



Environmental Liability Directive
The Scottish Government's 2nd Consultation
NGO Coalition response

RESPONDEE INFORMATION FORM

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Consultation title: Environmental Liability Directive, 2nd consultation

Responding as: (b) on behalf of a group or organisation

Content for your response to be made available? Yes

Content to be contacted in the future? Yes

Other respondent information

This document is a joint environmental NGO response to the Scottish Government's 2nd consultation on the Environmental Liability Directive (the 'ELD') on behalf of the following organisations:

- **ClientEarth**
- **eppac limited**
- **Friends of the Earth Scotland**
- **GeneWatch UK**
- **GM Freeze**
- **Munlochy Vigil**
- **RSPB Scotland**
- **Scottish Wildlife Trust**

We are submitting a joint response to help minimise administration for the Scottish Government. However, we respectfully request that when compiling the statistics on consultation responses received, the Scottish Government treats each of the organisations listed above as having submitted individual responses.

Summary of key points

The environmental organisations listed above:

Support:

- a. the inclusion of the **right to notify action in the case of imminent threats**, although in conformity with the provisions of the Environmental Liability Directive and the Aarhus Convention¹ the rights of standing of environmental organisations need to be clarified;
- b. the introduction of **flexibility in relation to joint liability**, including the possibility of joint and several liability and the potential for Directors' to be criminally liable if they commit offences under the Environmental Damage Regulations;
- c. the **exclusion of damage caused by genetically modified organisms** ('GMOs') from the operation of the permit and state of the art defences;
- d. the **extension of the long-stop limitation** period from 30 to 75 years in relation to GMO damage;

Disagree with:

- e. the **exclusion of SSSIs and Ramsar sites**, as well as Biodiversity Action Plan ('BAP') habitats and species from the scope of the draft Regulations;
- f. the approach taken towards the **definition of the threshold for damage** to protected species and habitats;
- g. the approach taken towards the **definition of water damage** and restrictions on the size of water bodies concerned;
- h. the complete **lack of regulations in relation to marine damage**, in particular in relation to marine SACs and to the Common Fisheries Policy.

Have concerns

- i. in relation to the way **powers and duties** of the competent authority and the operator have been set out in the draft Regulations.

¹ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998

Responses to Consultation questions

Q.1 Do you think that the draft Regulations adequately reflect the Directive?

Summary: Regulations (and Guidance) appear to be in direct breach of the provisions of the Environmental Liability Directive in the following areas:

- a) the interpretation given to the definition of water damage – see Regulation 3(2)(b);
- b) the interpretation of the correct threshold for biodiversity damage – see Guidance paras 3.9 – 3.11;
- c) date from which the Regulations apply – see Regulation 4(f) and (g)
- d) reference to ‘more stringent legislation’ is incorrect - see Regulation 5(b)
- e) duty of competent authority to determine whether imminent threat of an incident is likely to give rise to environmental damage - see Regulation 6(3)
- f) the mere need for approval of remedial measures by the competent authority, rather than a duty to determine measures – see Regulation 9(1)(c)
- g) the right of standing of environmental organisations in relation to requests for action – see Regulation 11(1)(d)
- h) the inclusion of an additional ‘permit’ defence in Schedule 1, paragraph 1(3)

In addition, there are conflicts between the draft Regulations and the Guidance, for example in relation to the right/duty to take preventive and remedial measures when there are *reasonable grounds* to believe that there is damage.

a) The definition of water damage: Regulation 3(2)(b) and Guidance, paras 3.24 – 3.61

1. We agree that any damage which would be consistent with a drop in status class under the Water Framework Directive (the ‘WFD’)² should be classified as damage for the purposes of the ELD, as it is by definition ‘significant’. However, we do not feel that the monitoring programmes that have been put in place for the WFD are fit for purpose for the Environmental Liability Regulations, especially as many of the standards, monitoring and compliance regimes proposed for quality elements are not designed to detect significant albeit short-term pollution events.
2. The WFD only applies to water bodies over a certain size threshold, which means that it is limited to lochs over 50ha and rivers over 10km² in length. Wetlands (other than groundwater fed) are also excluded from the scope of the WFD in Scotland. However, for legal and practical reasons, the Environmental Liability Regulations must apply to every water environment, and not be limited to water bodies.
3. There are a number of water bodies that will not have baselines for certain quality elements. However, this does not mean that there will be insufficient information to use powers under the Environmental Liability Regulations if a significant event occurs. The polluter should still be pursued under these Regulations. The Guidance should explain clearly the procedure for such situations.

² the "Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy"

4. **Hydro-morphological damage** is covered by the ELD, but not apparently by the Environmental Liability Regulations. It needs to be expressly included. Moreover, it should be made clear that ecological potential is also covered.
5. For a more in-depth analysis of these issues, please see Annex I.

b) The interpretation of the correct threshold for biodiversity damage – see Guidance paras 3.9 – 3.11

6. **We are very concerned that the Scottish Government’s approach to biodiversity damage sets the damage threshold unrealistically high to the extent that it would render the Directive unworkable in practice.**
7. We agree that it is the importance, rather than the magnitude of an effect which determines whether a damaging effect is ‘significant’ for reaching or maintaining favourable conservation status (see para 3.10 of the Guidance). However, in view of the accelerating decline of biodiversity and the lack of progress towards the goals to halt the decline of biodiversity by 2010, it should be clear that any adverse effect on reaching or maintaining favourable conservation status is necessarily a ‘significant’ one, as it further impedes and sets back sustainability goals and the achievement of the goals of the Habitats and Birds Directives. Moreover, it should not be assumed that impacts should be measured at Scottish or UK level (or beyond that at EU level). If appropriate, local levels must also be considered. A good general test in this context would be whether there has been any effect on the maintenance or long-term viability of a habitat or species, which the Guidance does seem to apply at least partially³.

c) The date from which the Regulations apply – see Regulation 4(f) and (g)

8. Regulations 4(f) and (g) refer to the coming into force of the Environmental Liability Regulations as the cut-off date for liability under the Regulations. However, European law says that a Directive must be applied from the date it is supposed to be transposed. In the absence of proper implementation of a Directive, courts must interpret existing law in the light of the wording and the purpose of the Directive.
9. The transposition deadline and deadline for entry into force of the ELD was 30 April 2007. The ELD’s provisions apply from that date onwards and anyone subject to its provisions, such as operators or competent authorities are bound by its terms and must follow its provisions.
10. According to the European Court of Justice in Marleasing⁴:
11. *‘The Member States’ obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5[10]of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. **It follows that, in applying national law, whether the provisions in question were adopted before or after the***

³ see para 3.17 of the Guidance.

⁴ *Marleasing SA v La Comercial Internacional de Alimentacion SA*; Case C-106/89 [1992] 1 CMLR 305

directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by it and thereby comply with the third paragraph of Article 189 [249] of the Treaty⁵. (Emphasis and brackets added)

12. In cases where damage has occurred after 30 April, but before the Environmental Liability Regulations come into force, this clearly means that national courts have to apply the provisions of the ELD when they are interpreting national law. Therefore, damage currently being caused by dredging, for example, to a number of marine SACs, would be subject to the rules of the ELD already, if it was brought to court now, and, of course, if this kind of case goes to court after the Regulations come into force, the ELD will apply to any damage caused after 30 April 2007.
13. **We consider not applying the Directive until the date the Regulations enter into force to be a breach of EU law.**

d) Reference to 'more stringent legislation' is incorrect - see Regulation 5(b)

14. Regulation 5(b) says that the Environmental Liability Regulations are without prejudice to any more stringent Community legislation regulating the operation of any of the Activities falling within the Environmental Liability Directive. More stringent EU legislation always takes precedence over national legislation, so this provision appears unnecessary. However, we are concerned that Regulation 5(b) attempts to reflect Article 16(1) of the Environmental Liability Directive. If this is the case, then it does not do so correctly. Article 16(1) of the Directive provides that Member States are not prevented from maintaining or adopting **more stringent national** provisions than those provided for in EU law in relation to the subject matter of the Directive. This is an important right and crucial for the effective implementation of the Directive. If this is to be expressly included in the Regulations, and Regulation 5(b) is to reflect it, then Regulation 5(b) needs to be amended. Otherwise, it may be useful to clarify why Regulation 5(b) is necessary.

e) The duty of the competent authority to determine whether imminent threat of an incident is likely to give rise to environmental damage - see Regulation 6(3)

15. We are concerned that Regulation 6(3) may undermine the immediate strict and absolute duty on operators under Regulations 7(1) and 9(1)(b)⁶ to carry out emergency and control measures if there has been environmental damage or if there is an imminent threat of environmental damage. Regulation 6(3) imposes a duty on the Competent Authority to determine whether an incident or an imminent threat of an incident is likely to give rise to environmental damage (see also para 1.10 Guidance, but not reflected in Chapter 6, which para 1.10 refers to). It is important that the fact that the Competent Authority has not made a determination under Regulation 6(3) is not used as a reason not to carry out immediate emergency and control measure duties under Regulations 7(1) and 9(1)(b). If this was an intended or even an unintentional consequence of the provisions of Regulation 6(3), we think this would lead operators to be in breach of the Directive itself, as they would not be able to comply with their immediate

⁵ Para 1 of Summary

⁶ Reflecting Articles 5(1) and 6(1)(a) of the ELD.

and absolute duties to take immediate preventive and control measures. It would also mean that the ultimate costs of remediation would increase, as interim costs would rise during the time delay until the Competent Authority had made its decision. Moreover, it would increase the burden on Competent Authorities. Obviously, the automatic absolute duty of the operator to take emergency and control measures in no way detracts from the right and the duty of the Competent Authority to order the operator to take such measures as and when necessary (and where the operator has failed to carry them out in the first place).

16. In addition, on the assumption that Regulation 6(3) is intended to transpose parts of Article 11(2) of the Directive, i.e. the duty of the competent authority to determine the 'significance' of damage, we are also concerned that it does not wholly achieve this purpose. Regulation 6(3) only encompasses a duty to assess whether an incident is 'likely' to give rise to environmental damage, and not whether it has given rise to environmental damage, which is what Article 11(2) obliges the competent authority to do.

f) The mere need for approval of remedial measures by the competent authority, rather than a duty to determine measures – see Regulation 9(1)(c)

17. We are concerned that the Environmental Liability Regulations and the draft Guidance do not contain a clear and unequivocal statement that it is the Competent Authority who has the ultimate right to decide the remedial measures to be undertaken, although parts of the draft Guidance do appear to imply this.

18. Under Article 7(1) of the Environmental Liability Directive, operators have the duty to identify potential remedial measures and submit them to the Competent Authority for its approval. The ultimate duty to determine which remedial measures should be taken lies with the Competent Authority under Article 11(2) of the Environmental Liability Directive. The draft Guidance confirms this approach in paragraph 7.1. However, the Environmental Liability Regulations and the rest of the draft Guidance imply that the Competent Authority merely has a power of approval of measures suggested by the operator (under Regulation 8(1)), which the operator then carries out (if required to do so by the Competent Authority under Regulation 9(3)). The wording is very mis-leading, as this obviously cannot be the intention of the Regulations.

g) The right of standing of environmental organisations in relation to requests for action – see Regulation 11(1)(d)

19. Article 12(1) of the Environmental Liability Directive clarifies the categories of persons who should have standing to bring a request for action under Article 12 or an action for judicial review under Article 13(1). Although the Directive says that what '*constitutes a 'sufficient interest' and 'impairment of a right' shall be determined by Member States*', it also says that '*to this end, the interest of any non-governmental organisation promoting environmental protection and meeting any requirements under national law shall be deemed sufficient for the purpose of [having a sufficient interest in environmental decision making relating to the damage]. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of [alleging the impairment of a right, where administrative procedural law of a Member State requires this as a precondition.*'
20. Regulation 11(1)(d) restricts this to non-governmental organisations promoting environmental protection and able to 'demonstrate that [they] meet[] the

requirements [of sufficient interest in the environmental decision making relating to the environmental damage] or [who can allege title to sue]’ (emphasis added).

21. **The Environmental Liability Directive establishes a presumption that environmental organisations** (as long as they meet the national legal requirements to qualify as such an organisation) **have a sufficient interest to bring requests for action and judicial review proceedings, whereas the Scottish Regulations turn this on its head and require organisations to demonstrate ‘sufficient interest’ or ‘title to sue’.**
22. **We consider this to be clearly in breach of the Environmental Liability Directive, as well as of the relevant provisions of the Aarhus Convention** (Articles 9).
23. **We would also like to see clarification in the Guidance stating that any organisation whose purpose, according to its own statutes, is to promote environmental protection meets the national legal requirements for being an environmental organisation.** If, in Scottish law, such environmental organisations fail to qualify with the conditions Article 11(1)(d), then we also consider this to be a breach of the Aarhus Convention (Article 2(5) and 9)⁷.
24. **Moreover, we call on the Scottish Government to address the existing inequities associated with the present costs rules in relation to judicial review.** Any right to an action for judicial review under the Environmental Liability Directive and the Environmental Liability Regulations will be severely undermined by the fact that relevant organisations cannot afford to bring the necessary legal action due to the potentially prohibitive costs they may incur if they lost the case, and of potential interim proceedings. In our view, the current Scottish costs rules are also in breach of the Aarhus Convention (Article 9(4)).

h) The inclusion of an additional ‘permit’ defence in Schedule 1, paragraph 1(3)

25. Although the Environmental Liability Directive allows national law to contain more stringent provisions, it does not allow the introduction of weaker provisions. In Schedule 1, paragraph 1(3) of the Environmental Liability Regulations, an additional potentially extremely far-reaching ‘permit’ exception is added to the Regulations by excluding from the operation of the Regulations (i.e. exempting from liability) any *‘damage to protected species or natural habitats caused by an act expressly authorised by the relevant authorities in accordance with the Conservation (Natural Habitats etc.) Regulations 1994 or the Wildlife and Countryside Act 1981’*. As the Scottish Regulations do not even include SSSIs this exemption is even more surprising. In any case, this is not a provision contained in the Directive itself and is therefore in breach of the Directive. The exemptions made in Article 2(1)(a) of the Directive in relation to Article 6(3) and (4) and 16 of the Habitats Directive⁸ and Article 9 of the Wild Birds Directive⁹ are already covered in Regulation 4(a).

i) Conflicts between the Regulations and the Guidance

⁷ See also p. 41 of the UNECE Aarhus Implementation Guide, ECE, CEP/72, New York and Geneva, 2000

⁸ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora

⁹ Council Directive of 2 April 1979 on the conservation of wild birds

'Reasonable grounds'

26. At paragraphs 4.1, 5 (introduction), 5.2, 5.4, 5.11 of the Guidance and at paragraph 21 of the Quick Guide, repeated reference is made to action being required both in relation to an imminent threat of damage and actual damage if there are reasonable grounds for believing there to be damage or imminent damage, which would be a very sensible approach.
27. Indeed, at paragraph 5.11, the Guidance specifically says that Regulation 9 contains such wording. However, the Regulations themselves do not reflect this approach at all. Regulation 9 does not mention 'reasonable grounds'. Neither does any other Regulation, except Regulation 7(3), according to which the competent authority must have reasonable grounds for believing there to be an imminent threat of damage before it may require the operator to take action, but this is a completely different issue. There is no general provision that reasonable grounds for believing there to be damage or an imminent threat of damage require the operator (and the competent authority) to take action.

Costs and the permit and state of the art defences

28. **We are fundamentally opposed to the inclusion of the permit and state of the art defences in this legislation at all. Therefore, we welcome the exemption of damage caused by GMOs from the operation of these defences, but we would urge the Scottish Government to drop them altogether.**
29. However, if some form of these defences were to be introduced, we would suggest their inclusion as mitigating factors that may, but not must, be taken into account. This would conform with the provisions of the Environmental Liability Directive, which says that the operator may not be required to bear the cost of remedial measures taken, which means that they are exemptions from the need to bear costs, not liability for carrying out remedial measures.
30. However, we would add in this regard that the permit and state of the art defences should not be applied to emergency or containment and control measures.
31. In addition, there is an underlying conflict in Regulations 13 (2) and (3) which provide that operators 'shall' not bear the costs of remedial and preventive measures where there has been third party interference and they followed compulsory orders, but only 'may' recover the costs (from the third party or the competent authority). If the competent authority does not bear the cost, and the operator 'shall' not, then who will?
32. In relation to the permit and state of the art defences, the competent authority 'may' determine that the operator is not required to pay the costs of remedial measures, but it is left open who will cover the costs in such an event. At paragraph 11.4, the Guidance says that authorities cannot recover their costs in all cases (including where the permit and state of the art defences arise). Does this mean that the Competent Authority will carry out remedial measures if it thinks these defences will apply? In any case, it must be presumed that it will be the Competent Authority who carries the costs in these circumstances. Although we fundamentally oppose the introduction of the permit and state of the art defences in general, if they were introduced after all, and an approach was taken which guaranteed the restoration of environmental damage by making sure that

either the operator or the Competent Authority bore the costs of restoration, then we would support such an approach over models which did not secure the restoration of environmental damage.

Consultation of interested parties

33. Paragraph 1.11 of the Guidance states that Competent Authorities may consult interested parties before requiring remediation by the operator. This is slightly mis-leading, as interested parties must be consulted (as confirmed by Regulation 8 (2) and paragraph 7.38 of the Guidance)

We will be happy to receive any other comments relating to any part of this consultation but **it would be helpful** if these could be set out as briefly and simply as possible. This will allow us to analyse and consider any comments submitted on the consultation documents more easily and quickly.

SSSIs and Ramsar sites

We are very concerned that the Scottish Government does not intend to SSSIs in the proposed Environmental Liability Regulations.

Given the importance of the SSSI network for Scottish wildlife protection, as well as the effort and financial investment already being made to protect and enhance SSSIs and the Scottish Government's own targets for their protection, everything points towards including SSSIs in the ELD system. This is confirmed by the Partial Regulatory Impact Assessment's cost benefit analysis that has found there to be an overall benefit in extending the ELD to include SSSIs, as well as identifying additional potential cases, which would not otherwise be covered. Not to include SSSIs would be illogical, counter-productive and a fundamental mistake.

We strongly urge the Scottish Government to include both SSSIs and Ramsar sites in the proposed Regulations

SSSIs

34. According to SNH, there are currently 1,456 SSSIs in Scotland¹⁰, but only just over 300 of these are also Natura 2000 sites (SACs and/or SPAs)¹¹. Therefore, more than 1,100 SSSIs in Scotland will not be protected in any way by the ELD or the Environmental Liability Regulations. This is to be the case despite the SSSI system being a vitally important pillar of nature conservation in Scotland.

'Sites of Special Scientific Interest (SSSI) represent the best of Scotland's natural heritage. They are 'special' for their plants, animals or habitats, their rocks or

¹⁰ See <http://www.snh.org.uk/about/ab-pa01.asp>

¹¹ See UK SAC data 2006 spreadsheet at <http://www.jncc.gov.uk/page-1461>; and UK SPA data 2007 spreadsheet at <http://www.jncc.gov.uk/page-1409>; and taking into consideration that out of 386 SPAs and SACs around 38 share a site (also SSSIs). This data was obtained by comparing the Scottish SAC list at http://www.jncc.gov.uk/ProtectedSites/SACselection/SAC_list.asp?Country=S; and SPA list at <http://www.jncc.gov.uk/page-1402>; with the lists with the overlap lists just referred to.

landforms, or a combination of such natural features. Together they form a network of the best examples of natural features throughout Scotland, and support a wider network across Great Britain and the European Union¹².

35. Moreover, even where a SSSI underpins an SPA or SAC, the SSSI designated features, which are not also SAC/SPA features, are not strictly covered by the ELD and may therefore not be covered by the transposing legislation. In cases of damage to more than one species or habitat at the same site, but subject to different levels of protection, this could mean that damage to one species is remedied under the ELD, but the equivalent damage to a species, which is merely a SSSI feature, is not. For example, Creag Clunie & the Lion's Face SSSI is within the Ballochbuie SPA and SAC. Both the SSSI and the SPA qualify for the capercaillie and scottish crossbill populations, and the SAC and the SSSI qualify for the native pinewoods. However, the SSSI also qualifies for its elm cyalecta lichen (*Gyalecta ulmi*), which is not an SPA/SAC designated feature. It would clearly be confusing, unfair and inequitable if only damage to one of the qualifying interest feature types could be remedied under the ELD, when all are protected interest features of the SSSI.
36. According to the Scottish Government's own best estimates in its cost benefit calculations in the Partial Regulatory Impact Assessment¹³, the benefits of extending the Scottish Regulations to cover SSSIs would far outweigh the costs (total benefits from 3 cases a year of £316,000, compared with total costs of £93,000).
37. Not including SSSIs in the Environmental Liability Regulations seems even more nonsensical if it is considered that the Partial Regulatory Impact Assessment predicts that there will be only one additional ELD biodiversity case every two years¹⁴, whereas it identified that there would have been two additional cases in 2003-04 and four additional cases in 2004-05, had the ELD applied to SSSIs then, leading to a prediction of an anticipated average of 3 more cases a year if SSSIs were included. Compared with one additional case every two years, this would be a substantial benefit for wildlife protection, particularly considering the benefits already identified above.
38. Moreover, as also already mentioned, leaving out SSSIs does not make any economic sense for operators either. An operator who causes biodiversity damage to an area that is designated both as a SSSI and a Natura 2000 site:
 - a. would be liable to restore the damage covered by the Environmental Liability Regulations in relation to the damage caused to all Natura 2000 designated features;
 - b. but would not be liable under the Regulations to restore the same damage to features purely SSSI designated;
 - c. may be convicted of a criminal offence for damaging a SSSI (see below);
 - d. may, upon being criminally convicted, be asked to restore the damage, but not according to the same criteria and to the same extent

¹² See 'SSSIs' SNH web-site at <http://www.snh.org.uk/about/ab-pa01.asp>

¹³ See Table 3, p.15 of Final Draft May 2008.

¹⁴ See p. 12 at para. 4.

as the damage caught by the Environmental Liability Regulations (see below).

39. This outcome is not only nonsensical in relation to the biodiversity concerned, after all the damage will be to an interlinked and interdependent ecological network, but it will also mean increased confusion, costs and administrative burdens for the operator, thus leading to unnecessary 'double-banking'.
40. Although it is not expressed clearly in the consultation, Guidance or Partial Regulatory Impact Assessment, it would appear that part of the reason for not including SSSIs may be based on arguments to the effect that SSSIs are already sufficiently protected under the relevant Scottish laws and would not benefit from further protection under the ELD, i.e. that extending the Scottish implementing Regulations of the ELD to SSSIs would not add anything.
41. This approach is clearly incorrect for the following reasons:
 - As already mentioned, the Partial Regulatory Impact Assessment anticipates additional cases if SSSIs are included, based on an assessment of existing cases and the fact that additional cases would have arisen in the past had the ELD applied to SSSIs. This demonstrates clearly that the existing legislation does not go far enough and does not guarantee the restoration of relevant damage in any case.
 - The main Scottish law which is relevant in the context of the kind of wildlife protection to be achieved under the ELD is found in the Nature Conservation (Scotland) Act 2004 (the 'NCSA'), particularly in Section 40, which deals with restoration orders. This section gives the courts the right in the context of criminal proceedings to order a person to carry out '*such operations for the purpose of restoring, so far as is reasonably practicable, the protected natural feature to its former condition...*¹⁵'. For section 40 to apply, a person must have been **convicted of a criminal offence** under the Act. In contrast, the ELD is a purely administrative process, not based on criminal law. Its main aim is very simply to prevent and restore environmental damage. It does aim to set incentives for the prevention of damage, but it is not about punishment. Section 40 is a criminal sanction, aimed at punishment. Restoration is of secondary importance. Criminal trials can be difficult, the burden of proof for example is a much higher one, costly and time-consuming. The delay caused by the need for a criminal trial before restoration can be ordered, is particularly worrying in the context of environmental remediation. Time delay can make restoration much more difficult, expensive or even impossible.
 - Even the remediation requirements themselves in section 40 are much weaker than under the ELD. Section 40 provides for restoration to former condition, as far as is reasonable. The ELD goes much further. It requires for '*primary*' restoration back to baseline, but if this cannot be achieved, the restoration that has not been achieved must be compensated for by additional alternative remedial measures in the form of '*complementary*' restoration, and in addition '*compensatory*' restoration must be carried out to make up for the loss of services in the period until '*primary*' and '*complementary*' restoration have been achieved.

¹⁵ Section 40(1).

- Moreover, unlike the absolute obligation to restore damage under the ELD, the NCSA restoration orders are not obligatory, they are at the discretion of a judge and indeed have hardly ever been used in practice since the 2004 Act.
- Moreover, the criminal offences caught mainly apply to owners and occupiers of SSSIs, or persons who are subject to land management orders or agreements or nature conservation or consent orders¹⁶. Again, this is obviously much narrower than the ELD requirements. Even where they apply in a slightly wider context, namely to persons who have caused ‘*intentional or reckless damage*’ to any SSSI feature¹⁷, they are narrower than the ELD provisions. The ELD introduces strict liability (in relation to Annex III operations) and fault-based liability to other operators, both of these are tougher and therefore more likely to result in the ‘polluter paying’ than ‘*intentional or reckless*’ damage under NCSA.

42. We conclude that the protection under the NCSA is profoundly lacking compared to the ELD.

Ramsar sites

43. From a comparison of all Scottish SAC, SPA and Ramsar sites¹⁸, it would appear that all of the Scottish Ramsar sites are also either an SPA or an SAC. This means that the structure for the application of the new Regulations will already be there. Again, it would be nonsensical to cover damage caused to the SAC or SPA designated features under the proposed Regulations, but not damage caused to features designated simply in relation to the Ramsar site. Given that the Natura 2000 network is protected by the ELD, and given the sensitive nature of Ramsar sites, it is therefore extremely surprising and very disappointing that Ramsar sites are to be omitted.

44. Other nationally protected biodiversity - BAP habitats and species and marine sites

The UK Biodiversity Action Plan (UK BAP) provides the most up-to-date reflection of UK biodiversity priorities. Therefore, the habitats and species subject to the UK BAP should be protected under environmental liability rules. At present this may not be possible because sufficient data has not yet been collected. However, this is set to change and there should at least be an option to include UK BAP habitats and species within the next 5 years.

UK Biodiversity Action Plan habitats and species and marine sites

45. Although the precise numbers, location or quantities of UK Biodiversity Action Plan (BAP) habitats and species are not currently known, a programme of work is underway, which will mean that such data will be available in the near future, and a biological assessment will be possible. We therefore believe that the Scottish Government should make provision for the inclusion of BAP habitats and

¹⁶ Section 40(1)(b).

¹⁷ Section 40(1)(a).

¹⁸ Using data contained in JNCC lists – see footnote 9 above and <http://www.jncc.gov.uk/page-1391>; for Ramsar sites.

species at a date when the relevant underlying data is available, which should occur within the next five years. This is particularly important in the marine context, as there are currently no marine SSSIs and presently just 1.4% of the UK's waters to 200nm are designated Natura 2000 sites. For the adequate protection of the marine environment and for consistency with the approach on land, it is also crucial that future EU and international Marine Protected Areas (under OSPAR, World Summit on Sustainable Development and Marine Strategy Framework Directive) and Nationally Important Marine Areas should also be covered by the Environmental Damage Regulations. This approach would also fit with the aspirations of the Scottish Government to develop and control marine spatial planning.

The Common Fisheries Policy

Commercial fishing activities should be expressly included in the scope of the Regulations. The ELD should be used to help the CFP achieve its environmental goals.

46. We fully recognise the Scottish Government's efforts to work together with the fishing industry to conserve fish stocks. It is therefore crucial that all the comments made in the following paragraphs should be regarded in that light and should help to support those efforts, and, in particular, that any action suggested should be compatible with planned measures under the Marine Bill and with the planned Conservation Credit Scheme and measures to ensure sustainable fisheries.
47. We accept that in principle commercial fishing is a policy area where the Community has exclusive legislative jurisdiction. However, this does not mean that Member States have no jurisdiction in relation to any commercial fishing activities anywhere under the CFP or that the Community in the application of the CFP does not need to pay any regard to environmental considerations and other environmental legislation, such as the ELD.
48. Article 8 of Regulation 2371/2002 EC, which sets out the Union's reformed CFP, gives Member States the right to take emergency measures if there is evidence '*of a serious and unforeseen threat to the conservation of living aquatic resources, or to the marine ecosystem resulting from fishing activities*'. Such emergency measures cannot exceed three months and must be notified to the Commission. However, if fisheries were to cause significant damage or a threat of such damage to a protected species, for example through dredging, then the relevant Member State would have a right to take emergency measures. If such a case occurred, it would make sense for a Member State to apply the rules of the Environmental Liability Directive, which after all is also an EU instrument and has the same underlying aims and principles as the CFP (see below). Therefore, the ELD should be treated as one of the instruments that are available for taking emergency measures.
49. Article 9 of the same Regulation allows Member states to '*take non-discriminatory measures for the conservation and management of fisheries resources and to minimise the effect of fishing on the conservation of marine eco-systems within 12 nautical miles of its baselines provided the Community has not adopted measures addressing conservation and management specifically for this area...*' This does not apply to vessels of another Member State; or from 6 to 12 nautical miles where treaty rights exist between Member States that allow fishing by

foreign vessels. However, this does mean that, as long as none of the exceptions apply, Member States can apply the ELD, at least to fishing vessels flying their own flag.

50. Under Article 10, Member States can '*take measures in waters under their sovereignty or jurisdiction if they apply solely to their fishing vessels*'. This applies mainly up to 6 nm from baseline, but again Member States can apply their own laws in this context and should enforce the ELD against their own fishing vessels.
51. Together these articles mean that between 0 to 6 nautical miles the activities of the inshore fishing fleet are definitely subject to Member State competence, and the ELD therefore applies in such circumstances. Depending on the circumstances, this may extend out to 12 nautical miles.
52. In addition, the fact that the CFP is subject to the exclusive competence of the Community does not mean that the CFP is free to disregard the environmental protection requirements which have to be part of all Community policies under Article 6 of the Treaty, which prescribes the integration of environmental requirements in all Community policies, including the CFP. This would include both the Habitats Directive and the ELD.
53. Moreover, the reform of the CFP in 2002, the Marine Strategy Framework Directive¹⁹ and recent developments of policy in relation to a new ecosystems based approach to fisheries, the use of maximum sustainable yield, fish discard etc. show clearly that the Commission is incorporating environmental considerations into the CFP and also that '*fisheries policy is fully coherent with and supportive of the actions taken under the cross-sectoral Marine Strategy and Habitats Directive*²⁰'. The CFP has to be guided by principles of good governance including the '*consistence with other Community policies, in particular environmental.... policies*²¹'.
54. '*The general policy objective of an ecosystem approach to marine management cannot be achieved by sector policies such as the CFP alone. Actions within different sector policies must link to this integrative framework by developing and implementing those measures that can be taken within the sector policy to support the overall objectives*'.²² The same document goes on to say that it is the '*task of fisheries management within an ecosystem approach in a EU context ... to ... ensure that actions taken in fisheries are consistent with and supportive of actions taken under the cross-sectoral marine Strategy and Habitats Directive*'; and that the '*integrated approach through the Maritime Policy and its environmental pillar, the Marine Strategy, will fully benefit sustainable fisheries by ensuring integrative management of all human, environmental and economic interactions in the maritime field*²³'.

¹⁹ 2005/0211(COD); P6_TA(2007)0595

²⁰ 'Commission Guidelines for the establishment of the Natura 2000 network in the marine environment. Application of the Habitats and Birds Directives', May 2007, p. 105

²¹ Article 2(2)(d), CFP

²² 'Communication from the Commission to the Council and the European Parliament; The role of the CFP implementing and ecosystem approach to marine management', Commission, 11.4.2008, p. 2.

²³ P. 4 same document.

55. Also it says that the '*Natura 2000 network of marine protected areas will provide protection for representative habitats. The coordinated use of CFP instruments such as closures for specific fisheries or no-take zones will be implemented as required to achieve the objectives of the specific Natura 2000 sites.*' Again this shows clearly how the CFP is now subject to other EU policies and environmental laws²⁴. There is no reason why this should not extend to the ELD, particularly as the ELD, at least once damage has occurred, is virtually the only enforcement mechanism in relation to many of the protective mechanisms of the Habitats Directive.
56. The CFP itself, like the ELD, is based on the following principles: (i) that it contributes to the achievement of the environmental objectives set out in the Treaty; (ii) that the CFP is based on the principles of precaution, prevention, rectification at source and the polluter pays; (iii) that the CFP aims at a progressive implementation of an ecosystem-based approach²⁵.
57. Therefore, it is clear that the ELD and the CFP do not 'trump' each other, as is sometimes implied. They must both take the other into consideration when they are applied. Therefore, the ELD cannot be excluded in cases of damage caused by fisheries, and should be applied, if necessary, with the input of the Commission/Council which have to take relevant measures if the CFP cannot adequately protect protected biodiversity and ecosystems. The ELD should be treated as an additional measure to help implement the environmental aims of the CFP.

²⁴ See p. 6.

²⁵ '*Communication from the Commission setting out a Community Action Plan to integrate environmental protection requirements into the Common Fisheries Policy*', COM (2002) 186final, p. 3 and see also CFP, Article 2(1) on precautionary approach

Annex I –Water

Water damage

- 1. Any damage which would be consistent with a drop in WFD status class should be classified as damage for the purposes of the ELD, as it is by definition ‘significant’²⁶. We do not feel that the monitoring programmes that have been put in place for the WFD are fit for purpose for the Environmental Liability Regulations, especially as many of the standards, monitoring and compliance regime proposed for quality elements are not designed to detect significant albeit short-term pollution events**
- 2. The WFD only applies to water bodies over a certain size threshold, which means that it is limited to lochs over 50ha and rivers over 10km² in length. Wetlands (other than groundwater fed) are also excluded from the scope of the WFD in Scotland. The Environmental Liability Regulations must apply to all water environment, and not be limited to water bodies.**
- 3. There are a number of water bodies that will not have baselines for certain quality elements. However, this does not mean that there will be insufficient information to use powers under the Environmental Liability Regulations if a significant event occurs. The polluter should still be pursued under the Environmental Liability Regulations. The Guidance should explain clearly the procedure for such situations.**
- 4. Hydro-morphological damage is covered by the ELD, but not by the Environmental Liability Regulations. It needs to be expressly included. Moreover, it should be made clear that ecological potential is also covered.**

Monitoring and reporting under the WFD

The WFD’s overall purpose is to protect and enhance the status of aquatic environments with the aims of achieving good status and preventing further deterioration of aquatic ecosystem. The purpose of the ELD is to prevent and remedy environmental damage in general, including water damage, and this is reflected by the wider and more absolute damage threshold of ‘*significant adverse effects*’ introduced by the ELD. Therefore, any interpretation of ‘*significant adverse effects*’ as merely covering damage which changes the status category of a water body under the WFD may not be enough to safeguard the implementation of the ELD. For example, the standards set by the UK TAG and the monitoring programmes established under the WFD are limited to a relatively small number of determinants and mostly aimed at detecting trends rather than picking up a significant pollution event.

To illustrate this point, if, for example, there is a significant incident in a river which happens to affect ecological or chemical characteristics falling within the WFD description of such characteristics, for example in Annex V of the WFD, but it is one for which no determinant has been set under UKTAG, then it will still amount to water damage under the WFD-linked ELD definition. However, it will be much more difficult to show that this is the case in a system that is so focused on the relevant quality

²⁶ See RSPB response, paras 49-50

elements under Annex V and the very specific and limited standards which may be set as a consequence. This could be particularly important, for example, where there is a direct impact on one of the biological quality elements set out in Annex V of the WFD, for example on fish fauna or benthic invertebrates, without there being a significant effect on one of the chosen UKTAG determinants relating to hydrology, morphology or chemical standards. This type of incident ought to be included, but the Regulations need to be clarified in this regard. The easiest way to do this would be to make sure that ‘*significant adverse effects*’ is not interpreted narrowly to only encompass status boundary change under the WFD.

Water bodies where all Quality Elements are not covered

Due to the risk-based approach to monitoring adopted, there are a number of water bodies that will not have baselines for certain quality elements. However, this does not mean that sufficient information to use powers under the ELD will be unavailable if a significant event occurs. Even if a pollution event occurs where the pollutant is not monitored, it should be possible, through the analysis of linked quality elements and further investigative monitoring, to identify the polluter. For example if a significant fish kill is reported subsequent investigation may link it to a chemical that is not routinely monitored. However, just because it does not fit within the routine WFD monitoring programme, the polluter should still be pursued under the ELD. The Guidance should explain clearly the procedure for such situations.

Ecological potential and hydro-morphological quality elements not covered by the draft RegulationsThe ELD defines water damage by reference to ‘*ecological, chemical and/or quantitative status and/or ecological potential, as defined in Directive 2000/60/EC²⁷*’. ‘*Ecological status*’ under the WFD ‘*is an expression of the quality of the structure and functioning of aquatic ecosystems associated with surface waters, classified in accordance with Annex V²⁸*’. Annex V of the WFD further breaks this down into biological, hydro-morphological and physico-chemical quality elements. ‘*Surface water status*’ is defined as ‘*the general expression of the status of a body of surface water, determined by the poorer of its ecological status and its chemical status²⁹*’. However, the draft Regulations miss out any reference to hydro-morphological quality elements (which specifically apply to sites at high status), which is therefore necessarily excluded. This merits further investigation.

In addition, the draft Regulations should also clearly state that good ecological potential (for artificial and heavily modified water bodies) is also covered by this remit.

The definition of water

The definition of water should not be limited to water bodies.

The ELD does not define ‘waters’ as ‘water bodies’.

²⁷ Article 2(1)(b), ELD

²⁸ Article 2(21), WFD

²⁹ Article 2(17), WFD

The Regulations should make clear that all waters, including smaller water bodies, are covered.

The definition of water in the draft Regulations is based on the definition of surface water bodies in Annex II of the WFD. Annex II allows two different approaches to identifying water bodies, but the one favoured by the UK Government is the one which sets minimum size limits on the size of a water body. These size limits are 50 ha for lakes and 10km² for rivers. Because of the link of the ELD's water damage definition to status under the WFD, and the link of status under the WFD to water bodies, as opposed to waters, it could be argued that the application of the ELD's water damage definition is restricted to water bodies, as defined by the WFD. However, the ELD applies to significant adverse effects on the different types of status already discussed '*of the waters concerned*³⁰'. '*Waters*' is defined as '*all waters covered by Directive 2000/60/EC*³¹', not all '*water bodies*' covered by the WFD. '*[All] waters covered by [the WFD]*' are basically all groundwater and surface water, including inland, transitional and coastal water³². The word expressly not used is '*water bodies*', which is what would have been used, had it been the intention of the ELD to restrict itself to '*water bodies*' only. Therefore, the Regulations should make clear that all waters, including smaller water bodies, are covered.

Moreover, this approach also makes sense from an environmental point of view, as there are many small water bodies, such as upland streams and ponds, which may be of high environmental significance, and any water damage caused to them should be covered by the ELD and the Regulations (for example damage to headwater species in a headwater stream caused by sheep dips or cattle slurry).

Similarly, wetlands are also currently excluded from the definition of water bodies under the WFD (unless they are groundwater dependant). Again, the ELD should apply to all aquatic eco-systems, including wetlands.

³⁰ Article 2(1)(b), ELD

³¹ Article 2(5), ELD

³² See Article 2(1), (2), (3), (6) and (7), WFD.