DEFRA PB12342 November 2006
Consultation on options for implementing the Environmental Liability Directive (ELD)

The ELD introduces a common framework for the assessment of damage, standards and financing of remediation. Many of the provisions already operate in England, Wales and NI. New defences are proposed but, in our view, would have limited scope if the directive is transposed as described in this consultation.

New liabilities for remediation following release of micro and macro organisms are identified.

New options of complementary and compensatory remediation are likely to be introduced.

The Government proposes to resist the use of a "permit" and "development risk" defences. The ELD creates the possibility of using these defences but each jurisdiction can define the scope that applies. The choice of scope could be challenged.

In our view, insurance against the costs of remediation would not experience a step change as a result of this directive and the way the UK government intends to transpose it. Liabilities to third parties would probably be unaffected though there may be more scope for courts to explore complementary and non pecuniary compensation measures.

The consultation concerns the UK implementation/transposition of Directive 2004/35/CE (ELD) of the European Parliament and of the Council of 21 April 2004.

The Directive introduces a regime of (a) strict liability for prevention and remediation of environmental damage to "biodiversity", water, and land from specified activities (occupational activities listed as appendix iii of the Directive) and (b) liability for remediation of environmental damage to biodiversity from all other activities on the basis of fault or negligence. The operator who causes the threat of or actual damage must prevent or remediate the damage at their own expense ('polluter pays' principle). The ELD seems to offer a choice between strict or fault based liability for some occupational activities in case of biodiversity damage, such a choice is not currently available in the England, Wales and NI.

The current England, Wales and NI remediation regimes operate as follows:

Regime		Scope of damage covered	Liability regime	Restoration Standards	Duty/Power of Regulator.
Contaminated land **"any land which appears to the local authority in whose area it is situated to be in such a condition, by reason of the substances in, on or under land, that –** **(a) significant harm is being caused or there is a significant possibility of such harm being caused..**	EPA 1990 Part IIA (Environment Act 1995)	Damage (including historic) in the form of substances in, on or under land creating unacceptable risk to human health or the environment.	**Strict.** Anyone who "causes or knowingly permits" presence of substances giving rise to the (contaminated) condition of land. Also owners/occupiers in some situations**. No offence or conviction required.** Applies regardless of "state of the art" or legality of the original contaminating activity.	Remediation to "suitable for use" standard, i.e. reduce risk to acceptable level and remedy effects of any significant harm or water pollution.	Duty to identify contaminated land. Duty to serve remediation notice. Powers to carry out remediation and to recover costs from liable parties.
Industrial/Commercial activity	EPA90 Part I - Integrated Pollution Control/LAAPC – Requires permits for a range of industrial activities so as to control releases into &	Pollution of water, land and air due to release of substances capable of causing harm to living organisms.	**Strict.** Court can require person convicted of breaching IPC to "remedy matters" which it is within the operator's power to remedy. Public Authority can remedy "harm"	Remedy of the "matters" or "harm".	Power to remedy "harm".

	pollution of the environment.		and recover costs, **if there is a conviction**.		
	PPC Regulations 2000 - Integrated Pollution Prevention and Control -successor to IPC	Pollution of water land and air due to emissions which may be harmful to health or the quality of the environment or may result in damage to property or interfere with use of the environment, etc.	**Strict.** Regulator can specify steps that must be taken to remedy the effects of any pollution caused by a permit contravention. Regulator allowed to deal with imminent risk of serious pollution and recover costs from operator. "Site reports" required from applicants, and at end of authorised activity, to identify any new contamination. **No conviction required.**	Remedy effects of pollution resulting from a breach, on and off site. Removal of pollution risk and restoration of site to previous state, at cessation of authorised activity.	Power to seek remediation, and power to refuse surrender of licence. Duty to ensure (at end of permit) necessary measures taken to avoid pollution risk and to return site to a satisfactory state.
Water	Water Resources Act 1991as amended by Environment Act 1995. Protection of water environment.	Damage in the form of "pollution of controlled waters", e.g. rivers, canals, lakes, ground waters.	**Strict.** Anyone who "causes or knowingly permits" pollution of controlled waters" Applies regardless of who causes damage. **No conviction required.**	Restoration of waters to previous condition if "reasonably practicable to do so". Includes ecological restoration and restocking of rivers.	Duty to maintain ecological status of rivers etc. Powers to require restoration.
Habitats and Species (biodiversity)	Wildlife and Countryside Act 1981, as amended by CROW Act 2000.	Damage to special interest for which the site has been identified.	**Fault based.** Owners/occupiers of SSSIs convicted of damaging sites via specified operations, and third parties convicted of reckless or intentional damage, can be ordered by Court to restore. **Convictions required.**	Restoration of protected site to former condition where this is possible.	Duty to maintain status of EC protected habitats and species. Powers to order Restoration.

Liabilities for remediation under these headings can be insured, as can liabilities to third parties.

Definitions as presented in the ELD:
These may be directly compared with the above (column 3).

(a) Damage to **protected species and natural habitats (Biodiversity damage)** is defined as:
"*any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species*". Criteria are set out in annex I of the ELD and require a degree of judgment to be applied by the relevant authority.

The significance of such effects is to be assessed with reference to the baseline condition (not pristine), taking account of the criteria set out in Annex I of Directive. Baseline would be as it was just before the polluting event. Gradual pollution and multiple sources of pollution would make such an assessment more complex. It would be a matter of judgement.

(b) **Water** damage is defined as:
"*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."*

Pollution standards have already been developed and will be carried forward for present purposes.

(c) **Land** damage is defined as:
"*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."*

Under Part 2A, the definition of contaminated land does not cover harm arising from organisms or micro-organisms. [Some legal commentators at the time of introducing the Contaminated Land Regime were of the view that Part 2A **did extend** to microorganisms and organisms including GMOs, also, weeds can give rise to liabilities]. In this respect, therefore, the government believes that the ELD goes further than Part 2A. Consequently, in their view, strict liability in relation to damage by organisms or microorganisms would need to be restricted to Annex III activities. It is not clear that the civil law would limit itself in such a manner.

Part 2A also applies to harm or risk of harm to the environment. EPA Land provisions apply to human health only.

(d) **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."*

Clearly this is a matter of judgement, a question of perspective and a question of material interest. The Environment Act has already made provision for the development of consensus on these issues and the government proposes that these mechanisms be perpetuated for present purposes.

The EC propose certain liability defences:
Annex iii of the ELD contains a list of occupational activities where strict liability would apply to biodiversity, water and land damage. Liability in negligence would apply elsewhere.

In addition to the choice of liability regime, defences may be sought for:

(i) *damage arising through the agency of a third party or arising from compliance with a compulsory order by a public authority;*

The government supports these proposals.

But there are civil precedents, reported in the Radar project, where liability for third party actions attached to the operator. It seems the government now agrees with EC that this is unfair, except where the operator has a **contractual relationship** with the third party in question. It is not clear that the civil courts would follow the lead set by legislation on this point.
The consultation document asks for views on whether or not the operator should establish third party payment before taking preventative or remedial action.

(ii) *damage which arises despite compliance with a permit where the operator is not at fault or negligent*;

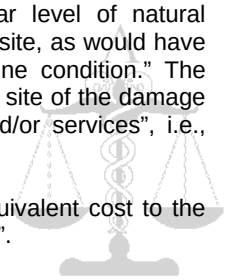
Currently there is no "permit" defence. The government now states its intention to allow it in some circumstances. They argue that permit conditions would however, become much tighter if there was a permit defence and this would restrict business opportunities. Those EC members who allow the permit defence more generally may, eventually, have to require higher standards but in the mean time the risks to operators in these states will be lower.

The government does not wish to relax the imperative for permit holders to be exposed to the full consequences of their actions. The permit defence would, they propose, only be allowed in respect of complementary and compensatory remediation which applies only to remediation of damage to water, protected species or natural habitats, not to contaminated land but the defence would not be available for primary remediation.

Complementary and Compensatory remediation may be acceptable options where primary remediation is not possible.

Primary remediation options comprise of actions to directly restore the natural resources and services towards baseline condition on an accelerated time frame, or through natural recovery.

The purpose of complementary remediation is to provide a similar level of natural resources and /or services, including, as appropriate, at an alternative site, as would have been provided if the damaged site had been returned to its baseline condition." The "remediation" required by complementary remediation – whether at the site of the damage or an alternative site – is by way of enhancement of resources and/or services", i.e., improving or increasing the resources and/or services.



Compensatory remediation seems to mean remedial measures of equivalent cost to the estimated monetary value of the lost natural resources and/or "services".

Mitigation of loss is an established precedent in the civil law but could be used to greater effect in pollution cases. Whether or not the costs of non-pecuniary settlement methods would be covered by insurances remains unclear. In our view, operators should consult with their insurers before undertaking such action.

Again the government asks if the remediation work should be undertaken before the question of the permit defence is resolved.

and

(iii) *damage from 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 Government considers it is reasonable that if a product has been developed in good faith and the technical and scientific knowledge at the time did not consider that it would be harmful then neither the manufacturer nor the user of such a product should be held liable for any damage that does ensue from use of the product where neither fault or negligence applies. Once again it chooses to allow the defence only where the ELD extends beyond the scope of current UK legislation e.g. complementary and compensatory remediation, microorganisms and organisms.

The adoption of two of these defences ((ii) and (iii)) is a matter for the discretion of the Member State. Assuming the defences are adopted, if the operator wishes to rely on one of these defences, it must demonstrate that the relevant conditions are satisfied.

Also, damage caused by armed conflict, hostilities and natural phenomena may be excluded from liability. In the latter instance the operator would need to demonstrate that they had taken reasonable precautions but which were overwhelmed by the natural event e.g. extreme rainfall.

Who pays when there are several polluters?
Relevant existing environmental legislation includes Part 2A of the Environmental Protection Act 1990 (Contaminated Land regime). Under this regime, proportionate liability – subject to the application of exclusions – is the approach followed. This approach was considered more appropriate for historic contamination where there is much more likely to be a succession of activities and persons over a period of time that have caused the problem which that regime addresses. Under s161 and s161A-D Water Resources Act 1991, there is joint and several liability.

The government asks for views and the ELD is open on this matter. Should there be proportionate or joint and several liability?

Limitation
The ELD proposes a 5 year limitation on the recovery of remediation costs for work undertaken by the competent authority. That is, five years from the date on which those measures have been completed or the liable operator, or third party, has been identified, whichever is the later. The consultation asks for views on 6 and 5 year limitation periods.

The ELD also states "*This Directive shall not apply to: damage, if more than 30 years have passed since the emission, event or incident, resulting in the damage, occurred."* This would be counter to the provisions of the Water Resources Act and the Contaminated Land regime and it seems unlikely that the

UK government would adopt this defence. One proposed solution would be to allow 30 years to pass and then apply e.g. the existing Contaminated Land regime. The consequences of 30 years uncertainty could be problematic for the operator.

Financial security
The 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 placed to take decisions about all aspects of their operations, including the optimum means of covering liabilities.

Comment
The consultation document indicates much of the thinking behind the government's response to the ELD and should be reproduced in guidance accompanying the draft regulation and again when the new regulation is passed. In our view the changes from the current regime would have little practical effect on the costs of remediation. The new defences offered would be of limited scope.

The liability for complementary or compensatory remediation is new to the UK regime. Operators should consult with their insurers before undertaking such measures whether or not in response to statutory duties. It is not clear that a civil court could order such measures, but mitigation of loss is a recognised concept.

Given the degree of public interest in GMOs and GM microorganisms it is unexpected that the government would not seek to take this opportunity to add these forms of damage to all possible situations. In practice, however, most such damage would be the result of occupational activities and would therefore be included in the new regime. This could be a significant cause of remediation activity if those organisms were self perpetuating, but thus far, such outcomes seem unlikely.

There was no mention of nanotechnology. Current UK regimes also make no specific accommodation for such materials. Under a strict liability regime such provisions may, in any case, be redundant.