

ANNEX 1

LINK Consultation Response

Environmental Liability Directive Consultation - March 2007

LINK Members signed up to this response are:

- Scottish Wildlife Trust
- RSPB Scotland
- Woodland Trust Scotland
- Marine Conservation Society
- WWF Scotland

Scottish Environment LINK (LINK) is the umbrella forum for Scotland's voluntary organisations working together to care for and improve Scotland's heritage for people and nature. Its member bodies have interests spanning nature conservation, recreation, landscape and archaeology. LINK member organisations have around 500 000 members across Scotland.

The summary of key points below loosely follows the order in which each issue appears in the Scottish Executive consultation.

Summary of key points

1. **The approach to transposition.** LINK members believe that by recommending that the Directive is transposed "without enhancement"¹, the Executive and Scottish Ministers will substantially fail to apply the principal aim of the Directive, namely to "make the polluter pay". It will also fail to meet the aim of Scotland's Sustainable Development Strategy which states that the "polluter pays principle will be embedded into policies"².
2. **Costs and benefits.** LINK members believe that, on balance, the additional costs of ELD to businesses are far outweighed by the benefits to society which will flow from enhanced protection of ecosystem goods and services³. We believe that such wider benefits to society are not adequately taken into account in Annex 1 of the consultation and that the costings should be amended to reflect such benefits.
3. **Damage to biodiversity – trigger for liability.** LINK members recommend that adverse impacts on Favourable Conservation Status (FCS) should be assessed at the *appropriate level* which must include both EU and nationally protected biodiversity both at a 'site' level and throughout the 'wider countryside' as part of the "*local and regional levels*" specified in Annex 1 of the ELD.
4. **Strict and fault based liability.** LINK members strongly advocate the application of strict liability to extend to all activities causing biodiversity damage. This will allow the ELD to be more practically workable and ensure compliance with existing provisions of the Habitats and Wild Birds Directives

¹ Paragraph 32 of the Consultation

² Paragraph 9.21 of Choosing Our Future

³ Scotland's annual ecosystem service value of has been valued at approximately £17 thousand million ($\$24 \times 10^9$) Williams et al (2003) The value of Scotland's ecosystem services and natural capital. European Environment 13: 67-78

5. **Inclusion of nationally protected biodiversity.** LINK members strongly disagree with the Executive's approach not to apply the option of including nationally protected biodiversity. We believe that the transposing legislation should apply to all Sites of Special Scientific Interest and Habitats and Species of Principal Importance to biodiversity conservation in the 'wider countryside' under Section 2 (4) of the Nature Conservation (Scotland) Act 2004 to ensure harmonisation with, rather than an undermining of, existing legislation.
6. **Damage to EU protected waters – trigger for liability.** LINK members believe that the definition of water damage should include, but should not be limited to, actions which cause or threaten to cause deterioration across a 'class boundary', as defined under the Water Framework Directive.
7. **Permit and State of the Art defences.** LINK members oppose the introduction of the permit and state of the art defences on the grounds that allowing such defences will: limit the practical and economic effectiveness of the ELD; weaken the application of existing laws; mean that the restoration of environmental damage at the polluter's cost (the whole purpose of the ELD) will not be fully secured, and is will be more likely to fall on the state.
8. **Strict and fault based liability.** LINK members advocate the extension of strict liability for water and land damage to all activities, not just Annex III activities. We feel this is vital to the practical workability of the ELD and to avoid weakening the effect of existing legislation.
9. **Recovering costs.** See below.
10. **Multiple party causation.** LINK members support the adoption of 'joint and several' liability with equitable apportionment between liable operators.
11. **Requests for action.** LINK members support of the inclusion of NGO rights of access to justice in cases of imminent threat of damage in order to help ensure the effective enforcement of the ELD, build trust and partnership working, and spread costs.
12. **Competent Authorities.** LINK members broadly support having two lead agencies as the Competent Authorities but recommends that the Executive might like to consider how any proposed UK (and subsequently Scottish) Marine Management Organisation might have a Competent Authority role at sea.

Consultation Questions

Question 1 - Damage to biodiversity

The trigger for liability under ELD

The Executive's preferred position in relation to the test of 'significant damage' to Favourable Conservation Status (FCS) appears to focus on biodiversity damage '*across the natural range of that habitat or species*'⁴. Whilst LINK supports an emphasis on viewing the functioning of biodiversity at a broader ecosystem scale, in practical terms ecosystems operate at *multiple scales*, encompassing "local, regional, national and Community"⁵ levels. We recommend that adverse impacts on FCS should be assessed at the *appropriate level* which must include 'sites' and 'biodiversity in the wider countryside' as part of the "local and regional levels" referred to in Annex 1 of the ELD.

⁴ We would appreciate more clarity

⁵ Paragraph 40 of the Consultation from Annex 1 of the ELD

We also draw the Executive's attention to the fact that it is a fundamental requirement of the Habitats Directive (see Article 3(1), Habitats Directive), that FCS of *each site* within the Natura 2000 network is a prerequisite for the *overall* achievement of FCS, and that this is supported by Case Law. We advocate there should be no restriction regarding the definition of biodiversity damage under the ELD otherwise the transposing law will be in breach of EU legislation. To avoid this potentially serious contravention of EU legislation, the Executive should use those thresholds for environmental damage exactly as they appear in the ELD. Guidance in implementing the thresholds could then later be developed by the appointed Competent Authority.

Furthermore, the preparation of an assessment to determine whether FCS has been affected 'across the natural range of the habitat or species' is likely to be scientifically problematic, time-consuming and potentially costly. It would also effectively prevent an operator from complying with the "self executing" duty to begin remediation measures "without delay" under Article 5 (1) the ELD.

Strict and fault based liability

LINK believes that from an environmental point of view, imposing strict liability in relation to any environmental damage, including biodiversity damage, makes sense. The principle of strict liability should be applied to all biodiversity damage, irrespective of what type of activity caused the damage or where the damage took place. Extending the principle of strict liability to biodiversity damage caused by non-Annex III activities would correctly apply the "polluter pays principle" thus preventing unforeseen state liability. It would ensure legal certainty and aid compliance with Member State duties under Articles 6(2) and 12(1)(d) of the Habitats Directive 1992 and Article 2 of the Wild Birds Directive 1979. Furthermore, strict liability would also aid better regulation by bringing different obligations under various legislative instruments in line with each other, thus avoiding confusing and conflicting laws.

We are concerned that, unlike damage to water or land that is subject to a strict liability regime under the UK Contaminated Land Regime (Part IIA Environmental Protection Act 1990) and the Water Resources Act 1991⁶, there are currently no strict liability rules (nationally) in relation to biodiversity damage. This leaves wildlife protection at a clear disadvantage despite biodiversity being one of the major areas where the ELD adds to existing legislation, and runs contrary to the Executive's commitment to saving endangered UK wildlife, protect and enhance species and

We believe that if a system of fault-based liability is introduced in relation to biodiversity damage caused by non-Annex III activities, then, in cases where no fault can be established (and restoration cannot be achieved under section 31 of the Wildlife and Countryside Act 1981 (the WCA), as amended) the companies causing the damage will not be obliged to restore it, but Member States will still be subject to the relevant obligations under Article 6(2) of the Habitats Directive and will be responsible for meeting these obligations (and therefore for restoring the damage).

Whilst most Natura 2000 sites are underpinned by SSSIs, not all Natura 2000 qualifying interest features are also features of the corresponding SSSI⁷. Where this is the case, the Natura 2000 feature may not benefit from protection under the WCA, and it would not fall within the ELD⁸ if no fault/negligence could be established. In such cases, there will be no mechanism available to prosecute and seek restoration of the feature unless strict liability under the ELD is applied. Introducing a general rule of strict liability would strengthen incentives to prevent damage,

⁶ See also Water Environment and Water Services (Scotland) Act 2003

⁷ Although strictly speaking they should be: if a species is considered to be of EU importance it will also automatically qualify as a species of national importance and should therefore have a SSSI designated for it.

⁸ Unless the species were covered both by the ELD and the WCA.

guarantee restoration and provide a greater degree of legal certainty. It would also make the ELD regime easier and simpler to understand and apply.

Although the ELD has a somewhat unclear approach to enforcement, we understand that operators who cause/are about to cause environmental damage, including biodiversity damage, are under an absolute duty to take preventive/remedial measures, even if their liability has not yet been established (including the proof of negligence or fault in cases of biodiversity damage caused by non-Annex III activities), or one of the available defences (including the permit and state of the art defences) applies. There is no mechanism for the Competent Authority to establish liability first, and waiting for the Competent Authority to act would be in breach of the ELD's provisions. If no fault can be shown, the costs of restoration will necessarily have to be borne by the Competent Authority (if the operator was not at fault). Strict liability for biodiversity damage in all cases would ease this burden on the state and Competent Authorities.

Possible extension to include nationally-protected biodiversity

We strongly disagree with the Executive's preference to not apply the option to include nationally protected biodiversity and believe the transposing legislation should apply to all Sites of Special Scientific Interest and Habitats and Species of Principal Importance to biodiversity conservation in the 'wider countryside' under Section 2 (4) of the Nature Conservation (Scotland) Act 2004.

Whilst LINK supports the Executive's recent drive towards 'better regulation' we strongly believe that in relation to ELD this should not automatically mean transposing the most basic regime. In fact, overall, the benefits of a transposed ELD which is consistent with national legislation and policy will lead to a more coherent suite of environmental regulation mechanisms, making the regimes *simpler*, not more complex.

There is a significant risk that weak transposition will lead to a weakening of existing national legislation such as the Nature Conservation (Scotland) Act, 2004. Article 16 of the ELD allows implementing legislation to be more stringent and stricter than the ELD itself. Use of this Article is crucial in cases where stricter national laws already exist, so that such laws are not weakened by the implementing legislation. It can also be important in situations where the ELD shows certain weaknesses or gaps which could be dealt with in the implementing legislation to ensure effective transposition.

Furthermore, considerable public and charitable expenditure is being invested in efforts to restore large-scale habitats and to protect particularly vulnerable species of national conservation importance. Yet if an activity causes significant damage to a UK BAP species that falls outside the scope of the basic ELD, there will be no requirement for the person or company undertaking the activity to pay for remediation to take place. This failing will undermine the Government's commitment to halt biodiversity loss by 2010.

Question 2 - Damage to EU protected waters

The trigger for liability under ELD

LINK supports in principle the use of 'status classes' for assessing 'significant' deterioration in water quality. The use of 'status classes' when defining damage brings with it obligations regarding the protection of surface water bodies from damaging physical change through the inclusion of hydro-morphological quality elements. In the case of *High Status* water bodies, the obligation to prevent damage is almost absolute. However, for other water bodies, morphology must be maintained or restored to a state consistent with the ecological objectives, which could bring liabilities for those carrying out engineering work in or near a water body e.g. flood defence, coastal protection, marina construction etc.

Question 3 - Damage to land causing significant risk of adverse effect on health

The trigger for liability under ELD

LINK does not have the necessary expertise in this area to make informed comment.

Questions 4 to 7 – Permit and State of the Art Defences

LINK does not agree with the Executive's position that 'permit' and 'state of the art' defences should be transposed.

The principal of 'polluter pays' is the principal aim of the ELD. LINK believes that if the permit defence is transposed it will undermine the whole rationale behind the Directive. Inclusion of the permit and state of the art defences provides less certainty as these defences would introduce several elements of doubt in relation to the restoration of environmental damage, and the application and enforcement of the regime. Instead of providing an automatic duty to pay for restoration of environmental damage when an operator is liable under the ELD, defence related liability will be contingent on the type of activity carried out, the type of permit operated under, proof of negligence, proof of a permit breach, and proof of whether the activity or emission was in accordance with the state of scientific and technical knowledge at the time. As the permit and state of the art defences apply to remedial actions only, i.e. not to preventative actions, defence related liability creates confusing and inconsistent rules. In addition, if the enforcement mechanisms of the ELD remain unclear, further uncertainties will arise should the defences be introduced.

LINK believes that it is unfair to penalise operators who adhere to their permits in the same way as operators who do not. This should be dealt with under the legislation under which the permits are issued, e.g. IPPC which will impose sanctions and penalties for breaches. The ELD is a separate and distinct piece of legislation with sometimes similar, but separate and distinct aims to those of the Annex III instruments that can give rise to the permit defence. 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. Furthermore, the introduction of the permit and state of the art defences has been rejected by the Government in relation to Part II A of the EPA.

We are concerned that the Executive's support of permit and state of the art defences will introduce fault-based liability through the back door, and note that the European Court of Justice (ECJ) has held that it is not possible to introduce a derogation from the application of the species protection provisions in Articles 12 and 13 of the Habitats Directive on the basis of the legality of the act carried out⁹. Similarly, the ECJ has also ruled that "state of the art" considerations taken into account under Art 6(3) and (4)) in assessing the safety of a plan or project do not preclude the Habitats Directive from applying, i.e. a decision that a plan/project can go ahead based on state of art considerations is not a defence, because of the general duty contained in Art 6(2) of the Habitats Directive. Introducing the state of the art defence under the ELD would militate against this fundamental principle.

We are also concerned that the ELD's twin goals of preventing and remedying environmental damage through the application of the "polluter pays principle" and a "strict liability" regime, will be missed if "compliance with permit" and "state of the art" are given as reasons to release operators from clean-up costs. The proposed defences directly oppose the "polluter pays principle" and undermine the principle of strict liability. 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.

In addition, and in respect of the marine environment, we are concerned that activities covered under the European Common Fisheries Policy (CFP) will have special derogation from the

⁹ See paras 109-114 of Case C6-04 ECJ ruling of 20 October 2005.

provisions of the ELD. At present it is our understanding that any damage caused to marine biodiversity as a result of the CFP is exempt from the ELD, regardless of the behaviour of the operator. This would include damage caused, for example, by fisheries by-catch, scallop dredging, and bottom trawling.

Questions 8 to 12 - Recovering costs

For the reasons outlined above LINK does not favour the inclusion of the permit and state of the art defences in the UK's transposing legislation. However, the introduction of what has been termed "self-executing provision" means that applying the permit defence before remediation takes place would amount to a breach of the ELD.

Although the enforcement mechanisms of the ELD have been left opaque, it does appear to impose a duty on operators to carry out some, if not all, remedial actions before asserting their potential right to avoid the costs of those measures under Article 8(4). This follows on from Article 6 which imposes an absolute obligation on the operator to take immediate control, containment and prevention measures and to take the necessary remedial measures according to what the competent authority determines. The right not to have to bear the costs of the measures "taken"¹⁰ is an express right to be reimbursed in relation to the mandatory defences (see Article 8(3)). Given that the permit and state of the art defences are discretionary, there would be no need to specify such a mechanism in the ELD itself.

It is presumed that there will be a mechanism for reimbursing claims and yet the question as to who will reimburse operators is unclear. Furthermore, if the discretionary defences are introduced in addition to the mandatory ones, this could reintroduce the concept of "subsidiary state responsibility" through the back-door, as it would convert the powers of the competent authority to request operators to carry out remedial measures or to take remedial measures itself as a last resort, to a de facto obligation either to pay for such measures or to carry them out itself¹¹, unless other models for reimbursement, such as purpose-made industry or state-financed funds, insurance or other financial security mechanisms are considered.

If no reimbursement mechanism is provided for, there may be little incentive on operators to comply with the regime. Competent authorities will have little incentive to enforce the ELD, if they are under pressure to pay for remedial measures without there being a robust mechanism to deal with such claims. In the absence of third party involvement, e.g. by NGOs, an enforcement stalemate might ensue and the regime would be ineffective.

Question 13 –Multiple party causation

LINK supports the adoption of 'joint and several' liability with equitable apportionment between liable operators. The other alternative, namely 'proportionate' liability, is less likely to deliver the 'polluter pays' principle of the ELD as there is a risk that in the event of an operator having insufficient funds to remediate environmental damage, it may fall to the Competent Authority to cover this share of the proportion (the so called 'orphans share'¹²). If proportionate liability is adopted a fund will be required to provide the Competent Authority with enough resources to pay potential 'orphan's shares' in cases of multiple party causation. LINK recommends that if proportionate liability is adopted then such a fund should be raised from levies on polluting

¹⁰ Note the use of the past tense.

¹¹ See Art 6(3): The ELD contains a power, not a duty, for the competent authority to take remedial measures if the operator fails to comply with its obligations, cannot be identified or "is not required to bear the costs under the Directive" as a means of last resort.

¹² In the United States the term orphan's share is defined as "the financial responsibility assigned to a potentially responsible party (PRP) who is insolvent or defunct and unaffiliated with other viable liable PRPs."

industries rather than the taxpayer as this would be more consistent with the 'polluter pays' principle of the ELD.

Question 14 – Request for action

LINK strongly advocates the inclusion of paragraphs 1 and 4 under Article 12 of ELD for the following compelling reasons:

- The Executive is signatory to The Aarhus Convention 1998¹³ which provides members of the public 'rights of access to justice'. Removal of the right of access to justice in cases of imminent threat would, LINK contests, amount to a breach of the Aarhus Convention.
- There is considerable expertise and *competence* regarding issues of environmental damage in the NGO sector. Excluding this sector in any way would result in much less efficient, transparent and effective delivery of the ELD. This expertise will be particularly important in respect of 'imminent' threat where the Competent Authority may not be aware of impending environmental damage and where action needs to be taken quickly.
- Involvement of NGOs should ease (not 'add to' as suggested in paragraph 90) the administrative and financial burden on Competent Authorities by delivering some of their workload for them and effectively carrying a proportion of the costs.
- Involvement of NGOs will encourage partnership working and wider stakeholder engagement in environmental justice issues generally and avoid accusations of Competent Authorities retreating into 'ivory towers'. It is clearly in everyone's interest to know about imminent causes of environment damage.

There is an assumption in paragraph 90 that applying Article 12 in full would increase the number of requests made to Competent Authorities without 'justifiable basis'. This assumption is both unproven and very subjective, and favours industry concerns rather than welcoming and encouraging greater public participation in environmental justice cases. This assumption, in part at least, also discredits NGOs by suggesting they do not have the expertise, judgement or objectivity required to make sound representations to the Competent Authority. This is clearly not the case as demonstrated by the effective partnership working between the Executive, its agencies, and environmental NGOs for many years.

Questions 15 and 16 – Competent Authorities

LINK supports a number of points raised in paragraphs 92 -100, in particular:

- The principle that there should be as few points of contact as practicable.
- That the most relevant players are SEPA and SNH supported by the organisations listed.
- The need for close working relationships across agencies (through for example by 'statutory consultation' between the CA and other agencies) to ensure all areas of expertise are covered.

In the marine environment, the Executive might like to consider how any proposed UK (and subsequently Scottish) Marine Management Organisation might have a Competent Authority role.

Question 17 to 19 - Appeals

LINK has no comment on these questions.

Other Issues

LINK advocates the creation of criminal offences where the operator fails to comply with a duty under the ELD. It is important that such offences be created for a number two main reasons:

¹³ See <http://ec.europa.eu/environment/aarhus/index.htm>

- Without such an offence the ELD will lack real authority as there will be no substantive provisions to help authorities enforce its provisions (resulting partly from the fact the ELD is a “self-executing” Directive).
 - The creation of a criminal record will serve as an additional deterrent for operators who may otherwise postpone complying with the Directive as long as possible without serious consequences.
-

LINK contact:

Jonathan Hughes
Head of Policy
Scottish Wildlife Trust
Cramond House
Cramond Glebe Road
Edinburgh
EH 4 6NS

Direct Line: 0131 312 4771

E-mail: jhughes@LINK.org.uk