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DEFRA,  
Environmental Liability Branch,  
Environmental Regulation Policy Division,  
Area 5B Ergon House  
Horseferry Road  
London SW1P 2AL

1 Queen Anne's Gate  
London SW1H 9BT  
Telephone 020 7344 1844  
Fax 020 7344 1866  
E-mail [gsuzenet@water.org.uk](mailto:gsuzenet@water.org.uk)  
Website [www.water.org.uk](http://www.water.org.uk)

Pamela Taylor  
Chief Executive

## **Environmental Liability Directive – Response to the Consultation on Options for Implementing the Environmental Liability Directive**

### **1. Introduction**

The UK water industry welcomes the opportunity to comment on the transposition of the Environmental Liability Directive (ELD). The UK water industry welcomes and fully supports the application of the defences and would like to reiterate that the inclusion of these is necessary to the water industry to continue to operate its services and manage its water resources in a cost-effective and productive manner. Defences in effect allow a balance to be achieved between an operator's responsibilities with regard to compliance and the protection of the environment whilst allowing certainty with regard to its funded obligations. This is of particular importance to the UK water industry given the complexity and rigours of the periodic review process.

The UK water industry would like to highlight that it has noticed differences in regimes between the draft Regulations issued in Scotland and the proposed Regulations in England and Wales. This puts the UK water industry at odds and does not create a level playing field in terms of regulatory obligations.

The UK water industry has suggested a number of amendments to the Regulations which are aimed at making the final Regulations sustainable and proportionate and still compliant with the original Directive.

### Key points:

- The UK water industry recommends limiting the framework of the regulations to only large-scale and significant pollution incidents in line with the principles of the Directive.
- The water industry would agree with the extension to SSSIs as suggested by the consultation document if it only covers damage which has a significant long term or permanent adverse effects and it is subject to a number of conditions, which would also encompass an exemption as set out in the response to Question 2.
- The water industry cannot agree with the current approach in defining water damage and has therefore suggested an alternative proposal that we would like to explore with DEFRA: *Water damage means damage to a surface water and/or groundwater body (as defined in Annex II to Council Directive 2000/60) and caused by an activity in Schedule 2. Water damage should be defined as being of such severity that it would cause significant adverse effects and long-term and/or permanent deterioration of the ecological, chemical and/or quantitative surface water and/or groundwater status, so as to significantly adversely affect and/or impede ecological services and other services and amenities provided by the water body. This definition is in the line with the original Directive and takes into account that “services” are defined as the ‘functions performed by a natural resource for the benefit of another natural resource or the public’. We would also need to ensure that water damage is of such severity that existing legislation provides no adequate remedy.*
- When assessing the potential application of the Regulations, existing legislation and its effective implementation should be considered *first* in the hierarchy. The Regulations would only apply in exceptional circumstances, where it is apparent that there have been significant adverse effects caused by environmental damage.
- The UK water industry believes that proportional liability is fully in line with the application of the “polluter pays” principle. When and where it is possible, proportional liability should be given precedence. It might be appropriate to follow the Scottish draft Regulations and include both options for cost allocation.

## 2. Detailed comments on key Consultation Questions to the water industry (2, 4, 5, 6, 7, 8, 12, 13, 18, 21, 22, 24, 27, 29)

### **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?**

The water industry would only agree if the extension as suggested by the consultation document covers damage which has a significant long term or permanent adverse effect and is subject to the following conditions:

- Defences such as compliance with permit conditions are included in the issued Regulations;
- The Regulations would only apply in exceptional circumstances and would only be used in circumstances where existing legislation did not achieve adequate environmental protection;
- The word “significant” is added to references to long term or permanent adverse impact to the integrity of the SSSIs. To accommodate this, *in Schedule 1, paragraph 4 (1) should be amended as follows: The damage must be such that it has a significant adverse effect on: [...] and in paragraph 4(2) the word “adverse” needs to be preceded by “significant”, and*
- The following exemption was added: *Damage to Sites of Special Scientific Interest does not include:*

*- Programmes, projects, and infrastructure of overriding interest authorised or approved under either the Town and Country Planning Act 1990, the Wildlife and Countryside 1981 (as amended) or the Water Resources Act 1991 (all as amended), provided that all the necessary preventive or mitigation measures identified by the statutory conservation agency have been complied with.*

Water UK questions the relevance of extending the Regulations to SSSIs as there is no need to duplicate the already stringent existing legislation and provisions. It would run counter to the Better Regulation agenda. Also, we understand that the draft Environmental Liability Regulations 2008 in Scotland does not cover SSSIs. Therefore these circumstances go against a level-playing field across the UK.

Under the Wildlife and Countryside Act 1981 (as amended), the Water Industry Act 1991, the Conservation and Rights of Way Act 2000, Conservation Regulations 1994 and the Natural Environment and Rural Communities Act 2006, water companies have a statutory duty to contribute towards the conservation and enhancement of natural beauty, the conservation of flora and fauna and geological and physiographical features of special interest.

The Environmental Assessment of Plans and Programmes Regulations 2004 also place legal obligations on water companies to assess the impacts of investment programmes and make infrastructure development biodiversity-friendly. In England and Wales, Government guidance on biodiversity and planning and the new planning legislation puts sustainability at the heart of the planning system with programmes and strategies being subject to environmental impact assessments.

**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 the ELD?**

The water industry cannot agree with the current approach in defining water damage. A change in the classification status or a breach of a relevant quality standard which is consistent with a deterioration in status should not automatically be caught under the Regulations. It would capture temporary self-limiting events, which we believe, was not the original intended purpose of the Directive.

In addition, the current definition as it stands in the Regulations does not reflect the fact that “good status” is based on a number of different indicators and parameters, and that a breach of standard for any one indicator and parameter might not necessarily be linked to or significantly adversely affect the ecology of the whole water body.

The definition of environmental damage to groundwater status does not take into account the approach to achieving good groundwater status in Directive 2006/118/EC which is also based on identifying the long-term upward trends of pollution concentrations induced by human activities and defining the starting points for reversing pollution trends. Annex IV of Directive 2006/118/EC complements the monitoring procedure in Annex V of

Directive 2000/60 by stating a detailed protocol for identifying significant upward trends and defining the starting points for reversing pollution trends.

The water industry would therefore like to make the following alternative proposal to define water damage and significant adverse effects on the qualitative and quantitative surface and groundwater status and would like to explore with DEFRA how it can be adapted with the definition proposed in the draft Regulations:

*Water damage means damage to a surface water and/or groundwater body (as defined in Annex II to Council Directive 2000/60) and caused by an activity in Schedule 2. Water damage should be defined as being of such severity that it would cause significant adverse effects and long-term and/or permanent deterioration of the ecological, chemical and/or quantitative surface water and/or groundwater status, so as to significantly adversely affect and/or impede ecological services and other services and amenities provided by the water body.*

*This definition is in the line with the original Directive and takes into account that “services” are defined as the ‘functions performed by a natural resource for the benefit of another natural resource or the public’. We would also need to ensure that water damage is of such severity that existing legislation provides no adequate remedy.*

The UK water industry fully supports the requirement for guidance which will set the criteria for further establishing what “significant adverse effect” means in relation to water damage and how the thresholds that will trigger potential liability can be set in relation to Annex V of Directive 2000/60. It is essential to consider the meaning of “significant” in line with large-scale incidents. The legacy of this Directive stems from major accidents and the principle of the Environmental Liability Directive is not intended to deal with daily business activities, which are already regulated. Therefore it is important to avoid the duplication of regulations in order to further the better regulation framework. The guidance should also include recommendations and/or provisions on a comprehensive and robust monitoring regime in relation to these Regulations which may be a development of the Water Framework Directive monitoring.

The acceptance criterion for damage to a surface water resource should therefore be the measurement of concentrations that would lead to the

consecutive and persistent failure to attain standards (based on the monitoring regime) and that demonstrates long-term deterioration and/or permanent pollution of the whole water body from the WFD target status, and which results in sustained/permanent ecosystem damage and/or loss of natural resources and/or services.

In respect of groundwater resources, damage would be defined by reference to concentrations of substances in excess of various drinking or other water quality standards which would adversely affect and/or impede ecological services and other services and amenities provided by this water body. The acceptance criterion is the measurement of concentrations of oil or hazardous substances in samples of that groundwater for instance. Again, there should be strict rules as to how the samples should be taken.

*Water damage also means a sudden and unexpected deterioration of the ecological, chemical and/or quantitative surface water and/or groundwater status, so as to significantly adversely affect and/or impede ecological services and other services and amenities provided by the water body. Emergency procedures would apply in this case.*

Short-term, transient pollution and natural recovery shall be included in the Regulations. For this purpose, the definition of “natural recovery” as provided for in the Environmental Liability Directive should be clearly stated in the Regulations.

Water UK proposes the following:

*Regulation 4. (3) and (4) Damage to the ecological, chemical and/or quantitative surface water and/or groundwater status does not include short-term, transient adverse effects from which the affected water body naturally recovers within an ecological cycle without the need to implement remediation measures.*

**Question 5: Do you agree that the definition of water should be limited to water bodies as identified for the purposes of WFD?**

The UK water industry considers the correct approach is for the definition of water to be aligned with the water bodies identified in the Water Framework Directive.

**Question 6: Do you agree with the proposed approach to the threshold for land damage? Question 7: Do you agree with the proposed approach for deciding remediation for land damage?**

As currently drafted, land damage only relates to human health being adversely affected but includes as part of the assessment future land uses.

Paragraph 7.55 of the draft Guidance states that this may not only include planning permission but also Core Strategies, Development Plan Documents as well as residual Local Plans and Unitary Development Plans.

In assessing whether there is actual damage (regulation 12) or the imminent threat of environmental damage (regulation 11) of a type covered by the regulations, the operator will not only have to assess the current use of the land but the future use for which the site has been designated under local or regional plans.

It is considered that this interpretation of the ELD is "over regulation" and goes beyond the requirements of the ELD and has the potential to cause owners of operational land significant problems in complying with regulation 11 (preventing environmental damage) and regulation 12 (preventing further environmental damage).

The UK water industry recommends the application of the same threshold for land damage as that under the existing Contaminated Land Regime.

**Question 8: Do you agree with the proposed approach to the overlap with other legislation?**

There is already a substantial, well integrated framework of existing legislation, which effectively manages liability for pollution incidents. And this existing legislation, and its effective implementation, should be considered *first* in the hierarchy, when assessing the potential application of the Regulations. The Regulations would then only apply in exceptional circumstances, where it is apparent that there have been significant adverse effects. They would therefore complement the existing legislative framework.

The water industry agrees that when damage or imminent threat fall within the scope of these Regulations, they must be applied. The water industry

also agrees that the same incident could be governed by two different legislative frameworks. The UK water industry also acknowledges the importance of the Regulations in enhancing the liability of the polluter and enabling environmental remediation where significant pollution incidents occur.

**Question 10: do you have any comments on the meaning of “natural disaster” particularly in the context of flooding?**

Natural disaster could be further defined along the lines of the definition of “act of God” contained in 9 Halsbury’s Laws of England (4<sup>th</sup> Edn) para 458: “... an extraordinary occurrence or circumstance which could not have been foreseen and which could not have been guarded against ...”

Natural disasters are the consequences or effects of natural hazards. They represent a serious breakdown in sustainability and disruption of economic and social progress. In the case of the UK, the exemption could be extended to drought.

Also, Water UK suggests the following amendment:

*Regulation 7. (2)(b) Natural disaster, in particular floods and drought, provided the responsible operator took reasonable preventive measures to protect against damage being caused by such an event*

**Question 12: Do you agree with the proposed division of responsibilities between competent authorities?**

Whilst the logic behind the division of responsibilities can be appreciated, the UK water industry questions whether it is appropriate to include local authorities even where they are the relevant permitting authority. The Regulations should only apply where there are cases of significant damage and we question whether an individual LA would have the necessary resources and skills to be in a position to deal with it. It might be more appropriate and simpler if the competent authorities were limited to organisations which purport to have the skill and knowledge required i.e. the Environment Agency - land & water damage, Natural England - biodiversity and MFA for marine biodiversity (and in the future MMO).

The water industry would also like to seek clarification concerning the competent authority that will have jurisdiction over water damage in transitional waters as defined in the Water Framework Directive.

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

Subject to an exemption/defence in respect of any environmental damage caused when acting under or in accordance with the direction of a "competent authority" in an emergency (whoever that may be), it would seem to be appropriate that there are some links in the event of an emergency e.g. when potential flooding from a dam or reservoir failure is likely to result in environmental damage. Potential consideration should be given to linking this with the flood plans under the Reservoirs Act 1975 and the current work of civil contingency planning.

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

The appeal procedures should be clearly specified, precise and unambiguous to enable all parties to know what their duties, obligations and remedies are at the outset.

**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?**

Water UK supports a further definition of "sufficient interest" or at least expand Regulation 18 to include an additional criterion and in particular for NGOs.

Water UK suggests the following:

*Regulation 18. (1) (c) who is a NGO with legal personality and who can establish a specific connection between the subject matter of the case and its goals as reflected in its statutes.*

**Question 24: Do you agree with the proposed power for the enforcing authority to take action?**

The UK water industry believes that proportional liability is fully in line with the application of the “polluter pays” principle.

*When and where it is possible, proportional liability should be given precedence. It might be appropriate to follow the Scottish draft Regulations and include both options for cost allocation.*

*The UK water industry would like to explore with the Government the inclusion of robust cost recovery provisions so as to ensure that in practice it is able to recover such costs in full should the conditions of the third party defence be met. As required by the Directive, the general principle should be: if operators incur clean-up costs where they can successfully demonstrate a defence, then the implementing legislation must enable those operators to recover those clean-up costs in full.*

*Alternatively the UK water industry would seek assurance from the Government that the procedure for damage remediation will require the regulator to genuinely seek the operator who is liable for the damage caused.*

Joint and several liability could result in inflated litigation costs, since the enforcing authorities would tend to pursue "deep pocket" targets in the first instance, who in turn pursue other responsible parties to recover their losses. Joint and several liability has been used in the US, for instance, and we understand that it has caused severe problems.

This is important since the Regulations will be applied to large-scale incidents, which usually entail substantial costs for remediation. Joint and several liability puts the water industry at risk of being compelled to undertake remediation steps and pay for the cleaning up costs in relation to damage caused by others. This provision makes the industry vulnerable and the financial risks would be passed onto the customers' bill, since companies may not be able to recover these costs from those responsible for the damage.

Third party defence will not bring comfort because the Directive states that an operator who can prove third party causation "shall not be required to bear the costs" of remedial/ preventive measures, but goes on to state that that operator should be enabled by implementing legislation to “recover the

costs incurred”. This indicates that it *can* be required to bear the costs initially, but will be entitled to recover them. The water industry would particularly be vulnerable to this, as in many cases water companies are required to clean up pollution incidents caused by third parties, where these parties cannot be specifically or readily identified.

**Question 27: Do you have any comments on Schedule 1?**

Please also see the response to Question 2 and in particular the exemption proposed.

Despite the statement in the draft guidance (page 27), the UK water industry thinks it important and appropriate to include the following words from Annex 1 of the Environmental Liability Directive into Schedule 1 in order to clarify the scope and extent of application of “significant damage”:

*The following does not have to be classified as “significant damage”:*

- *Negative variations that are smaller than natural fluctuations regarded as normal for the species or habitat in question,*
- *negative variations due to natural causes or resulting from intervention relating to the normal management of sites, as defined in habitat records or target documents or as carried on previously by owners or operators,*
- *damage to species or habitats for which it is established that they will recover, within a short time and without intervention, either to the baseline condition or to a condition which leads, solely by virtue of the dynamics of the species or habitat, to a condition deemed equivalent or superior to the baseline condition.*

**Question 29: Do you have any comments on the authorisations listed in Schedule 3?**

*The UK water industry would wish to see drought permits & drought orders specifically mentioned and a link with acting under the direction of a competent authority in an emergency.*

Under the Water Industry Act 1991 there is a power for undertakers to make discharges for works purposes (S165) so it may be that Schedule 3 should also refer to any discharges made under existing legislation. In the case of

section 165 that is generally the section relied on to authorise discharges from reservoirs for testing for reservoir safety work.

Furthermore, the UK water industry is aware that the Environment Agency is in the process of modernising regulation and intends to replace a number of authorisations such as discharge consents and abstraction licences with environmental permits. It is important to make sure that these Regulations are consistent with the proposed changes in these Regulations.

### **3. Other questions – agreement with the government’s approach**

Water supports the government’s approach suggested in the following questions:

Q 1: definition of activity

Q 3: site integrity

Q 9: proposed approach to damage caused by on-going emissions at the date of coming into force of the Regulations

Remedial measures and appeal procedures

Q 16: proposed procedures for assessment and identification of remedial measures

Q 17: appeal procedures

Q 19: **the remediation notices should be suspended pending appeal**

Q 20: provisions dealing with requests for actions

Q 23: **judicial review is the appropriate route for challenging decisions**

Q 25: proposed powers of entry – **Water UK would however suggest adding “statutory undertakers” to Regulation 21.**

Q 26: charging provisions

Q 28: no comments on Schedule 2

Q 30: no comments on Schedule 4, except in relation to Qs 6 and 7