

**COUNCIL FOR NATURE CONSERVATION  
AND THE COUNTRYSIDE**  
**An Advisory Council to the Department of the Environment**

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CNCC/ELD/CON/LBH/few/0207

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Mr Karl Beattie  
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Dear Karl

**CNCC RESPONSE TO CONSULTATION ON OPTIONS FOR IMPLEMENTING THE ENVIRONMENTAL LIABILITY DIRECTIVE**

Council for Nature Conservation and the Countryside (CNCC) welcomes improved environmental regulation that strengthens and complements the existing legislation system and ensures the implementation of the 'polluter pays' principle. We welcome the objective of the Environmental Liability Directive (ELD) to proactively encourage operators to prevent environmental damage and to compensate for it when it occurs.

In the spirit of the directive CNCC would recommend that the directive when transposed should recognise our nationally important biodiversity and that the scope of the ELD should extend to protecting species and habitats designated as ASSIs under the Environment Order legislation.

In recognising the Favourable Conservation Status (FCS) of habitats and species within their natural range, the directive must also allow for the developing ASSI programme in Northern Ireland (significantly behind that in Great Britain) and should therefore recognise the importance of proposed designation programmes within Northern Ireland. Consequently we would recommend that the definition of significant damage also includes both RAMSAR sites and also species and habitats that are defined under the Biodiversity strategy. The use of appropriate databases such as the ancient and long established woodland inventory (an example of significantly fragmented and threatened habitat in Northern Ireland) and those in CEDAR should ensure that environmental baselines take due note of such information.

The directive also recognises that habitats and species provide services annex 1, page 81. Consequently the transposition of the directive needs to give further consideration to these services ensuring that they too are protected.

The directive allows for the restoration remediation and compensation for serious environmental damage, CNCC believes that the use of the habitats equivalence analysis compensatory mechanisms must be in the locality of the area of damage and that recognition must be given to the serious threat of irreparable environmental damage.

The effect of cumulative damage and also that of cumulative multiparty damage is not adequately addressed within the consultation and is a significant problem in NI where most business would be classed as small or medium enterprises. The establishment of compensatory funds similar to those under the International Funds for Compensation for Oil Pollution Damage should be considered. These could be established as sectoral compensatory funds. The directive recognises the Precautionary principle in the term of threat of imminent damage and charges operators to take avoidance action. However CNCC believes that the precautionary principle is not applied when a state of the art or a permit defence is allowed. CNCC recommends that strict liability applies to all actions so that the application of precautionary principle is consistently applied.

The responses to the questions in the consultation document are appended below:

### **Question 3.1**

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

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

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

CNCC agrees with these options in that the Natura 2000 sites seek to protect and to enhance the conservation status of both the habitat and species over their natural range. Consequently in recognising the natural range of the habitat and /or species, the transposing legislation would apply to relevant protected biodiversity on and outside designated sites, but the option must also allow for thresholds to be applied which recognize both the integrity of the designated sites but also the favorable conservation objectives of the habitat or species and include factors which would significantly affect that attainment of FCS. The natural range should also recognize long term distribution abundance and survival However CNCC has concerns over restricting the definition of damage to habitats and species to only that declared within the Habitats directive and not to the wider declared species of the designated sites programme.

The test of significant adverse affect should also take into account the services provided by the amenities, the habitat and species produce as referred to in Annex 1 pg 81 Negative variations caused by management interventions as performed by historical permissions or actions if causing significant adverse impact should also be included in the definition of significant adverse environment damage.

### **Question 3.2**

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

CNCC agrees with the principle that the threshold for water damage under ELD should draw upon the WFD standards and also recognize the differing requirements of different water bodies. However, having been made aware of the UK standards currently being proposed through the recent Scottish consultation, we have ongoing concerns about their ability to identify damage

significantly. They are based on a series of chemical assessments that would enable the *potential* ecological status of a water body to be measured but not its actual ecological status and unless the standards are modified considerably to address this, CNCC would have concerns about them being used to underpin the ELD.

CNCC would recommend that the change of class status of a water body to a lower status should be considered as a significant adverse event if such an event prevents that water body from acquiring its appropriate ecological status as defined within the WFD and consequently under ELD the polluter pays principle should ensure reparations of the damage incurred. Likewise we would agree with the use of the significant adverse effect leading to damage within a class boundary, should also ensure action under the ELD ensuring that there is a framework of strict liability based on the polluter pays principle.

### **Question 3.3**

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

CNCC would agree that the two regimes should be complementary. However there appears to be a discrepancy between the wordings set out in the 2 regimes; as the wording stands at the moment, there would appear to be a lower threshold of damage required to trigger ELD damage compared to that referred to in the Contaminated Land regime. Therefore it is considered that the application of the same threshold in both cases could be open to legal challenge.

### **Question 3.4**

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

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

CNCC agrees with option (ii). By introducing a general rule of strict liability, incentives are strengthened to prevent damage, guarantee restoration and provide a greater degree of legal certainty. It would also make the ELD regime easier and simpler to understand and apply.

Strict liability for biodiversity damage in all cases would ease this burden on the state and competent authorities.

### **Question 3.5**

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

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

The principle of strict liability should be applied to all environmental damage, including water and land damage, irrespective of what type of activity caused the damage or where the damage took place and should complement existing national laws.

### **Question 3.6**

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

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

No – CNCC would prefer option (ii) in paragraph 3.30 of the consultation document as this would be in the interests of maintaining the same level of protection afforded by the Part 2A contaminated land regime (excluding organisms and micro-organisms).

### **Question 3.7**

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

CNCC recommends that the ELD is implemented to include the species and habitats for which any ASSI is designated under national legislation. This would provide consistency in protection. Most SAC's and SPAs are underpinned by national designations although the list of species and habitats protected may differ between the designations, consequently site based damage to certain species and habitats could be treated differently under minimum transposition, causing confusion. The ASSI network is important for wildlife protection and helps to achieve Government's own targets for biodiversity. Due note should also be taken that the network in NI is still under development.

CNCC would also urge the Government to include Ramsar sites in the protective regime introduced to transpose the ELD. As there is extensive overlap between Ramsar and Natura 2000 sites, the additional costs of inclusion are likely to be marginal and such an inclusion can ensure that the Wise Use of Wetlands a core objective of RAMSAR would help to protect the amenities and services of these sites. It should also be noted that the Government has given a commitment to treat Ramsar sites as Natura 2000 sites.

The national designation programme for protected sites (ASSIs) in NI is significantly behind that achieved in GB, consequently many of our habitats and species are offered little protection. The transposition of the directive to recognise the value of BAP habitats and species would afford these often fragmented and highly vulnerable habitats, protection under the ELD.

### **Question 3.8**

**Do you support the Government's intention to excluded treated sewage sludge spread for agricultural purposes from the scope of the ELD?**

**If you do not what are your reasons?**

CNCC does not agree with this exemption, significant adverse environmental damage can occur through misapplication of sewage sludge spread for whatever purpose. If the action is covered by other regulations then the transposition of the ELD should compliment the existing national laws. Including the application of sewage sludge in the directive would also provide an incentive to operators to protect and conserve the environment.

### **Question 3.9**

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

Yes.

### Question 3.10

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

CNCC would prefer for all specified environmental damage to be treated within the scope of ELD irrespective of whether it is caught by International Conventions in force in the UK; it is considered that this would afford a higher level of environmental protection than that provided by such conventions.

With respect to diffuse pollution and establishment of a causal link to one or more parties, the directive should apply the precautionary principle to those activities. CNCC believes that the directive should apply at a sectoral level where a causal link has been established. Mechanisms should be put in place where a sector could be held responsible possibly through the establishment of compensatory funds.

### Question 3.11

- (a) What are your views about the treatment of costs in relation to cases where an operator can prove that the incident giving rise to an imminent threat of or actual environmental damage as the result of action by a third party (non contractual) despite appropriate safety measures?**
- (b) Do you have a view about whether the Government should provide for express cost recovery mechanisms in the implementing regulations to enable the operator to recover costs from third parties? If so what new or additional mechanisms would you suggest?**

The objective of the directive is to minimize the damage to the environment and to provide remedial and compensatory actions. Similar to the exemptions as listed under the international conventions CNCC would endorse the establishment of a compensatory fund to start remedial measures this would also allow for the operator to recover costs.

### Question 3.12(a)

**The Government's view (in respect of England and Northern Ireland) is that, on balance, a permit defence is justifiable and intends to implement this defence for those elements of the ELD which are additional to those addressed by existing environmental protection legislation. Do you agree?**

**If you do not what are your reasons?**

No, the allowance of a permit defence moves away from the presumption of strict liability. Compliance with a permit does not free operators from liability under general laws on liability (e.g. tort law) or other environmental laws such as Part IIA of the Environmental Protection Act (EPA) 1990 or the Habitats Directive.

The precautionary principle is encapsulated in the ELD by the recognition of the threat of imminent damage; a permit defence exemption excludes the precautionary principle. In the DEFRA assessment of the benefits of removing the permit defence it found that immunity from liability could be inconsistent with the environmental responsibility and that costs should only fall on those who do not take proper responsibility for the environmental effects of their actions."

### **Question 3.14**

**The Government's view is that, on balance, this defence is justifiable and intends to implement this defence for those elements of the ELD which are additional to those addressed by existing environmental protection legislation. Do you agree?**

**If you do not agree, what are your reasons?**

No, the allowance of a state of knowledge defence moves away from the presumption of strict liability directly opposing the "polluter pays principle" and is inconsistent with the protection provisions listed in the Habitats directive.

The precautionary principle is encapsulated in the ELD by the recognition of the threat of imminent damage, a state of knowledge defence exemption excludes the precautionary principle. Operators who cause environmental damage should be liable regardless of whether they are at fault, thereby ensuring that damage is remedied by the person who causes it and not at the taxpayer's expense.

Introduction of either of these defences will produce delays and doubts over restoration and remediation procedures and make enforcement more time consuming and expensive.

### **Question 3.13**

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

Enforcement mechanisms of the ELD should ensure that remedial measures are put into place as soon as possible after the event to prevent further damage. The directive imposes a direction to operators to take immediate control containment and prevention measures as necessary to avoid adverse pollution events. The reimbursement of costs to the operator could then be sought after the event or from a liability/compensatory fund. If permit and state of the art defences are allowed, this situation would occur more frequently. Deferred remedial action due to decisions on fault would exacerbate the damage and consequently the objectives of the directive are not met. However if the operators are operating wholly within the requirement of a well constructed and enforced licensing regime then such instances are likely to be limited.

### **Question 3.14**

**The Government's view is that, on balance, this defence is justifiable and intends to implement this defence for those elements of the ELD which are additional to those addressed by existing environmental protection legislation. Do you agree?**

**If you do not agree, what are your reasons?**

No, CNCC does not agree and believes that such exemptions are in contravention of the precautionary principle.

### **Question 4.1**

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

- (a) the natures of security the competent authority may take a charge against how conversion of the charge should be realized (i.e. converted into actual funds).**

No comment to make.

#### **Question 4.2**

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

- (a) Proportionate;**
- (b) Joint and several.**

Joint and several liability is favoured; it is considered that this is liable to afford a greater standard of protection than proportionate liability.

#### **Question 4.3**

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

The period set out under the ELD i.e. five years from the completion of the measures or (if later) the identification of the operator, would appear to give greater scope for successful recovery of costs than the alternative (six years from the date on which the cause of actions accrued).

#### **Question 4.4**

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

**By applying para 1 and 4 competent authorities are not statutorily obliged to take action but to duly consider a request for action; consequently CNCC supports applying paragraphs 1 and 4 of Article 12 to cases of imminent threat of damage, In such circumstances, it is not considered that competent authorities and operators should be unduly burdened by including the ELD provisions in UK legislation.**

CNCC advocates that NGO and public involvement would benefit the government in enforcing the ELD regime and would raise public awareness of environmental regulation.

#### **Question 4.5**

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

No limit – in line with domestic legislation.

#### **Question 4.6 (paragraph 4.27-4.28; page 49)**

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

Agree.

**Question 4.7 (paragraph 4.27-4.28; page 49)**

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

Enforcement mechanisms of the ELD should ensure that remedial measures are put into place as soon as possible after the event to prevent further damage. If there are circumstances whereby remedial action is urgent to prevent further environmental loss there should be powers introduced whereby remediation is not suspended during the appeal. This would also have the advantage in limiting remediation cost which would otherwise accrue under the Habitats Equivalence analysis application.

**Question 4.8**

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

CNCC agrees that criminal offences should apply.

**Question 4.9**

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

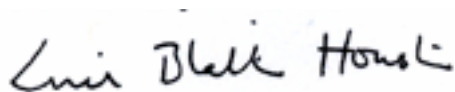
CNCC would also suggest that operational restrictions such as removal of licenses or ability to operate the business should also apply.

**Question 4.10**

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

Yes. The use of injunctions is considered to offer a fast and flexible means of tackling breaches of legislation in many instances and may be appropriate for certain ELD offences.

Yours sincerely



**DR LUCINDA BLAKISTON HOUSTON  
CHAIRMAN**