RESPONSE TO THE DEFRA SECOND CONSULTATION ON IMPLEMENTATION OF THE ENVIRONMENTAL LIABILITY DIRECTIVE

MAY 23RD 2008

INTRODUCTION

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

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

UKELA makes the following comments to the Government's second consultation on the implementation of the Environmental Liability Directive ("ELD") by the Department for Environment, Food and Rural Affairs ("Defra").

We have responded to the questions as set out below, as well as adding some additional / miscellaneous comments at the end of this response. Where we have not responded to a specific question this should not be taken as to our agreement with the question.

Question 1: do you have any comments on the definitions, in particular the definition of activity' to which the regulations apply (regulation 2)?

An "activity" is described as "any commercial activity, whether public or private and whether or not carried out for profit". It is not clear how an activity could constitute a "public commercial activity". A non-exclusive list of examples might assist understanding and, ultimately, enforcement of the Regulations.

Question 2: do you agree that the Regulations should apply to all species and habitats within a SSSI for which that SSSI has been notified as well as to EU listed species and habitats (regulation 4)?

There could be circumstances where the site integrity of a SSSI could be unaffected but the conservation status of, say, a transient wader species could be so affected. Hence, UKELA suggests that the Regulations should be broadened to include such a situation.

Question 3: do you agree that the test of damage within SSSIs should be based on site integrity (Schedule 1)?

We agree with the test as a sensible approach that enables an operator to comply with the duty in regs. 11(1)(a)-(b) and 12(1)(a)-(b) immediately to take all practicable steps to avoid environmental damage and immediately to notify the appropriate competent authority of relevant details.

We consider, however, as indicated in our response to Question 2, that the Regulations should be refined to ensure that they protect an EU-protected species or natural habitat that is adversely affected on a SSSI when the damage to that protected species or natural habitat does not have an adverse effect on the integrity of the SSSI.

Question 4: do you agree that any damage which would be consistent with a drop in WFD status class should be classified as damage for the purposes of ELD (regulation 4)?

The ELD uses the term '*significant adverse effect*[1]*'* as distinct from '*deterioration in status'* (as per the Water Framework Directive). The aim of the ELD is to prevent and remedy environmental damage in general, but also including water damage. The aim of the WFD is to prevent further decline to the water environment. The two laws should work in harness. Hence, we consider that an interpretation of '*significant adverse effects*' as simply and solely covering damage which changes the status category of a water body would be in contravention of the ELD and in conflict with the WFD. That is, we consider that the UK Government would breach the ELD if significant damage within a status class (i.e. without a drop in status class) falls outside the Regulations.

Question 5: do you agree that the definition of water should be limited to water bodies as identified for the purposes of WFD (regulation 4)?

"Waters" is not defined as "water bodies" by the ELD. This is, therefore, a restrictive definition which risks narrowing the ambit of the ELD.

"Waters" in general should be covered – expressly to include small water bodies, e.g. ponds.

Question 6: do you agree with the proposed approach to the threshold for land damage (regulation 4)?

It is proposed that environmental damage to land means contamination of land by substances, preparations, organisms or micro-organisms arising out of an activity [specified in Schedule 2] that results in a significant risk of adverse effects on human health. The term "preparation" is unclear and should be defined.

There is the obvious issue that the definition is different from Part 2A of the Environmental Protection Act 1990 due to the difference in language between the two pieces of legislation. UKELA recommends that the Government issues clear and authoritive guidance on the threshold at the same time as the Regulations are brought into force so that the issues similar to those over SGVs are not repeated.

Question 7: do you agree with the proposed approach for deciding remediation for land damage? (Schedule 4)?

The proposed approach is that remediation must ensure, as a minimum, that the relevant contaminants are removed, controlled, contained or diminished so that the land, taking account of its lawful current use or any planning permission in existence at the time of the damage, no longer poses any significant risk to human health. It is noted that "natural recovery" is a permitted form of remediation in appropriate cases.

UKELA suggests that the term "natural recovery" is described to explain its relationship to "remediation" and "natural attenuation".

Question 8: do you agree with the proposed approach to the overlap with other legislation (regulation 6)? If you prefer an alternative approach please give details of how you think it should work and why you favour it.

Question 9: do you agree with the proposed approach to damage caused by emissions which are ongoing at the date of coming into force of the Regulations?

We recognise that the UK Government cannot empower the relevant competent authorities to implement the ELD until the final Regulations enter into force.

We consider, however, that the UK Government will be in breach of EU law if it fails to implement the ELD in respect of an emission, event or incident which took place and finished after 30 April 2007

[1] Article 2(1)(b), ELD.

but before the coming into force of the Regulations. This is 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 30 April 2007.

The corollary of the above is that an operator who causes environmental damage in the period between 30 April 2007 and the coming into force of the Regulations will be liable for interim losses regardless of the lack of Regulations. The interim losses will increase if the operator does not comply with the ELD in the absence of its enforcement by the relevant competent authority. We consider that this situation does not, as indicated by the Government in paragraph 57 of the Executive Summary, offer "improved certainty for both business and enforcing authorities".

Question 10: do you have any comments on the meaning of the term'natural disaster' particularly in the context of flooding (regulation 7)?

We believe there is a need for greater clarity on the meaning of "national defence". By way of example, BAE Systems are suppliers of defence equipment; does this apply to them? This could be dealt with easily via guidance.

Question 11: do you agree that commercial sea fishing activities which are in accordance with the CFP should be excluded from the scope of the Regulations?

Question 12: do you agree with the proposed division of responsibilities between competent authorities (regulations 9 and 10)?

No. We consider that Natural England and the Countryside Council for Wales do not have the necessary expertise to handle the remediation of chemical contamination for land damage involving protected species and natural habitats and SSSIs. We note that paragraph 7.17 of your draft Guidance recognises that Primary Remediation measures may include such remediation measures.

We suggest that you designate the Environment Agency as an enforcing authority for protected species and natural habitats and SSSIs, together with the nature conservation organisations, with the split of responsibility being the remediation of contamination and the restoration of the natural resource, respectively.

Question 13: do you think the Regulations should contain special provisions about handling emergencies and if so, what should they be?

We note from paragraph 5.15 of the Draft Guidance and paragraph 82 of the Executive Summary that the UK Government has recognised that the operator's duty to carry out emergency actions continues from the time that the operator's activity caused environmental damage until the damage has been fully remediated. We also note from paragraph 99 of the Executive Summary that there will not be an appeal from a notice to carry out emergency measures.

We consider that the Regulations should provide explicit provisions to specify that:

(1) An operator whose activity has caused an imminent threat of, or actual, environmental damage has a duty to carry out emergency measures to prevent the environmental damage or further environmental damage, respectively;

(2) An enforcing authority may serve an "emergency notice" to require an operator to carry out emergency measures under articles 5(2) and 6(1)(a);

(3) A competent authority may serve an emergency notice on an operator at any time until the environmental damage is fully remediated;

(4) There is no appeal against such a notice; and

(5) It is an offence to fail to comply with an emergency notice.

We further suggest that Regulation 17 is revised to state that the responsible operator is responsible for the costs of the enforcing authority in monitoring the environmental damage during the pendency of an appeal to ensure that the authority is able to alert the operator if further environmental damage may be caused such that the operator's duty to carry out any emergency measures has been triggered.

Question 14 (Wales only): do you agree with extending liability to GMO permit holders (i.e. the GMO producers) as well as operators (such a farmers) who purchase GMOs from them (regulation 13 of the Welsh regulations)?

Question 15: do you agree with the way in which the 'defences' in the Directive have been applied (regulation 14 in England, regulation 15 in Wales)?

UKELA disagrees with the Government's approach to 'defences' in relation to remediation as explained in paragraphs 90 and 91 of the Consultation, which we believe fails to transpose the ELD correctly.

That approach involves treating the 'defences' as exceptions to the ELD which would appear in article 4. However, it is clear from Articles 5 and 6 that in the situations covered by the 'defences' the preventive and/or remedial action must be carried out. Article 8 merely shifts the financial burden of the action. That can be achieved either (a) by providing for recovery of the cost of the work from the appropriate third party or authority, or (b) by the authority carrying out the necessary work itself and refraining from recovering costs from the operator who benefits from the 'defence'.

UKELA notes that the correct approach is followed in relation to preventive measures. In that case no defences or appeals are provided but the responsible operator may recover expenses under draft Regulation 20 from the third party or public authority who gave an instruction.

The point could be dealt with in relation to remedial measures by deleting draft Regulations 14(4((d)-(g) and amending Regulation 20 to read '…….expenses under regulation 11, 12 or 15……'

Our reply to question 24 is also relevant to this question.

In order to transpose the 'permit' and 'state of the art' "defences" in accordance with the ELD, we suggest that there should be a requirement on the enforcing authority to take the necessary remedial work where either of those "defences" applies with no recovery against the operator.

Question 16: do you agree with the proposed procedures for assessment and identification of remedial measures, and for the service of remediation notices (regulation 15 in England, regulation 16 in Wales)?

Question 17: do you agree with the proposed appeal procedures (regulations 14 and 16 in England, regulations 15 and 17 in Wales)?

The effect of Regulations 14 and 15 would appear to be that mandatory remediation will not generally be imposed pending the outcome of any appeal against a notification (Regulation 14) and / or a remediation notice (Regulation 15).

As UKELA pointed out in its response to the first consultation on the Directive (see UKELA answers to consultation questions 3.11, 3.13 and 4.7 of that consultation), there is a strong argument that Article 8 of the Directive envisages that operators should not be allowed to delay remediation works pending the outcome of any liability proceedings, but should be allowed to recover their costs if they can, at a later stage, demonstrate that one of the "defences" applies. UKELA notes, however, that the Government has considered this point and decided that it would not be workable to require operators to carry out remediation work pending the outcome of any appeal as to liability (paragraphs 90 and 91 of the Consultation document).

If the Government decides to suspend mandatory remediation pending the outcome of appeals, it is important to bear in mind that the scale of any complementary and compensatory remediation is likely to increase as a direct result of any delay in starting remediation work (e.g., most obviously, because any interim losses pending full recovery will relate to a longer period).

In view of this, it will be important to ensure that any appeal process can be expedited or made subject to an express, clear and rigorous timetable. As currently drafted, the Regulations establish two types of appeal – an appeal against liability at notification stage (Regulation 14) and an appeal against quantum at remediation notice stage (Regulation 16). No appeal procedure is established. In view of the direct effect that any delay is likely to have on quantum, Defra should consider whether an express (statutory) appeal procedure would be appropriate.

We would like to draw attention to the following two further issues:

First, UKELA has concerns about the drafting of reg. 14(2), which limits withdrawal of a notification to circumstances where the authority is satisfied that the notification should not have been served.

- There may be a number of cases where the notification was properly served on the information then available, but the authority thereafter concludes that the operator has satisfied it of the applicability of one of the "defences". As currently drafted, such a notice can only be set aside on an appeal. It is therefore suggested that reg.14(2) be amended to read:

  "*It may withdraw the notification if it is satisfied that the notification should not have been served* ***or that one of the grounds of appeal in subsection (4) below are likely to be made out*****"**

- In this regard, we have in mind the long-running legal debate within Councils as to whether they had the power to withdraw an abatement notice under Part III EPA 1990 in advance of the determination of an appeal against such notice.

Secondly, a problem arises out of the fact that an operator has two opportunities for appeal: (a) in respect of the notification (on the question of liability for the damage); and (b) in respect of remediation (on the question of the extent of that liability).

- UKELA is very concerned that the regulations propose that these appeals be run in series, rather than in parallel. Indeed, as currently drafted, the regulator cannot serve a remediation notice until any notification appeal has been unsuccessful: reg. 15(1), and hence the operator cannot commence his remediation appeal. This means that in a case of any complexity, each appeal stage is likely to be drawn out, however efficiently managed by PINS or the parties. DEFRA should reflect on the timescales of the Sandridge EPA Part IIA appeals currently awaiting determination in this regard – where all the issues on liability and extent of remediation *were* heard together: how much longer would the proceedings have taken if the issues had been determined in two separate tranches? There is also likely to be a good deal of overlap in the evidence required on notification and remediation appeals, particularly where there are two potential operators responsible for the contamination: again see Sandridge for a similar situation.

- The solution is to retain both appeal stages, but to provide (a) in reg. 14(1) that the operator shall serve a proposed remediation notice with the notification, if reasonably practicable to do so; and (b) a new ground of appeal, (h) in reg.14(4), "***that measures other than those specified in the proposed remediation notice are more appropriate.***"

- UKELA's thinking is that (i) this will concentrate the authority on identifying at the earliest practical moment the nature of the remediation – where this can be sensibly done, and (ii) this will enable the operator to take a view *before he contests the notification* whether doing so is prudent. So, if the works set out in the proposed notice are modest in scope, it may not be worth the operator's while to contest the notification, and this is more likely to lead to voluntary remediation. Finally, where a contest is required, it will enable what may turn out to be the real dispute in the case (say, the need for significant engineering works versus natural attenuation + monitoring) to be addressed at the earliest practical moment.

Thirdly, the drafting of Regulations 17 and 19 is not entirely clear. Nor is it clear how the two Regulations tie in with each other. Most importantly:

- It is not obvious that remediation costs are in fact recoverable at all by the competent authority. Regulation 19 refers to "proceedings for the recovery of costs". "Costs" are as specified in Regulation 17. The costs specified in Regulation 17 do not include remediation costs (only the costs of monitoring of remediation work);

- There is no express right for the competent authority to recover costs. Instead, there is a statement that the enforcing authority "may itself carry out some or all work necessary under these Regulations …. at the expense of the person under the duty". Compare this with the clear drafting of regulation 57(4) EPR, which states: "if the regulator arranges for steps to be taken under this regulation, it may recover the cost of taking those steps from the operator".

Question 18: should appeal procedures be specified or left at the discretion of the appointed person?

UKELA believes they should be specified.

Question 19: should remediation notices be suspended pending appeal?

We agree that remediation notices should be suspended pending appeal.

See our responses to questions 13, 15 and 24, however, for some of the problems which will be encountered if remediation notices are suspended pending an appeal.

Question 20: do you agree with the provisions dealing with requests for action (regulation 18 in England, regulation 20 in Wales)?

Question 21: do you think 'sufficient interest' should be further defined and if so how?

Question 22: do you think an NGO should be defined for these purposes and if so how?

No, we do not think this would be possible, sensible or necessary.

Question 23: do you agree that judicial review is an appropriate route for challenging decisions by enforcing authorities?

In the absence of a specialist Environmental Tribunal (which UKELA advocates), we do not believe there is any other appropriate mechanism apart from judicial review. This, however, should be kept under review.

Question 24: do you agree with the proposed power for the enforcing authority to take action / costs recovery (regulation 19 in England, regulation 21 in Wales)?

Articles 5.3(d) and 6.2(e) of the ELD provide that the competent authority may at any time take the necessary preventive or remedial measures itself. That applies even in cases where the responsible operator has not failed to comply with its duty to undertake the work.

Draft regulation 19 does not empower enforcing authority to take action in that situation and to that extent it fails to transpose the ELD correctly.

In order to comply with Articles 8.3 and 8.4 of the ELD, Regulation 19 should also provide that the enforcing authorities shall not recover their expenses from the operator where one of the 'defences' applies, except where the operator has a right of recovery under Regulation 20. Even in that case, we consider that the enforcing authority should have a discretion not to recover its costs. That may be appropriate, for example, where the damage has been caused by an unknown vandal.

We suggest that Regulation 19 should also be amended to give the enforcing authority power to recover costs directly from a third party who has caused the damage. This is contemplated by Article 10 of the ELD and is in accordance with Articles 8.3 and 8.4.

(i) Costs of establishing liability

The range of costs which can be recovered by the enforcing authority pursuant to Regulation 17 is extremely wide (much wider than is usual under current environmental law in the UK). On the whole, this seems correctly to reflect the wide cost recovery provisions in the Directive. However, UKELA queries whether it is correct for enforcing authorities to be entitled to recover costs of establishing liability, which appears to be the effect of the Regulations as currently drafted.

Regulation 17 provides, among other things, for the responsible operator to be responsible for the administrative, legal and enforcement costs and other general costs of "establishing who is the responsible operator".

It is true that the ELD definition of "costs" is very wide, extending to costs "which are justified by the need to ensure the proper and effective implementation of this Directive" and "administrative, legal and enforcement costs".

However, the operative provisions of the ELD which actually deal with the recovery of costs by competent authorities (as opposed to the recovery of costs by operators) state that competent authorities may recover "costs" (as defined) which are

- "incurred in relation to the preventive or remedial actions taken under this Directive" (Article 8(2)); and

- in relation to "any measures taken in pursuance of this Directive" (Article 10).

Arguably, these provisions extend only to costs incurred in relation to preventive and remedial measures, and not in relation to establishing liability.

It would be unusual for a regulator to be given a statutory right to recover the costs of establishing liability[2]. Regulators may recover some of their enforcement and prosecution costs in court if particular matters are litigated, but the amounts which can be recovered in court are obtained pursuant to court rules on cost recovery, rather than under statutory environmental law.

(ii) Reasonableness

UKELA notes that neither the Regulations nor the draft Guidance contain any provisions stating that the costs incurred by the enforcing authority must be reasonable in order to be recoverable.

Under current UK environmental law, where environmental regulators are given the right to recover costs from operators, these are usually made subject to express obligations to ensure that the costs are necessary and / or reasonable[3]. There will in any case be a general public law duty on competent authorities to behave reasonably. However, administrative and legal costs incurred by enforcing authorities may be high given the complexity and unprecedented nature of the regime, especially when the regime is new. In view of this, it is quite possible that cost recovery actions by competent authorities could be challenged. In the event of a challenge, it would be preferable for the Regulations and guidance to include express language clarifying the scope of the regulator's statutory right to recover costs.

[2] Under the Contaminated Land Regime, for example, the enforcing authority may recover remediation costs, but not legal costs of establishing liability (see Chapter E of the Statutory Guidance to the Contaminated Land Regime in Circular 01/2006). Under the Environmental Permitting regime, the Environment Agency may charge prescribed fees for preparing / varying / transferring operational permits (Schedule 5, Environmental Permitting Regulations 2007 (**EPR**)); and may recover its costs incurred in taking steps to avert an imminent threat to the environment (Reg 57, EPR). But it does not have a statutory right to recover its legal or administrative costs incurred in establishing liability in the event of a breach.

[3] See for example the Contaminated Land Regime under Part IIA Environmental Protection Act 1990, under which the enforcing authorities are subject to detailed guidance designed to ensure that costs which it seeks to recover are reasonable (see guidance on cost recovery decisions in Chapter E of the Statutory Guidance to the Contaminated Land Regime in Circular 01/2006). See also regulation 57(5)(b) EPR, which states that costs incurred by a regulator are not recoverable if they can be shown by the operator to have been unnecessarily incurred.

Question 25: do you agree with proposed powers of entry (regulation 22 in England, regulation 24 in Wales)?

Yes.

Question 26: do you agree that there should be a charging provision in the Regulations (regulation 24 in England, regulation 26 in Wales)?

Yes.

Question 27: do you have any comments on Schedule 1?

Question 28: do you have any comments on Schedule 2?

Question 29: do you have any comments on the authorisations listed in Schedule 3? In particular, are there any other authorisations to which the permit defence ought to apply in your view?

Question 30: do you have any comments on Schedule 4?

Question 31: do you have any comments on, or additional evidence for, the Impact Assessment?

Question 32: do you have any comments on the guidance that are not already reflected in your answers to earlier questions?

We have comments in respect of the following matters.

- **Apportionment of Liability in Multiparty Cases (Ref: Regulations 14 and 20)**

There do not appear to be any provisions or guidance clarifying the scope of a responsible operator's right to seek compensation from other responsible operators in cases of multiparty causation. Regulation 20(1) states that "a responsible operator who incurs expenses under these Regulations may recover all or some of those expenses from a third party who also caused the damage".

The draft Guidance states at 10.2 that "in cases of multi-party causation, the authority may enforce requirements and reclaim the costs associated with the imminent threat or environmental damage from any one of the operators responsible for causing them. That operator can then pursue other responsible operators for a contribution for their share of the liability".

The lack of detail on the scope of a responsible operator's right to seek compensation from other responsible operators gives rise to a number of uncertainties.

To begin with, in the absence of contractual indemnities or agreements between responsible operators, a contribution claim will not be based on an established cause of action for which case law exists to guide the court's decision (such as negligence, nuisance or breach of contract). Without any statutory provisions or case law, the Courts will have to decide how to apportion liability according to their own view of what is fair and equitable in the light of the ELD and the Regulations.

In view of this, Defra should consider, as a minimum, including within the Regulations an overarching statutory discretion on the court to take such factors as it deems appropriate into account when determining liability in multiparty claims[4].

[4] See for example the provision in US legislation, the Comprehensive Environmental Response, Compensation and Liability Act (**CERCLA**), which provides that "in resolving contribution claims, the court may allocate [clean-up] costs among liable parties using such equitable factors as the court determines are appropriate"). Currently the Regulations do not include even a broad discretion of this kind.

The Government should also consider whether it would be appropriate to produce guidance on how to apportion liability in multiparty cases. Guidance could either be "high level" (e.g. a list of key principles included in the Regulations which would need to be applied in each case) or detailed (cf the detailed statutory guidance given on liability apportionment under the Contaminated Land Regime, in Defra Circular 01/2006). In whatever form it takes, guidance or principles should clarify in advance – rather than leaving to the courts - important areas of uncertainty in multiparty cases, such as:

- What factual circumstances should a court take into account when deciding what share of the overall liability should be taken by each party?

- The effect of individual responsible parties ceasing to exist or being unable to pay their share – will their share of the liability be picked up by the remaining parties, or become "orphan" shares?

- Whether voluntary action will give rise to a right to seek contribution?

- Will action which is "mandatory" under the terms of the Regulations, but not the subject of a notification or remediation notice, give rise to a right to seek contribution?

- Will individual parties be allowed to make individual contribution settlements and thereby discharge their liability (there is a provision of this kind under US legislation, which can be used to deal with unmanageably large numbers of parties)?

- **Nature of the liability mechanism under the Regulations**

UKELA advocates that, in the interests of clarity, the joint and several liability mechanism underpinning the Regulations should be expressly described as such.

- **Insurability**

UKELA notes that insurance providers are being encouraged to provide cover for ELD risks. UKELA's Working Party for Liability and Insurance includes some professionals from the insurance sector. To provide the insurance cover for ELD, UKELA understands that insurers will need to be confident that the approach which regulators adopt to applying a value to damaged resources is consistent, reasonable and can be challenged (in concert with the insureds). This, in turn, underlines the importance of clear and workable grounds for appeal (ref: question 17 above).

We welcome the opportunity to have responded to this consultation and would be more than happy to discuss any of the issues raised in this document.

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