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Summary

A company, public entity or individual may be liable under the ELD if it is an ‘operator’. The term ‘operator’ includes a person who holds a permit or authorisation or who registers or notifies an activity as well as a person who actually conducts an activity.

There are two classes of operators. The operator of an activity that is carried out under European Community (EC) legislation listed in Annex III of the ELD is strictly liable for measures to prevent or remedy damage to water, land and protected species and natural habitats (known as ‘environmental damage’ to ‘natural resources’). Legislation listed in Annex III includes the Integrated Pollution Prevention and Control Directive, waste management operations, authorised discharges into surface and ground water, water abstraction, the manufacture, storage and use of substances, the transportation of dangerous goods, operations that cause air pollution, the contained use of genetically modified micro-organisms and the deliberate release of genetically modified organisms.

The operator of an activity that is not listed in Annex III is liable for measures to prevent or remedy environmental damage if the operator is negligent and the activity damages a protected species or natural habitat.

Environmental damage to water, which includes damage to surface, transitional, coastal and ground water, occurs if there is a significant adverse effect to the ecological, chemical or quantitative status or the ecological potential of the water.

Environmental damage to protected species and natural habitats occurs if there is a significant adverse effect to the favourable conservation status of a species or habitat that is protected by the Birds Directive or the Natural Habitats Directive. Specifically protected areas are known as European...
sites and form the Natura 2000 network which covers approximately 15 per cent of the land area of the EU. The ELD provides that a Member State may also impose liability for environmental damage to species or habitats that are protected under equivalent provisions of domestic nature conservation law. Environmental damage to land occurs if there is a significant risk of human health being adversely affected by contamination.

An operator who causes an imminent threat of, or actual, environmental damage must carry out preventive or remedial measures, respectively. If the activity results in damage to land, the operator must remove the significant risk to human health caused by the damage.

If an activity results in damage to water or a protected species or natural habitat, three types of remediation may apply.

- **Primary remediation** is the restoration of the natural resource and services rendered by it to its baseline condition, that is, its condition before the environmental damage. The services that must be restored include services to other natural resources as well as the public.

- **Complementary remediation** is any remedial measure that is carried out to compensate for the inability to restore a natural resource to its baseline condition by providing a similar level of natural resources or services at another site. This type of remediation is supplementary to the partial restoration of the damaged site.

- **Compensatory remediation** is the provision of improvements and other measures to a natural resource to compensate for interim losses, that is, the loss of the resource or services rendered by it from the time of the damage to restoration to its baseline condition.

Liability is prospective only. Member States may impose either joint and several or proportionate liability.

The ELD does not impose liability for bodily injury, property damage or economic loss.

The ELD does not apply to environmental damage that is caused by an act of God or an act of war including terrorism. In addition, it does not apply if liability or compensation for environmental damage is within the scope of international conventions on marine oil pollution, nuclear risks or the transportation of dangerous goods by road, rail and inland navigation vessels provided that the applicable convention is in force in the relevant Member State.

An operator has a ‘defence’ to liability if the operator proves that the imminent threat of, or actual, environmental damage is caused by a third party and occurs despite appropriate safety measures; or results from compliance with a competent authority’s compulsory order or instruction provided that the order or instruction is not related to the operator’s actions in respect of the environmental damage.

The ELD provides a further two ‘defences’ which Member States may, but are not obliged to, adopt. An operator may have a defence if the operator proves there was no negligence and the damage was caused by either

- an emission or event that was expressly authorised by and fully in accordance with a permit under legislation listed in Annex III of the ELD; or
- an emission or activity that was not considered likely to cause environmental damage according to the state of scientific or technical knowledge when it occurred.

If the defence applies, a Member State ‘may allow the operator not to bear the cost of [appropriate] remedial actions taken pursuant to [the ELD]’.

Natural or legal persons including qualified non-governmental organisations (NGOs) may submit comments to the relevant competent authority if they consider that environmental damage has occurred or if (at the option of the Member State) there is an imminent threat of environmental damage. Such persons may also request a court or another independent impartial public authority to review the procedural and substantive legality of the competent authority’s decisions, acts or failure to act.

The ELD requires Member States to encourage the development of financial security instruments and markets but does not impose mandatory financial security. The European Commission must submit a report on conditions of insurance and other financial security mechanisms by 30 April 2010. If appropriate, the Commission will also submit a proposal for a system of ‘harmonised mandatory financial security’.

The deadline for transposing the ELD into the domestic law of the 27 Member States of the European Union (EU) was 30 April 2007. Most Member States, including the UK, failed to meet that deadline.

**Summary of comments to the Consultation**

Efra Committee

On 13 June 2007 the House of Commons Environment, Food and Rural Affairs Committee (Efra Committee) held a hearing on Defra’s transposition of the ELD. UKELA’s comments to the Efra Committee are set out following UKELA’s comments to the Consultation.

The Efra’s Committee’s report is available at http://www.publications.parliament.uk/pa/cm200607/cmselect/cmenvfra/694/694.pdf

Comments to Defra, the Northern Ireland Department of the Environment and the Welsh Assembly Government on the Consultation on the Environmental Liability Directive

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 submits comments 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, Contaminated Land, Litigation and Nature Conservation Working Parties.

The following are UKELA’s comments to the Consultation. For ease of reference, we have set out the [relevant] Questions and the Government’s Preferred Transposition Package (PTP) from the Consultation.

General

UKELA considers that if the Government adopts some aspects of the PTP:

• an argument could be made that the UK’s transposition of the ELD is inadequate; and
• the resulting regime is likely to be difficult or impossible to implement.

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 [favourable conservation status] 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?

(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 the ELD?

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

PTP: 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.

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 WFD standards?

PTP: A test of water damage using a number of criteria which give practical effect to the requirements of the ELD drawing upon the WFD standards.

1. Adopting the PTP in respect of the minimum threshold for environmental damage to protected species and natural habitats and water would place the UK Government at risk of breaching article 19(1) of the ELD and the consequent reputational damage and infraction fines that the Government wishes to avoid (Partial Regulatory Impact Assessment, para. D.1). In addition, the exclusion of environmental damage could lead the Government to breach its obligations under the Birds and Habitats Directives.

2. UKELA considers that the above potential exists for the following reasons.

2.1 Focusing on Natura 2000 sites when the ELD also applies to protected species and habitats outside such sites will almost certainly exclude environmental damage covered by the ELD in areas outside Natura 2000 sites unless competent authorities adopt a programme of regularly inspecting or monitoring such areas for environmental damage, which does not appear to be intended.

2.2 Taking account of the significance of a site or sites only in respect of the conservation status of a protected habitat or species over its natural range rather than its significance at a particular site may fall below the threshold for environmental damage in the ELD.

2.3 Preparing an assessment to determine the significance of a protected species or natural habitat across its natural range before liability for its remediation attaches would automatically prevent an operator from complying with the ELD’s self-executing provisions to begin preventing or remedying environmental damage “without delay” or “immediately”, respectively (see comments on Question 3.11 below).

3. Further, UKELA considers that adoption of the PTP would prejudice industrial, agricultural and other operators for the following reasons.

3.1 It would create a liability “lottery” which would prejudice operators who caused environmental damage to protected species and natural habitats and water after they had been damaged by other operators because:

(a) operators who caused the first damage to sites in a species’ or natural habitat’s natural range may not have to restore or replace them whereas operators who damaged such sites in the future are more likely to have damaged the natural resource’s FCS due to the earlier damage to it; and

(b) operators who caused the first damage to water may not have to restore or replace it even if the damage caused a lowering of the classification status of a water body whereas
later operators are more likely to cause damage due to the earlier reduction in the ecological, chemical and/or quantitative status and/or ecological potential of the water.

3.2 In the event of a decision by the European Court of Justice (ECJ) on the appropriate threshold for ‘environmental damage’ (which may arise from any of the EU-27), an operator who had not remedied environmental damage as a result of the UK Government’s high threshold would be liable, not only for substantially increased remedial costs (if the damage had not been remediated under another regime), but also for interim costs from the time of the damage.

3.3 The high threshold in the ELD is likely to result in liability for remediating contamination being partially shifted from an operator who caused the damage to companies and other persons who are considered to be ‘knowing permitters’ of contaminated land (including Natura 2000 sites) under Part 2A of the Environmental Protection Act 1990 (EPA 1990). This shift of liability, which would result from the lower thresholds for significant harm or a significant possibility of such harm to ecologically protected areas under Part 2A, would result in less culpable persons being liable for remediating contamination.

3.4 It would be necessary for operators who wished to have insurance cover to protect them from the risk of environmental liabilities under the ELD due to their activities to continue to purchase policies after those activities had ceased in order to protect them for potential liability under Part 2A.

4. In order to avoid the above potential breaches of EC law and resulting detriment to operators, UKELA respectfully suggests that the Government copy out the thresholds for environmental damage from the ELD. The relevant competent authorities could issue guidance setting out their approaches to implementing the ELD in respect of the thresholds.

**Question 3.3**

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

If you do not agree with the assessment:

(a) what approach do you suggest?
(b) how would it work in practice? and
(c) what would be the benefits of your suggested approach?

**PTP:** The threshold for land damage for the purposes of the ELD is the same as for contaminated land under Part 2A of the EPA 1990.

5. UKELA considers that adoption of the definition of ‘contaminated land’ in respect of harm to human health in Part 2A of the EPA 1990 as the threshold for land damage under the ELD will almost certainly result in domestic legislation unlawfully excluding environmental damage covered by the ELD.

6. UKELA respectfully submits that the apparent legal conclusion in the PTP that the threshold for land contamination in the ELD is the same as the definition of contaminated land due to harm to human health in Part 2A is incorrect.

7. UKELA’s reasons are as follows.

7.1 The word ‘significant’ qualifies only the word ‘risk’ in the ELD whereas it qualifies the terms ‘harm’ and ‘possibility of such harm’ in Part 2A.

7.2 Section 79(1B) of the EPA 1990 uses the terms ‘harm’ and ‘possibility of harm’ rather than the terms ‘significant harm’ and ‘significant possibility of such harm’ in Part 2A.

7.3 Section 78A(5) of the EPA 1990 directs the Secretary of State to develop statutory guidance to determine, among other things, ‘what harm … is to be regarded as “significant”’ and ‘whether the possibility of significant harm … being caused is “significant”’.

7.4 Section 78A(6) of the EPA 1990 directs the Secretary of State to provide statutory guidance for ‘different descriptions of harm to health [and] different degrees of possibility to be regarded as “significant” (or as not being “significant”).’

7.5 The description of human health effects in table A(1) in annex 3 of Defra Circular 01/2006 as ‘death, disease, serious injury, genetic mutation, birth defects or the impairment of reproductive functions’ further indicates that the threshold in the ELD is lower than that in Part 2A due to the serious nature of the stated harm.

8. UKELA suggests that the most practicable measure would be to lower the threshold for contaminated land in Part 2A in respect of human health to the threshold for land damage in the ELD. The continued development of soil guideline values by Defra and the Environment Agency could accommodate this process.

9. A benefit to operators of the above approach would be that the common threshold for human health effects under both regimes would help ensure that the operator who caused environmental damage would be liable under the ELD rather than a non-operator being liable under Part 2A as a knowing permitter, an owner or an occupier. As such, the approach would further the polluter-pays principle of the ELD.

**Question 3.5**

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

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

**PTP:** Strict liability in respect of Annex III of the ELD activities only.

10. UKELA considers that limiting strict liability for biodiversity damage in water pollution to activities under legislation in annex III would create an unworkable liability system which risks undermining existing environmental protection standards.

11. The system would require the Environment Agency (as the enforcement authority for the Water Resources Act 1991 (WRA 1991) and the potential competent authority for water under the ELD), to distinguish between biodiversity damage under the ELD and damage to flora and fauna dependent on the aquatic environment under the WRA 1991. This task would be impractical if not impossible due to an overlap between the two types of damage.

(a) If the Environment Agency considered that the ELD applied, it would have a duty to require restoration of the environmental damage to baseline condition (or replacement...
of the damaged natural resource) subject to exceptions and other provisions of the ELD.
(b) If the Agency considered that the WRA 1991 applied, it would have a discretion to require restoration to baseline condition. If the Agency exercised its discretion, the operator could challenge enforcement on the basis that the ELD, rather than the WRA 1991, applied.
(c) In both cases, the Agency could prosecute the operator under section 85 of the WRA 1991, to which strict liability for causing a pollutant to enter controlled waters applies - potentially resulting in the application of two standards of liability.

12. The overlap between biodiversity under ELD and fauna and flora under the WRA 1991 cannot be eliminated because the Government has stated that it wishes to ensure that environmental protection standards are not undermined (Consultation, paras. 2.2, 3.62). Therefore, repealing strict liability for the restoration of flora and fauna under the WRA 1991 in lieu of fault-based liability for damage to non-annex III flora and fauna is not an option.

13. UKELA, therefore, considers that the only feasible way to avoid unnecessary confusion on the part of operators and the Environment Agency and a waste of the Environment Agency’s enforcement time and money is strict liability for any activity causing biodiversity damage in water pollution. This approach would also avoid environmental protection standards being undermined.

Question 3.7
Should the ELD be implemented to include only EC protected species and habitats or also include species and habitats for which any SSSI is designated under national legislation?

PTP: Implement the ELD so that ‘protected species and natural habitats’ only includes EC protected species and habitats.

14. UKELA considers that the protection provided by the ELD should extend to SSISs. This would be in accordance with national policy towards such sites and Public Service Agreement target as to their condition. Extending the ELD provisions in the manner provided for at article 2.3(c) would provide a further means by which these objectives could be pursued. Such an extension would cover many habitats and species that are required to be protected by the ELD in any event, such as species in Annex II of the Habitats Directive which are not on a Natura 2000 site.

15. Further, UKELA considers that the protection of the ELD should also extend to include those species of principal importance for the purpose of conserving biodiversity as are listed in accordance with section 41(1) of the Natural Environment and Rural Communities Act 2006. This would both provide a means of pursuing existing obligations under the Convention on Biological Diversity 1992 and raise the profile and perceived value of nationally important biodiversity, whether on protected sites or not.

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 is 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?

PTP: It is proposed that the test of whether the operator should bear the costs of, in particular, remedial measures where the environmental damage has been caused by the actions of one or more third parties, should be applied before the remedial measures are actually undertaken by the operator.

16. UKELA considers there is a strong argument that the ELD does not provide the Government with the option of applying the test of whether an operator should bear the costs of environmental damage caused by a third party before the operator carries out preventive or remedial actions.

17. When article 8(3) is read in the context of the ELD, it appears to mean that the ELD authorises an operator to bring an action against a third party or public authority (not against the competent authority) to seek to recover the costs of preventive or remedial actions already taken by it.

18. UKELA’s reasoning is as follows.

18.1 Article 8(3) specifically envisages a cost-recovery action by an operator because:
(a) it states that in the event that environmental damage has been caused by a third party or compliance with a public authority’s order, ‘Member States shall take the appropriate measures to enable the operator to recover the costs incurred’; and
(b) due to the inherent nature of a cost-recovery action, an action can only be brought after the preventive or remedial actions that led a person to incur costs have taken place.

18.2 Article 8(3) provides that an operator must ‘prove’ that actual, or an imminent threat of, environmental damage was caused by a third party or resulted from compliance with a public authority’s order in order not to be required to bear the costs of preventive or remedial actions.

18.3 Further, nothing in the ELD refers to any ‘defences’, in particular, defences to liability. Rather, an operator is liable for preventing or remediating an actual, or imminent threat of, any environmental damage caused by its occupational activity – articles 3(1), 5(1), 6(1), 8(1).

18.4 Whilst UKELA agrees that a competent authority is not required to refund an operator for remediating damage caused by a third party (Consultation, para. 3.56), it respectfully submits that the Government appears to have misconstrued article 8(3)(a) as a defence.
(a) Because article 8(3)(a) is not a defence, a competent authority would never be in a position in which it was obliged to refund the operator under article 8(3).
(b) Therefore, contrary to the Government’s contention (Consultation, para. 3.56), articles 5(4) and 6(3) are not implicated, the competent authority’s discretion would not be undermined, and Member State subsidiary liability would not be introduced.

18.5 Further, adoption of the PTP would undermine environmental protection standards because placing the risk of
failing to recover remedial costs on the operator accords with existing English law (see Consultation, para. 3.52).
(a) The House of Lords held, in *Empress Car Company (Abertillery) Ltd. v National Rivers Authority*, that an operator may be convicted of the offence of causing water pollution when a third party who was not under the control of the operator was the immediate cause of the pollution.
(b) In *Empress Car*, the operator was unable to recover any costs expended by it in remediating the pollution due to the third party having been an unidentified vandal who opened an oil storage tank, causing its contents to enter a stream.
(c) The operator is also liable under the WRA 1991 for costs expended by the Environment Agency in investigating and carrying out emergency remediation. WRA 1991, ss. 161(1A) 161(3). Such costs are traditionally sought as part of a prosecution. *Prosecution of Offences Act 1985*, s. 18(1); see R. v. *Associated Octel Company Ltd. (Costs).* Liability for such costs is joint and several and, thus, arises whether or not a third party who also caused water pollution is identified and/or has the means to pay such costs.

**Question 3.13**

Do you favour the application of the permit and state-of-the-art defences before or after remediation is undertaken by the operator? In either case what are your reasons?

**PTP:** The Government proposes that the test of whether the defences apply should be undertaken before remediation is undertaken.

20. Whilst UKELA considers that the ELD is not entirely clear on this issue, it considers that the correct interpretation of the ELD is that the permit and state-of-the-art ‘defences’ should be applied after remediation has been undertaken by an operator. UKELA therefore, considers that the Government may not have the option of implementing the ELD so that the test is applied before remediation has been undertaken.

21. UKELA’s reasons are as follows.

21.1 As the Government recognises (Consultation, para. 3.66), article 8(4) of the ELD uses the past tense of the word ‘taken’ in providing that Member States ‘may allow the operator not to bear the cost of remedial actions taken pursuant to [the ELD]’.

(a) On its face, therefore, the ELD appears to envisage that remedial actions shall be taken before responsibility for their costs is determined.

(b) Because a competent authority may only carry out remedial actions ‘as a means of last resort’ (art. 6(3)), the ELD appears to envisage that they will have been carried out by an identified operator before the test is applied.

21.2 The enforcement mechanism provided by article 7 of the ELD envisages an operator identifying and submitting potential remedial measures to the competent authority for its selection of the measures to be carried out.

21.3 Article 6(3) does not, as a general rule, provide the competent authority with the power to carry out remedial measures when it has identified the operator who caused the damage unless the operator fails to carry them out or ‘is not required to bear the costs under [the ELD]’. In all other cases, article 6(3) provides that a competent authority ‘shall require’ an identified operator to carry out remedial measures.

21.4 The typical way in which a competent authority ‘requires’ an operator to carry out works under English law is to serve a notice (order) which may be appealed by the person on whom it is served (see EPA 1990, s 78E(1); WRA 1991, ss 161A(1)-(2)). The ELD strongly implies that such an enforcement mechanism is envisaged under the ELD because:

(a) article 6(2) provides such powers to a competent authority;

(b) article 8(4) provides that, in order for the permit and state-of-the-art ‘defences’ to apply, the operator must ‘demonstrate’ (not ‘prove’ as in article 8(3)) that it was not at fault or negligent and must meet other criteria indicated in article 8(4); and

(c) article 6(1)(b) requires an operator to carry out necessary remedial measures in accordance with article 7.

21.5 The so-called ‘defences’ under article 8(4) are not, therefore, true defences. Instead, they appear to be grounds by which the operator on whom a competent authority has served a notice/order requiring the operator to carry out remedial measures may appeal the notice/order.

21.6 The issue to be decided by the Government, therefore, is whether a competent authority’s notice/order may be suspended during an appeal against it on the basis of the grounds specified in article 8(4) of the ELD.

21.7 As indicated in paragraph 18.3 above, the ELD does not contain any defences to liability. An operator may not, therefore, demonstrate that it is not liable for carrying out remedial measures on the basis of the permit or state-of-the-art grounds of appeal. An operator may raise the permit or state-of-the-art grounds only as reasons why it should not bear the costs of such measures.

21.8 Further, as a general rule, a competent authority cannot determine whether an operator ‘is not required to bear the costs of remedial measures’ (article 6(3)); it may only consider whether the operator ‘may not be required’ to bear such costs.

(a) This is because an operator’s responsibility for such costs cannot be determined until the operator has ‘demonstrate[d]’ to a court or other independent and impartial public body (see article 13(1)) that it meets the criteria in article 8(4) and, thus, is not responsible for the costs.

(b) Article 6(3) does not on its face, therefore, appear to provide that a Member State may transpose the ELD by authorising a competent authority to delay its duty to require/order an operator to carry out remedial works until the operator’s responsibility for the costs has been determined.

21.9 Still further, article 6(1)(a) provides that an operator has a duty ‘immediately’ to carry out all practicable steps to ‘control, contain, remove or otherwise manage’ contaminants ‘in order to limit or prevent further environmental damage’.

(a) This duty, which is acknowledged by the Government (Consultation, paras. 1.7, 1.15, 1.16 and pp. 17, 18 and 20; Partial Regulatory Impact Assessment, E.23(i), J.1), is a
continuing duty which does not depend on the intervention of a competent authority.

(b) If the ELD authorised a Member State to transpose it by authorising a competent authority to suspend its notice/order in respect of primary remedial measures (which, UKELA recognises, the Government is not proposing but which is relevant to an analysis of the relevant provisions of the ELD), the operator would still have a duty to ensure that no further environmental damage occurred.

(c) It would appear to be illogical for the ELD to provide that an operator has a continuing duty to prevent further environmental damage immediately that a risk of such damage occurred whilst, at the same time, to provide that remediation of the environmental damage itself could be delayed. Such a reading would necessitate the operator or competent authority continually monitoring the contamination in case, for example, contaminants migrated to cause further environmental damage.

21.10 Further, if the Government authorises a competent authority to suspend a notice/order requiring an operator to carry out complementary and compensatory remediation measures until a court (perhaps the House of Lords or ECJ) after a lengthy judicial process) has ruled on whether the grounds for appealing a notice/order apply, the Government would have adopted a position that is contrary to the purpose of the ELD. That is, unless the Government had remediated the damage at taxpayers’ (not the polluter’s) expense, it would have permitted the loss of water or protected species or natural habitats to continue whilst the parties engaged in the appellate process. Among other things, this would be contrary to recital 1 which describes the “many contaminated sites in the community, posing significant health risks, and the loss of biodiversity [which] has dramatically accelerated over the last decades” as a primary reason for enacting the ELD.

21.11 In describing “interim costs,” annex II, para. 1(d) states that they occur from the time of environmental damage to water or a protected species or natural habitats to continue whilst the parties engaged in the appellate process. Among other things, this would be contrary to recital 1 which describes the “many contaminated sites in the Community, posing significant health risks, and the loss of biodiversity [which] has dramatically accelerated over the last decades” as a primary reason for enacting the ELD.

(a) If complementary measures were not carried out until after an appeal had been decided, the interim costs would necessarily increase.

(b) It does not seem logical that the ELD envisages such an approach, which would prejudice operators who could not avail of themselves of the permit or state-of-the-art grounds of appeal, in particular, small to medium sized enterprises and the agricultural sector.

(c) For example, if two or more operators are liable and the permit or state-of-the-art grounds of appeal are not applicable to all of them, suspending the notice/order for operators to which the grounds of appeal could apply could delay remediation for all operators (unless the Government paid the remedial costs of the operators who had appealed the notice/order).

21.12 In setting out the reasoning for the PTP, the Government states that the ELD does not require a competent authority to provide a refund in a cost-recovery action by an operator on the basis of the permit or state-of-the-art ‘defences’ and appears to state that it would not provide such a refund. UKELA respectfully submits that this statement is suspect because:

(a) it would have been inappropriate for the ELD to provide a provision for a refund because of the optional nature of the permit and state-of-the-art grounds of appeal; and

(b) if the Government was to authorise proceedings for the provision of a refund, doing so would not introduce mandatory subsidiary liability because a Member State has the option of deciding not to adopt the permit and state-of-the-art grounds of appeal.

22. Finally, introducing a permit or state-of-the-art ground of appeal as a defence to liability would undermine existing environmental standards (contrary to the Government’s wishes; see Consultation, para. 3.62) because a works notice under the WRA 1991 is not suspended during an appeal (see paragraph 11 above commenting on the overlap between liability for biodiversity damage under the ELD and WRA 1991).

23. UKELA would like to emphasise that it is not stating that a competent authority may not carry out remedial actions itself if there is, say, overwhelming evidence that an operator would not be liable for the costs of such actions due to application of the permit or state-of-the-art grounds of appeal. In such a case, UKELA considers that a competent authority may decide whether to carry out the necessary actions.

**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? or

(b) joint and several?

**PTP** The Government proposes proportionate liability, either fully in proportion to liability or modified in certain respects.

24. UKELA considers that adopting joint and several liability as the legal basis for the scope of liability under the ELD with equitable apportionment between liable operators is preferable to proportionate liability due to the difficulty and additional expense in adopting proportionate liability for indivisible environmental damage.

25. UKELA notes that the Consultation is silent on the effect of the adoption of proportionate liability.

25.1 An automatic effect, however, is that the risk of ‘orphan shares’ rests with the claimant, namely the competent authority; as opposed to joint and several liability, in which the risk of orphan shares rests with defendants. (Reasons for an orphan share include an operator not having sufficient funds to remedy environmental damage, the application of an exclusion or the application of articles 8(3) or 8(4).)

25.2 The existence of an orphan share, therefore, necessarily means that the Government must pay the costs of that share in order for a damaged natural resource to be remediated and/or replaced.

25.3 If the Government adopts proportionate liability, therefore, it would seem that the Government has no choice other than to establish a fund from which the competent authority can pay the costs of orphan shares.

25.4 Further, the fund should necessarily be funded by tax
levies from polluting industries, rather than general taxpayers, in order to comply with the ‘polluter pays’ intent of the ELD (see art. 1, recital 2).

25.5 There is no indication in the Consultation, however, that the Government intends/foresees establishing a fund or otherwise funding orphan shares.

25.6 UKELA would be happy to discuss the potential application of joint and several liability with equitable apportionment and/or funding for orphan shares with the Government.

26. Finally, in respect of the scope of liability, UKELA respectfully notes that paragraph 4.7 of the Consultation, which states that the scope of liability under Part 2A is proportionate liability ‘subject to the application of exclusions’, is incorrect. (a) Part 2A imposes modified joint and several liability by excluding various specified liable persons from liability (Circular 01/2006, annex 3, paras. D.40.-72).

(b) It is only after an enforcing authority has applied modified joint and several liability (which may result in all but one liable person remaining in a liability group) that Part 2A provides for proportionate liability amongst persons who remain in the liability group (Circular 01/2006, annex 3, D.73.-86).

Question 4.4
Are you in favour of or opposed to applying paragraphs 1 and 4 of Article 12 to case of imminent threat of damage? In either case what are the reasons for your position?

PTP: The Government is not proposing to grant the right of request for action in cases of imminent threat of damage.

27. This question concerns the access to justice provisions in the ELD. We set out UKELA’s general position before responding to the question raised.

Lawfulness of the consultation process

28. The consultation paper contains little discussion about access to justice in the context of implementation of the ELD. The only discussion focuses on whether the ‘request for action’ provisions should be extended to cases of imminent threats of environmental damage (the ELD requires them to apply where damage has been caused but gives Member States the discretion to decide on their applicability in cases of imminent threat of damage).

29. There is no discussion of how the request for action will work in practice or the provisions for access to a court/tribunal to review any decision by the competent authority following a request for action.

30. The lack of analysis in the Consultation may be explained by the fact that it is concerned to focus on the main issues in implementation. It is however disappointing, given that access to justice is widely perceived to be problematic. It may reflect the lack of importance the Government attaches to access to justice.

31. We are 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 (unreported at the time of writing). See also: A public body undertaking consultation must do so fairly, letting those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a great deal) to enable them to make an intelligent response. Consultation must be undertaken at a point when the proposals are still at a formative stage. R v North Devon HA ex p Coughlan [2001] QB 213, per Lord Woolf MR at paras 108 (see also para 112), ‘… whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken (R v Brent LBC ex parte Gunning [1986] 84 LGR 168)’.

32. This was cited and confirmed in Edwards and Pallikaropoulos v Environment Agency and others [2006] EWCA Civ 877, per Auld LJ at para 90.

Potential failure to implement the ELD

33. The implications to be drawn from the Consultation 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 ELD. 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.

34. 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 ELD (“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”).

Access to justice in the event of imminent threat of environmental damage

35. The one access to justice topic that the Consultation does discuss is whether the request for action provisions should apply to an imminent threat of environmental damage as opposed to where damage has occurred. Defra does not express a concluded view but asks for views. [See paragraphs 4.12 to 4.16 and question 4.4]

36. We find the reasoning given for not allowing the request for action procedure unconvincing and, with due respect, patronising in part. The impression is that that the access to justice provisions have been written with industry’s concerns
in mind rather than protection of the environment. Part of the reasoning appears to be that environmental groups are incompetent or opportunistic and that investigating their requests for action will divert valuable resources.

37. In our view, it is in everyone’s interests to know about imminent causes of environmental damage. Responding to a request for action need not be a lengthy process – given the imminence of the harm it is far better that it is not. The resource implications could be controlled by requiring requests to be worded shortly. Requests could be required to include other documents likely to assist the regulators (e.g. photographs, a plan of the area). Deciding that a request is irrelevant and notifying the applicant of this should be not resource intensive. The applicant will then need to decide whether to question the decision in front of a court/tribunal. Experience suggests that legal challenges are not undertaken lightly given the time/cost implications which will act as an inevitable filter to cases being taken further.

Question 4.7
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?

PTP: None stated

38. For the reasons stated in response to Question 3.13 above, UKELA considers that the Government would have failed to comply with its obligations to transpose the ELD if it suspends a requirement to carry out remediation during an appeal.

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?

PTP: None stated

39. The Government has recently accepted all the recommendations of the Macrory report on regulatory sanctions. The report recommends less reliance on criminal sanctions and greater use of a broader toolkit of regulatory penalties including administrative penalties. The Defra report on its review of environmental penalties came to similar conclusions about the use of criminal sanctions. UKELA supports the adoption of a broader penalty regime for failure to comply with a duty under the ELD in line with the conclusions of both reports.

40. UKELA is in favour. It is in the public interest to avoid adverse consequences. In any event, it is not possible to prevent people making such requests and the competent authority would be required to apply public law principles in deciding on their response.

Other issues

41. UKELA notes that the Consultation is silent on many crucial aspects of the transposition of the ELD including the following: 41.1 the method of implementing the ELD in respect of existing domestic liability systems, in particular, liability for remediating water pollution and land contamination; 41.2 the type of property over which a competent authority may take security and whether a charge can be triggered solely by a competent authority or whether a court procedure is required (see Question 4.1). UKELA notes that that there is nothing in article 8.2 of the ELD which limits the type of property over which a competent authority may take security and that English law already provides that competent authorities may trigger a charge (see EPA 1990, ss. 78P, 81A); 41.3 application of the permit and state-of-the-art grounds of appeal if environmental damage is caused by a combination of the activities relevant to those grounds and other activities. The ELD appears to contemplate that activities subject to the permit and state-of-the-art grounds of appeal must be the sole cause of the damage in order for the grounds to apply; 41.4 a detailed outline of the technical guidelines/regulations to be proposed under annex I (and annex II) and whether the Government envisages proposing regulations and/or guidance on procedural and substantive issues involved in: (a) remediating environmental damage to protect human health and the environment; and (b) restoring and/or replacing water and protected species and natural habitats both of which would appear to be necessary for adequate implementation of the ELD; 41.5 a list of permits and authorisations that would qualify for the permit ground of appeal and elaboration on the meaning of “fully in accordance with the conditions of [a permit]” in article 8(4)(a); and 41.6 the extent of criminal sanctions and whether the Government will also introduce sanctions for civil administrative offences (and if not, why not).

Financial security

42. UKELA would like, respectfully, to point out that the Government’s statements in paragraphs 4.20 of the Consultation and paragraphs E.43 and E.44 of the Partial Regulatory Impact Assessment are incorrect in that “appropriate products”, that is, environmental insurance policies for ELD liabilities including complementary and compensatory remediation, have already been developed and have been purchased by operators for some considerable time.

43. In addition, UKELA respectfully suggests that the Government should expedite measures to encourage financial security instruments and markets in view of the absence of cover in many public liability policies for ELD liabilities and the obvious detriment to operators of such an absence. UKELA would be happy to discuss this lack of cover with the Government.

Competent authorities

44. The Government appears to assume that ‘primary remediation’ is limited to restoring and/or replacing protected species and natural habitats due to its proposal that Natural England and the Countryside Commission for Wales should be competent authorities for “biodiversity damage” (Consultation, para. 4.24). Primary remediation, however, necessarily includes measures to remediate contamination as well as measures to restore or replace natural habitats because, in most cases, restoration cannot take place until contamination has been remediated.

45. Further, the Government does not mention article 6(1)(a) remedial actions in its suggestion that Natural England and the Countryside Commission for Wales should be competent authorities for biodiversity damage.

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46. In view of Natural England’s and the Countryside Commission’s lack of expertise regarding the remediation of contamination, UKELA respectfully suggests that the Government should consider also designating the Environment Agency as a competent authority in respect of damage to protected species and natural habitats. The failure to do so would necessarily prejudice operators because a competent authority which does not have expertise in remedial measures would be selecting measures which must be carried out at operators’ expense.

Timing

47. UKELA respectfully notes that there is insufficient time for the Government to consider comments to the Consultation, issue the Second Consultation and draft legislation, consider comments to it and prepare and lay secondary legislation before Parliament before 30 April 2007. The Government will, therefore, necessarily fail to comply with its obligation under the ELD to transpose the ELD by that date.

48. UKELA further notes that operators will be liable for any environmental damage that they cause after 30 April 2007 regardless of whether domestic legislation has been enacted. This is the case, not because of the potential direct effect of the ELD, but because article 17 of the ELD indirectly provides that the ELD applies to any environmental damage caused by an emission, event or incident that occurs after that date.

49. Accordingly, the Government’s failure to transpose the ELD by 30 April 2007 will result in operators who cause environmental damage being liable for interim losses and other remedial actions in the absence of domestic legislation to guide their response to such damage.

50. UKELA, therefore, respectfully suggests that the Government issues interim guidance to safeguard the interests of operators until it has issued secondary legislation.

51. In addition, UKELA respectfully notes that the secondary legislation should have retrospective effect to 30 April 2007 when it is issued.

Difficulty in implementation

52. The ELD relies, to a much greater extent than other Directives, on Member States inserting provisions into domestic legislation in order to create a workable regime.

53. By adopting a minimalist approach, the Government fills gaps in the ELD with blanks in domestic legislation. This approach is likely to prejudice operators by creating a regime that is not workable in practice.

Comments to the Inquiry by the House of Commons Environment, Food and Rural Affairs Committee on Implementation of the Environmental Liability Directive

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.1 In particular, UKELA considers that Defra has failed to consult on the access to justice provisions in articles 12 and 13 of the ELD and on 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

1. Access to justice: 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 Arhus 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.’)

5. Criminal sanctions: 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.


1 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).