOLDS

According to the UK Government’s analysis of the potential economic and practical impact of the Environmental Liability Directive (ELD), it would seem that the ELD will have very little effect in the UK, only applying in less than 1% of all environmental damage cases. This assessment is made because the damage thresholds under the ELD are perceived to be extremely high (“significant adverse effects” etc).

There are a number of problems with this approach:

(a) Although the thresholds are undoubtedly high, both the threshold in relation to wildlife damage and the one relation to water damage are intended to be set at too high a level. Indeed, in evidence it was admitted that “favourable conservation status” might be applied to a field, South East England or more, as

appropriate. However, if transposed as planned (as evidenced in the Government's first consultation paper), this could mean that the UK will be in breach of the ELD and the Habitats Directive 1992, with the possibility of infraction proceedings being brought against the UK.

Another important point to make in this context is a legal/practical one. Under the requirements of the ELD, operators are under an immediate obligation to take control and containment measures if they cause environmental damage. It will be impossible for an operator to wait until it is established whether this damage is significant, if he is to comply with the provisions of the Directive and not expose himself to significant additional liabilities. In the case of prudent operators this will mean that the high damage threshold, at least in relation to immediate control measures, will not be as important as it is made out to be by the Government, but in any case imposing a very high or unnecessarily complex damage threshold will make it very much harder for operators to assess the significance of damage themselves and come to the right decision in this context.

Set at the appropriate (and practical) levels, damage thresholds may still be high, but may well allow for more cases to be caught by the ELD. Also, lower thresholds would make for more clarity, certainty and predictability for operators in practical terms, fewer breaches of the ELD with less onerous long-term liabilities.

(b) In addition, Defra's analysis of the likely number of cases that would be caught by the ELD shows a strong reliance on cases that fall within existing legislation. However, the ELD operates differently to existing legislation. Unlike the Water Resources Act 1991, for example, the ELD covers all types of environmental damage, not just pollution damage. In relation to wildlife damage, the ELD could also cover development. Moreover, it covers protected habitats and species outside Natura 2000 sites, as well as on such sites.

It is very difficult to assess the significance of these issues and make a reliable prediction of future cases, but what is clear is that the Government has probably under-estimated the number of cases that could fall within the ambit of the ELD.

(c) There will be significant over-lap and conflict between the ELD and national law, which will lead to confusion and a possible eroding of national laws over time. The imposition of high thresholds in the ELD is not a good reason to let this happen. Rather it would make sense to take a robust approach that ensures a high level of environmental protection, clarity and predictability.

(d) The meaning of "significant", particularly in relation to wildlife damage, is a partly legal, mainly scientific question, and, especially in relation to ELD damage, which has already happened and is not a matter of future conjecture (as opposed to future damage under the appropriate assessment mechanisms of the Habitat Directive), is not a matter of value judgement, except to a very minor degree.

BETTER REGULATION AND REASONS FOR NOT OVER-IMPLEMENTING

From the evidence given, it would appear that there are two main reasons against "over-implementation" of the ELD (in spite of the over-all benefits identified in the Regulatory Impact Assessment's (RIA's) cost-benefit analyses in relation to some of the "environmental" options). They relate to the marginal benefits of the environmental options and the lack of support for better fitting laws:

(a) *The benefits identified in the RIA are so marginal that they are not worth pursuing, and it is felt that in that situation additional costs to business are not justified. The Government consultation is said not to have identified any major additional benefits, and the figures in the cost-benefit analyses were not challenged.*

In this context, it should be noted that some of the NGO responses (eg the RSPB's), did challenge the RIA and the cost benefit analyses, as well as the underlying minimum implementation approach applied to the ELD (see first part of the RSPB's response). They identified a probable over-estimation of costs and under-estimation of benefits in the cost benefit analyses, as well as instances where costs appear to have been taken into account more than once in the underlying calculations (thereby de-creasing benefits). In addition, they questioned the compatibility of this approach with true "better regulation" principles and with the UK Government's Sustainable Development Strategy and the application of the "polluter pays principle".

In terms of the importance of the benefits identified in the RIA, it is questionable whether they really are "marginal". In fact, all the alternative options taken together are shown to be of a beneficial value of £4.8 million per year which amounts to roughly 23% of the total annual benefits identified for the minimum implementation option—not merely a marginal increase (see summary table on p 8 of the consultation document).

Moreover, in relation to wildlife protection and set against the annual spend on wildlife protection and, in particular, damage restoration, £1 million per annum, for example (roughly the value of the benefit identified in the RIA for including SSSIs), constitutes a significant amount. As an example, the water vole is a species subject to widespread decline and needing vital recovery work, and therefore subject to much higher spending than other species protected under the UK Biodiversity Action Plan. The Environment

Agency estimates that plans that are intended to improve the status of the water vole amount to £1.2 million per annum. On average, yearly spending is around £56,000 per action plan. Clearly, £1 million a year in this context is not a marginal sum.

(b) *There is no intention to change existing laws and no strong case was made in the consultation responses to make the laws fit together better, even if the law will not be “as clear and transparent as could be”.*

Many of the responses to Defra’s consultation high-lighted concerns about the potential overlaps and conflicts between different laws on the same kind of environmental damage, which may lead to an erosion of stronger national laws over time. Of equal, but possibly more immediate importance, though, are the several instances identified by consultees, where the Government’s current approach would lead to breaches of the ELD itself or of other European laws, leading to the possibility of infraction proceedings being brought by the Commission (for example, in relation to the thresholds, or in relation to applying the permit defences before remedial measures have been taken).

In addition, it would be worth considering the discussions in relation to the “disproportionate costs derogations” under the Water Framework Directive 2000 and ensuring consistency of approach to these kinds of considerations where the value of environmental benefits is set against the relevant costs.

INCLUDING SSSIs, UK BIODIVERSITY ACTION PLAN HABITATS AND SPECIES AND RAMSAR SITES

(a) Including SSSIs within the ambit of the ELD rules will only be of marginal benefit (see arguments above) and will only lead to a 1% improvement in meeting the Government’s Performance Services Agreement (PSA) target of bringing 95% of SSSIs into favourable or recovering condition by 2010, which is also felt to be of marginal value.

It is mistaken to see a 1% improvement in meeting the 95% target as a marginal improvement only. At the moment, the Government is struggling to reach this PSA target, and has yet to improve performance by roughly another 20% to actually meet this target. To the same degree as improving performance becomes more difficult (as is witnessed by current status), every additional percentage gain is harder to achieve and more valuable, so where first improvements of SSSI condition were relatively easy to achieve, any additional improvement now is becoming harder and harder and any gain is extremely important. Therefore, a 1% improvement to meeting the Government’s PSA target is extremely important, and more so the closer the target becomes to being met. If it is true that the damage thresholds have been over-estimated and the benefits of the environmental options under-estimated, this percentage may be higher in any case.

(b) It is argued that 90% of SSSIs will contain some kind of EU feature in any case. However, it is also stressed that it will only be the EU features, which will benefit from protection under the ELD, not any of the remaining protected SSSI features. Similarly, Ramsar sites are covered if an EU feature is at stake.

The figure of a 90% “overlap” appears to be a new one, which has not so far been mentioned in any official documentation that the author of this note is aware of. The Defra consultation paper refers to a figure of a 70% overlap between SSSIs and Natura 2000 sites (by area), and the Government’s answers to parliamentary questions show that 3,300 SSSIs will not be covered at all by the ELD. It is quite likely that the 90% figure is an over-estimate, but even if it is not, it must be remembered that the ELD will only apply if an EU interest has been damaged, but not if a nationally important feature is damaged.

THE POLLUTER PAYS PRINCIPLE

In its assessment of the provisions of the ELD, the Government appears to be focusing very much on what it perceives to be “fair” on industry, particularly in the application of fault-based and strict liability, ignoring the extent to which principles of strict liability are already anchored in UK law, and ignoring its commitment to the “polluter pays principle” in relation to environmental protection and as part of its Sustainable Development Strategy. This is of particular relevance in the field of GMOs and similar technologies.

UN-REMEDIED DAMAGE

There still has not been enough focus on the problem of un-remedied damage under provisions of the ELD. It is clear that the ELD does not impose, and the Government does not accept, the concept of “subsidiary state responsibility” in relation to environmental damage that falls under the Directive but where the operator cannot be found or cannot pay. Unless such a principle is accepted, at least to an extent, it will be impossible to operate a regime that contains fault-based liability concepts, and that incorporates defences such as in relation to compliance with permit or operation according to the state of scientific and technical knowledge at the time.

June 2007