

EXECUTIVE NOTE

THE ENVIRONMENTAL LIABILITY (SCOTLAND) REGULATIONS 2009 SSI 2009/ 266

The above instrument is to be made in exercise of the powers conferred by section 2(2) of, and paragraph 1A of Schedule 2 to, the European Communities Act 1972(a).

In accordance with paragraph 2(2) of Schedule 2 to that Act, a draft of this instrument will be laid for approval by resolution of the Scottish Parliament.

Introduction

The Environmental Liability Directive relates to significant damage to biodiversity of European importance in terms of the Birds Directive and the Habitats Directive, to water bodies in terms of the Water Framework Directive and to land where public health is at significant risk of being adversely affected. There can also be significant damage caused by an operator where there will be an overlap, e.g. damage from land to water. Coastal damage can also affect land, water and biodiversity.

Background

The Directive addresses concern at the damage to the environment from a number of large scale incidents in Europe in the previous last two decades. On occasions the damage would affect more than one Member State. The loss of protected species and natural habitats or 'biodiversity' was a particular concern. The Directive concentrates on incidents considered of significant damage in terms of European significance. Existing legislation should continue to be applied where appropriate .

Policy objectives

The purpose of the instrument is to implement the Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage. The main aim of the Regulations is to establish a new kind of civil mechanism to be deployed in the cases foreseen by the Directive, based upon the 'polluter pays' principle.

Provisions

The environment is already protected by existing legislation much of which implements Europe-wide policy which applies to all Member States. Some existing legislation requires the repair of damage done to the environment and the Environmental Liability (Scotland) Regulations 2009 do not replace any existing laws but add remediation requirements for the most **significant** cases involving the threat of or actual damage to: -

- **Biodiversity** (protected species and habitats) of European importance in terms of **the Birds Directive and the Habitats Directive**
- **Water** (to water bodies) in terms of the **Water Framework Directive** and,
- **Land** where public health is at significant risk of being adversely affected.

The Regulations place a duty on certain operators who cause a risk of significant damage to land, water or biodiversity to avert such damage occurring or, where damage has occurred, a duty to reinstate the environment to the condition prior to the incident or to undertake compensatory activity. For the purposes of the Regulations an operator is the person who operates or controls an activity which poses a threat of damage or causes actual damage to the environment. Activity is defined quite widely, extending to any activity carried out in the course of economic activity, a business or an undertaking, irrespective of its private or public, profit or non-profit nature. The Regulations will not impose requirements relating to any damage which has occurred prior to them coming into force.

Competent authorities

The role of policing the environmental liability legislation will be the responsibility of designated competent authorities. Competent authorities are designated to empower or require an operator to carry out the necessary preventive or remedial measures. For protected species or natural habitats other than marine, the competent authority is Scottish Natural Heritage (SNH). In relation to land and waters (as set out in s3(8) of the Water Environment and Water Services (Scotland) Act 2003) the competent authority is the Scottish Environment Protection Agency (SEPA), and in the territorial sea around Scotland out to 12 nautical miles, the competent authority is the Scottish Ministers.

A competent authority may call upon another public body for assistance or advice if it is felt that the other public body is in a better position to facilitate the carrying out of preventative or remedial measures.

Co-operation between competent authorities

If a Scottish competent authority has reason to believe that an operator is in danger of causing an imminent threat of or has caused actual environmental damage which is likely to affect the territory of either another Member State, or of another part of the UK, the Scottish competent authority must inform and assist the competent authority of that Member State or other part of the UK. It shall also ensure that the appropriate preventive or remedial measures are carried out ..

Where a competent authority discovers damage within Scotland and the activity which caused the damage did not originate there it must notify the Scottish Ministers who, in turn, may notify the Commission. The Scottish Ministers can also make recommendations for the appropriate preventive or remedial measures to be taken.

Request for action and review

An interested person or non-governmental organisation (NGO) promoting environmental protection may request a competent authority to investigate an incident which they think is likely to cause an imminent threat of or actual damage to the environment. The competent authority after considering any evidence/information available on the incident will consider whether or not to proceed with an investigation.

Appeals

In the case of a dispute between an operator and a competent authority the operator can appeal, on questions of fact and law, to the Sheriff against a decision made by the competent authority under the Regulations. An operator must lodge an appeal by way of summary application to the Sheriff within 28 days. The determination of the Sheriff on appeal will be final.

Compensation for access

The responsible operator, any person acting on behalf of an operator, or the competent authority, will be liable to compensate any person who grants permission/access to enter land or waters either owned or occupied by them in order to carry out any remedial or preventive measures. An application for compensation must be made in writing to the person who was given permission to access the applicant's land or waters.

Recovery of costs

The Regulations provide that the normal rule is that the competent authority shall recover all costs it has incurred from the operator responsible for the threat or actual damage to the environment. There are two exceptions to this where an operator will not be liable for the cost of preventative or remedial measure. These are (a) where an operator can demonstrate that the threat or actual damage was caused by a third party despite appropriate safety measures being in place and (b) if the operator was carrying out his activities in compliance with a compulsory order or instruction from a public body.

Offences and penalties

A person or body who commits an offence under the Regulations and is found guilty on summary conviction will be liable to a fine which will not exceed the statutory maximum or 12 months imprisonment or both. If a person or body is convicted on indictment the penalty will be an unlimited fine or a term in prison up to but not exceeding 2 years or both.

Consultation

Measures to transpose Directive 2004/35/CE on environmental liability in relation to prevention and remediation of damage caused to the environment were the subject of two consultation exercises. The first consultation, which ran from 21 December 2006 until 23 March 2007, focused on the policy intentions as set out in the Directive. The second consultation was prepared taking into account the responses from stakeholders from the first consultation paper. It sought comments/views on draft Regulations, draft guidance, a quick guide and a draft Regulatory Impact Assessment (RIA). The consultation period for the second exercise commenced on 16 May 2008 and ended on 8 August 2008. Copies of the analysis of the responses for both consultation exercises have been placed on the Scottish Government's consultation website.

The following bodies were consulted.

- Scottish local authorities
- Trade association/industry
- Other interested parties
- SEPA
- SNH
- Individuals
- Political parties

Financial Effects

A Partial Regulatory Impact Assessment (RIA) has been carried out on the effect of these Regulations and it is estimated that up to 10 cases of **significant** environmental damage will result in Scotland annually under the Regulations. Costs for these 10 cases will be in the region of £1.4 million per annum. A copy of the Partial RIA for the Environmental Liability Directive is attached.

Competent authorities may initially incur administration costs or incur expenditure while carrying out enforcing measures for preventive or remedial action.

Scottish Government Environmental Quality Directorate
12 May 2009

**DIRECTIVE 2004/35/CE ON ENVIRONMENTAL LIABILITY WITH REGARD
TO THE PREVENTION AND REMEDYING OF ENVIRONMENTAL DAMAGE
(THE ENVIRONMENTAL LIABILITY DIRECTIVE)**

REGULATORY IMPACT ASSESSMENT

Final
March 2009

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1. TITLE OF PROPOSAL

Proposal to transpose into Scots law Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage (Environmental Liability Directive)

2. PURPOSE AND INTENDED EFFECT OF ELD

Objective of transposing ELD

The principal aim of the Directive is to establish a new kind of civil law mechanism based upon the “polluter pays” principle. Certain operators who risk significant damage to land, water or biodiversity will have a duty to avert such damage occurring or, where damage does occur, to take measures to remedy the losses to the environment. ELD requires no action until imminent threats exist or damage has occurred.

It differs from civil law remedies such as delict – the claiming of compensation from someone whose actions have done us harm - in that the harm (and redress) is to the environment, with no individual victim and no claim of personal loss. The new regime will not create more regulation. Instead, an operator will have to notify the competent authority (CA) of the imminent risk or damage and of its plans to avert or repair the damage. Offence and penalty provisions have been included to penalise operators who fail to comply with the requirements of the Regulations .e.g. fail to notify the CA , take preventative or remediate measures, or to pay the costs of doing so.

A major role in the operation of the Directive’s provisions will fall on the ‘competent authority’(CA), which have been designated from existing public body with environmental responsibilities: SEPA, SNH and the Scottish Ministers themselves. The CA will, in consultation if necessary, direct what repair work is to be done or may arrange to undertake the work itself, recovering the cost from those responsible for the damage. The balance between repair of the environment under this Directive and repair of the environment and /or criminal prosecution under extant regimes will need to be established by the CA. Both might apply in some circumstances.

Background

Some existing environmental law already provides for operators to pay for remediating environmental damage, for example water framework legislation.

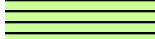


The activities to be covered by strict liability (Annex III to the Directive) include many already regulated, for example: chemicals, discharges to water, waste management and some already carry some liability for environmental damage. Liability for damage to biodiversity is largely new and will affect a wider range of operators than in Annex III. The interpretation of the key threshold - “environmental damage” – will be crucial in determining the number and type of case in which the liability under the Directive will apply. Conclusions below suggest that the number of cases attracting ELD remediation will be small but some may be quite large and costly.

Impacts

Costs and benefits result where ELD provisions are more extensive than existing ones. The main examples where this is the case are:

- There is a duty on operators to report imminent threats and damage - which is not always the case in existing law - and to take steps without delay to limit damage
- There is a duty on the public authorities to require that measures are taken in the event of damage - not always the case in existing law
- Land contamination from organisms and micro-organisms is included in the definition of land damage
- There are two new elements for biodiversity and water damage. These are complementary remediation which is additional remediation where the environment does not return to baseline and compensatory remediation which is additional remediation to compensate for the interim loss of environmental resources and services.

Table 1 overleaf outlines the main changes for the types of damage covered by the directive, highlighting (in colours/patterns as indicated) where the ELD provisions:

- are equivalent to existing arrangements; 
- where they are less extensive than existing arrangements 
- where they exceed existing arrangements. 

Damage to:	Biodiversity	Water	Land
Threshold/ scope of damage	ELD applies to significant effects on EU-protected biodiversity at a species or habitat-wide level whereas Scots law applies to a wider range of biodiversity and restoration requirements relate to sites with some offence to features outside sites.	ELD applies to significant effects on the status of water whereas any pollution of waters is currently covered	ELD covers significant risks to human health which is equivalent to Part IIA (and a higher threshold than in PPC or waste regs) ELD covers damage from contamination by organisms which is not currently covered.
Remedial standard	ELD requires return to equivalent of baseline and compensation for interim loss whereas existing arrangements only require return to existing condition if possible	ELD requires return to baseline and interim loss whereas Scots law only requires return to previous condition 'if reasonably practicable'	ELD requires that risks be removed which is equivalent to Part IIA (and less stringent than PPC or waste regs)
Duties on operators	Duty to notify authority of damage and imminent threats and to take immediate action. This duty does not generally exist currently except in regulatory regimes such as PPC and waste		
Duties/ powers for authority	Duty to require preventive and remedial measures whereas powers to require measures in existing law along with powers to provide assistance.	Duty to require preventive and remedial measures whereas powers in existing law. Power to take measures is new	ELD duty to require preventive measures and remedial measures goes further and is more immediate than duty in Part IIA to PPC and waste regs
Activities covered	ELD contains liability for all activities with certain exclusions. Existing arrangements apply to all activities (although in different circumstances)	ELD liability only applies to activities in Annex III and some activities are excluded whereas all activities are currently covered	ELD liability only applies to activities in Annex III and some activities are excluded whereas all activities are currently covered
Nature of liability regime	In ELD liability is strict for Annex III activities and fault-based for other activities. Liability currently only applies if consensus cannot be reached.	Liability is strict in ELD and in existing arrangements	Liability is strict in ELD and in existing arrangements
Defences to liability for costs	ELD has a defence against remedial costs if the event causing damage was expressly authorised by specified permits (except in the case of the release of GMOS) or not thought likely to cause damage. There are generally no such defences exist currently.		
Time limit for liability	ELD does not apply to damage caused more than thirty years (seventy-five years in the case of the release of GMOs) before whereas there is no limit in existing arrangements		

Rationale for government intervention

The Directive is addressed to Member States. Environment is a devolved competence, so it falls to Scottish Ministers to transpose the Directive into law in Scotland. If Scotland does not transpose the ELD adequately the Scottish Government will be in breach of its obligations under the Scotland Act 1998 not to act except in accordance with law of the European Union. It will also be in breach of the UK's requirement to transpose the Directive and would share in any infraction proceedings against UK, including any financial penalty imposed. It may also suffer reputational damage. There are provisions in existing legislation requiring remediation of damage to the environment but they do not always match the requirements of the ELD.

3. CONSULTATION

Within Government

In preparing to transpose the Directive the Scottish Government has consulted Defra, BERR, Cabinet Office, HM Treasury, SEPA, SNH, COSLA, teams of the Scottish Government responsible for the policies affected (Environment, Justice, etc).

Public consultation

The first consultation set out the implementation options, including the preference for 'minimum transposition'. The Directive provides for a number of exceptions from its requirements and there are some optional provisions.

Options for Member States are

- To extend the scope of 'protected species and natural habitats' to include any that are protected by national law
- In relation to remediation of damage, to allow an operator to claim a defence that the damage was caused by an emission or event expressly authorised and fully in accordance with the conditions of a permit or licence granted under one of the regimes listed in Annex III of ELD and / or that he operated in accordance with the state of scientific knowledge – 'state of the art'
- In the case of an imminent threat of significant damage, a Member State may decide not to respond to a request for action.

Following the first consultation and after further consideration, The Scottish Government believes that it is justifiable to allow 'permit' and 'state of the art' defences, except under the case of genetically modified organisms (GMO) permits. The Scottish Government does not consider it necessary to extend the liability to include species and habitats protected by national law, such as sites of specific scientific interest (SSSI).

Exceptions are provided for damage covered by other measures

- International conventions in Annex IV of the directive
- Limit of operator's liability under LLMC (Maritime)
- Euratom.

Also excepted is significant damage caused through:

- Armed conflict, hostilities, civil war or insurrection
- Exceptional natural phenomena
- Diffuse pollution – unless a causal link is established
- National defence, international security.

The Scottish Government proposes to allow those exceptions. In the circumstances of any case, of course, it may be necessary to identify that the pre-existing subject-specific regime or circumstances do indeed apply.

4. OPTIONS

[A number of options have been considered for the transposition of the Directive:](#)

(1) The ‘do nothing’ approach

If Scotland does not transpose the ELD adequately the Scottish Government will be in breach of the Scotland Act 1998 and share in any infraction proceedings against UK. It may also suffer reputational damage. There are provisions in existing legislation requiring remediation of damage to the environment but they do not always match the requirements of the ELD.

(2) The minimum transposition approach

The Directive is addressed to Member States and they are required to transpose into national law by 30th April 2007. There are provisions in existing legislation requiring remediation of damage to the environment but they do not always match the requirements of the ELD. Accordingly, some action is needed to transpose the Directive. The proposed approach therefore is that where significant damage comes within the scope of ELD, the relationship between the operators, CAs and 3rd parties will be set by ELD transposition. Where damage falls outwith the scope of ELD, existing arrangements will continue to operate. We wish to implement in a way which makes overall liability arrangements as clear as possible so that it is clear to operators for what they may be liable and what may be the consequences of causing significant environmental damage.

(3) Minimum transposition approach with no permit defence for GMOs

[This option is the basis for the Scottish Government draft regulations.](#)

As above but without permit defence for GMOs. Currently there are no GM crops research trials being carried out in Scotland. There are a limited number of GMO licences in Scotland issued for Contained Use, between 2005 and 2008, 50 such licences have been issued.

(4) Minimum transposition approach with extended liability to SSSIs

As in options 2 and 3 but with the extension of liability to ‘protected species and natural habitats’ to include any that are protected by national law. This would extend liability to biological sites of specific scientific interest (SSSI). There are 1133 such sites in Scotland.

5. COSTS AND BENEFITS

The following summary information relates to the Scottish Government's preferred option (option 3 above), hereafter referred to as the draft Regulations. For more detailed information on costs and benefits of this and the other options, please refer to Annex 1.

Approach to assessing costs and benefits

There are two main direct effects of the ELD expected that may give rise to costs to businesses and benefits.

- The first is that businesses may take 'anticipatory' action in response to changes in liability.

This would include any additional measures that businesses take to assess and reduce the risks they run or to transfer risks for example by taking out insurance. A best estimate of **£0.7m** is made for these anticipatory measures. There are likely to be benefits to the extent that environmental damage does not occur or is less severe as a result of any measures taken.

Additionally there are likely to be costs associated with operators familiarising themselves with the new requirements. An estimate of **£0.3m** is made.

- The second is that additional action will be required in response to imminent threats and actual damage.

We have considered records of past environmental damage to assess how many and which cases of environmental incidents would have fallen within the scope of the ELD. We have then assessed what additional measures would have been required the likely costs of dealing with these cases. We estimate that **up to 10 cases** of environmental damage will result in additional works under ELD on average **each year**. Together these are estimated to lead to additional remedial costs of about **£1.4m** per annum in the early years after transposition. This estimate includes the costs of assessing damage, developing remedial measures and administering works as well as the substantive works themselves. We have also assessed the value of the environmental benefits which arise with an estimate of **£2.3m**.

Details of the costs and benefits can be found at Annex 1.

The methodology for assessing costs and benefits can be found in the Annex 2.

In summary, the **key figures** from Table 7 (Annex 1) are as follows.

Costs to operators of

Familiarisation	0.3m
Voluntary steps	0.7m
Remediation	<u>1.4m</u>
	2.4m

Costs to authorities of

Set up	0.2m
Annual net of recovered costs	0.2m
	<u>0.4m</u>

Total costs £2.8m

Value of benefits to the environment of

Voluntary action	0.7m
Remediation	<u>2.3m</u>

Total benefits £3.0m

6. ASSESSMENT OF CONSULTATION ISSUES

Sectors and groups affected

For the purpose of the Directive, the obligations to avert and, where necessary, to remediate, significant damage falls upon the operator. The operator is the person who operates or controls the ‘occupational activity’ that risks or causes damage. The ‘occupational activity’ is defined quite widely, extending to any activity carried out in the course of economic activity, a business or undertaking, irrespective of its private or public, profit or non-profit character. This includes NGOs and the public sector as well as businesses.

The sectors most likely to be affected by environmental damage as defined in the directive are agriculture and land management, manufacturing, the waste and water industries which are assessed together to account for over 70% of damage. The distribution of costs across these sectors is discussed in detail in Annex 1.

Removal of permit defence for GMOs

Whether or not there is a permit defence is unlikely to have a significant bearing on how much damage is covered by the directive. This is because it is difficult to identify cases from the past where damage would qualify under ELD and has been caused within a permit. Where this has occurred it has generally been under permits that have since been updated.

There are a very small number of GMO licences in Scotland and these licences are considered to be strict, therefore, the risk of damage being caused by GMOs is likely to be small. However, if there were an incident relating to the release of GMOs subject to a GMO licence, the damages are potentially significant, including damage relating to the loss of biodiversity.

It has not been possible to estimate these damages as there are no existing cases of such damage on which to base an analysis. The Scottish Government considers it prudent to remove the permit defence for GMO licences as any breach of permit could cause potentially significant levels of damages, which may affect several elements of the ecosystem and damages may persist over time.

There may be wider effects from providing a permit defence for all other types of licence. These would include the possibility that competent authorities would tighten permit conditions, that there would be more legal action over uncertainty as to whether operators had complied with the relevant conditions and that it would make the insurance sector more willing to offer products.

7. SMALL / MICRO FIRMS IMPACT TEST

A review of the impacts on small firms of transposing the ELD concluded that:

- i) As much ELD damage is likely to be caused by small firms as large firms and small businesses are capable of causing very significant incidents of damage.
- ii) The resulting costs will be larger relative to the turnover and profit margins of smaller companies than of larger companies. For example, £100,000 which is (roughly) the estimated additional level of costs of water and biodiversity incidents represents two years of turnover for the average one-man farm but less than 0.1% of the turnover for the average chemicals manufacturer employing 500 people.
- iii) Time invested in finding out about the new rules may be relatively greater for smaller companies
- iv) Smaller companies may be poorer at assessing risks than larger companies which may lead to lower levels of risk reduction

The discussion of methodology in Annex 2 to this RIA describes two sets of workshops with UK industry sectors held to assist construction of the partial RIA. These precursors to the public consultation were necessary to give a range of information. The public consultation in Scotland sought dialogue with a range of key interests, including small / micro business, to offer a closer exchange of views and a refinement of available information.

8. 'TEST RUN' OF BUSINESS FORMS

No business forms will be required in the proposed regulations

9. COMPETITION ASSESSMENT

All countries in the EU are required to implement the directive. It is not expected to put UK businesses at a disadvantage to other EU businesses.

Businesses in non-EU countries will not be subject to the ELD and may have lower levels of environmental liability with lower risks of incurring costs for environmental damage. Whether the introduction of the ELD will give those companies an advantage will depend largely on the increased risk for UK companies and on the potential for trade in the sectors in which they operate. The sectors that are at highest risk of increased costs are the agricultural sector, the waste sector and the water sector but the risks are still very low with the total cost of damage by sector representing 0.02% or less of turnover. The ELD costs for manufacturing and other sectors that have a higher exposure to international competition are significantly lower.

We have considered the effects of ELD on internal UK competition¹ and have concluded that the directive is unlikely to have a detrimental effect on competition in any sector.

10. ENFORCEMENT, SANCTIONS AND MONITORING

Enforcement

The Directive requires Member States to designate CAs. The following reflects the result of the Scottish Government's consideration.

In principle, the fewer CAs there are, the easier it may be to achieve consistency and, for example, the simpler the cost recovery and reporting aspects will be. Where a body has only a limited role in ELD implementation it may be better to have it in a supporting role and not as a CA. Ideally the CA would have expertise in both the type of damage and the activity which has led to damage e.g. SEPA where there has been water damage by a PPC site. However, this is not entirely necessary if the CA is able to call upon other bodies to exercise their expertise where necessary.

The most relevant players are SEPA, SNH and the Scottish Ministers. Support will be required at times from Scottish Water, Health Protection Scotland, Local Authorities; Pesticide Safety Directorate; Health and Safety Executive; BERR (offshore processes); Transport Scotland and Department for Transport (including Maritime and Coastguard Agency). Support mechanisms are, to some extent, already in place and available as required under civil contingencies legislation.

Scottish Ministers favour the simplest practical structure with fewer rather than a greater number of CAs. Hence the following designations: SEPA as competent authority for damage to water and land, SNH for protected species and natural habitats and land, with the Scottish Ministers taking responsibility for protected species and habitats in the marine area. Other bodies may fulfil a role as subject matter requires.

Sanctions

¹ The RIA for England, Northern Ireland and Wales provides further information.

There are no penalties in this regime for causing or failing to avert damage. There are penalties for non-compliance with requirements to take action and pay costs.

Monitoring

Article 18 of the Directive requires Member States to report their findings on the ELD regime to the Commission by 10 April 2013 including information and data set out in Annex VI of the Directive. Arrangements for monitoring were put in place as soon as the transposition of the Directive was completed.

ANNEX 1: COSTS AND BENEFITS : DETAILS

Remedial measures

Biodiversity damage

We note that:

- *The threshold for biodiversity damage would be that a significant adverse effect on reaching or maintaining the favourable conservation status of relevant species and habitats has occurred (hereafter this threshold is referred to as 'FCS')*
- *Relevant habitats and species are those in the Annexes of the Habitats Directive and the Birds Directive as referred to in Article 2.3 a) and b) of the ELD.*

Sources

There is no single or centralised recording system for damage to species and habitats in Scotland. We have therefore drawn on a number of sources to estimate the number of cases under the Directive. For land-based biodiversity these include records held by Scottish Natural Heritage and by UK NGOs and reports on habitats and species under the European Directives. The assessment for marine biodiversity was undertaken with marine conservation experts including in the Joint Nature Conservation Committee in Aberdeen, the Centre for Environment, Fisheries and Aquaculture Science, Natural England and Defra.

Estimated number of cases

Draft Regulations

For land-based biodiversity damage it is estimated that on average there might be a **case that exceeds this threshold (FCS) every two years**. This is on the basis that the majority of these will fall within EU sites although there may also be the occasional case involving outside sites.

Cases of marine damage are likely to be rarer with a case coming to attention every ten years on average although this depends to a large extent on the nature of enforcement in the marine environment compared with that on land. The consensus was that there were few activities which could cause significant damage at a species or habitat level in the marine environment and where the cause can be traced to identifiable operators. Fishing with bottom gear is most likely to attract action under

the Directive with a few other activities such as engineering operations, dredging and dumping and mariculture causing damage rarely.

In addition to the cases that might be expected to occur year on year, there would very occasionally be more severe cases. An example might be if a business introduced a non-native species which significantly reduces the populations of protected species across Scotland. It is suggested that such severe cases might occur once in a generation (or, once in twenty-five years) in Scotland.

No cases of imminent threats were identified where more would have been required under the ELD than at present. Where there are imminent threats of damage to species and habitats covered by the ELD there are generally the arrangements in place to prevent it. It is therefore unlikely that additional preventive measures would be required because of the ELD.

Costs

Twelve cases of land-based biodiversity damage from across the UK were examined, and the costs of potential additional measures assessed. This suggested that on average the costs of these cases were unlikely to fall outside the range £25,000 to £400,000 with a best estimate of £100,000. Review of the types of damage that might occur in the marine environment and the potential costs provides a range of £100,000 to £2m on average per case.

As well as the remedial work itself operators will also face costs of assessing the damage in line with Annex II of the Directive and costs of administering work as well as costs that the enforcement authority recovers.

Benefits

The assessment of the benefits to society that accrue from additional remedial measures taken² is made on the basis of the expected outcomes of the remedial measures identified for the assessment of costs. The improvements associated with measures were identified and the value to society of improvements was estimated by transferring values from studies that value similar ecological resources. The assessment of benefits is made on the basis of twelve land-based cases and one case of marine biodiversity.

Table 2: Remediation of biodiversity damage

² These measures are generally concerned with enhancing, protecting, conserving and creating features for biodiversity.

Threshold for damage	Numbers of cases (pa)	Remedial costs per case, £'000s	Total cost pa ³ , £'000s	Total benefits pa, £'000s
Severe case (included whatever the test)	1 in 25 years	5,000 (1,000 – 10,000)	220 (45 – 480)	443 (310 – 576)
Significant adverse effect on FCS (land-based)	1 in 2 years	100 (25 – 400)	105 (27 – 450)	227 (159 – 295)
Significant adverse effect on FCS (marine)	1 in 10 years	800 (100 – 2,000)	110 (18 – 320)	150 (105 – 195)
TOTAL			436 (90 – 1250)	820 (574 – 1066)

There is some uncertainty in these estimates of future damage as they are based on past experience.

Option (2)

The costs and benefits associated with this option are the same as the draft regulations for biodiversity damage.

Option (4)

There may be additional cases of remediation relating to SSSIs if the liability was extended to cover such sites. In Scotland, SNH have estimated that there would have been 2 additional cases in 2003-04 and 4 additional cases in 2004-05. On average, therefore, we might expect the number of additional cases under this option to be in the region of 3 per year.

The average cost for SSSI cases was estimated at £22,000, within the range of £10,000 to £60,000.

The benefits associated with remediation of damage caused to SSSIs is based on past studies that value similar ecological resources, more information on this approach is provided in Annex 2.

Table 3: Additional remediation of biodiversity damage under extended liability

	Number of cases (pa)	Remedial costs per case, £,000s	Total costs pa, including assessment and administrative costs, £,000s	Total benefits pa, £,000s
SSSI integrity (excluding FCS)	3	22 10 -60	93 42 - 288	316

Water damage

³ Including the costs of assessment and costs recovered by the enforcement

The definition of water damage refers to the ‘status’ of waters under the Water Framework Directive (WFD). The ‘status’ of waters will be determined by standards that are being developed in the WFD context. Criteria will need to be developed to determine what is meant by ‘significantly adversely affects’. For the purposes of this assessment assumptions have been made on what these standards and criteria will be. In essence, the threshold based upon the changes in status class of water bodies under the Water Framework Directive will capture the most significant cases of water damage.

Sources

The assessment is based on data from SEPA including incident reporting databases and information on failures of standards under EU directives. It is also informed by advice from SEPA and from the Environment Agency of England and Wales.

Draft Regulations

Estimated number of cases and costs

It is estimated that there might on average be three cases of water damage each year. Seven case studies⁴ were examined and the costs of potential additional measures required under ELD assessed. The average additional cost from these cases of £105k is used. There is also likely much less often to be a case that leads to significantly higher costs, normally because a major aquifer is severely polluted. By comparison with the assessment in England and Wales, it is suggested that these are unlikely to occur more than once every forty to fifty years on average and that additional costs of £5m would not be atypical. It is considered unlikely that there will be cases where preventive action is required over and above what is already required.

Benefits

Benefits were assessed for the seven case studies using a per km benefits estimate⁵ and is used for the estimated three cases in Scotland.

Table 4: Remediation of water damage

Threshold for damage	Numbers of cases (pa)	Remedial costs per case, £'000s	Total cost (pa) inc. assessment £'000s	Total benefits pa, £'000s
‘Severe’	1 in 40-50 years	5,000 1,000-10,000	127 (26 – 267)	313 (188 – 430)
Significant exc. short-term	3	105 25 - 500	465 (105 – 2100)	608 (365 – 836)
TOTAL			592 (131 – 2367)	921 (553 – 1266)

Option (2)

⁴ These case studies were from England and Wales but cases in Scotland are likely to follow a broadly similar pattern.

⁵ Derived from benefits assessment work undertaken for the Periodic Review of water prices in England and Wales.

The costs and benefits associated with this option are the same as the draft regulations for water damage.

Option (4)

The costs and benefits associated with this option are the same as the draft regulations for water damage.

Land damage

Generally the remedial standards for land damage in the ELD are not more rigorous than corresponding provisions in existing legislation, for example those contained in Part IIA of the Environmental Protection Act 1990. The ELD may lead to more remedial work being undertaken in response to land damage for two reasons:

- 1) The ELD imposes a requirement for operators to notify the competent authority of damage and undertake the necessary measures whereas there is no such automatic requirement in Part IIA
- 2) Damage from organisms and micro-organisms is explicitly covered in the ELD.

Draft Regulations

Estimated number of cases

The ELD only applies to land damage that occurs (or caused by events that happen) from the date the Environmental Liability (Scotland) Regulations 2009 came into force. It is suggested that there might be around 50 incidents of 'new' land damage in Scotland that are already addressed under existing regimes each year⁶. It is expected that in the majority of cases where people are aware of significant risks to their health arising from contaminated land action will already be taken and people would request the relevant authority to pursue it. It is suggested that the ELD may lead to an additional 10% of cases (5 per annum) being addressed.

Costs

The costs of six sample cases of 'new' land damage were assessed⁷ which suggest an average cost of £52,000 which is applied to the estimated 5 cases of damage per annum.

Benefits

The benefits of the six cases were also assessed. It is difficult to predict the nature of any cases that may additionally be addressed once the ELD comes into effect; it is, however, possible that it will be those cases with less defined benefits as existing

⁶ This estimate is made on the basis of information for England and Wales taking account of Scotland's geographical extent, number of businesses and population in proportion to those for England and Wales.

⁷ These were cases from England but no reason to suggest significantly different types of cases in Scotland was identified.

arrangements may already pick up those cases where action is most ‘needed’. The benefits estimates are deflated by 50% to reflect this.

Table 5: Remediation of land damage

Threshold for damage	Numbers of cases (pa)	Costs per case, £'000s	Total cost (pa) including assessment, £'000s	Total benefits (pa), £'000s
Significant risk of adverse effect on human health	5	52 20 - 100	395 (150 – 650)	669 (334 – 2006)

Option (2)

The costs and benefits associated with this option are the same as the draft regulations for land damage.

Option (4)

The costs and benefits associated with this option are the same as the draft regulations for land damage.

Operator anticipatory response to ELD

Draft Regulations

Nature and cost of anticipatory measures

The ELD only applies where there is damage or an imminent threat of damage. Remediation will lead to costs for businesses. In addition to these, some operators will incur some costs, as a matter of choice, in taking anticipatory measures in response to changes in the liability rules.

Risk assessment

Some businesses will undertake additional risk assessment to work out their exposure to increased costs. This could take a variety of forms. For smaller businesses it might involve a visual inspection of aspects of their activities that may give rise to risks, or research into the location of sensitive environmental features. Some businesses may seek external advice.

Precautionary measures

Some businesses may act to reduce their risks, taking precautionary measures rather than risking increased costs associated with causing ELD damage. Businesses will have different attitudes to risk which will affect the way they respond. For some companies the risk of reputational damage may be more important than the immediate costs of remedial works.

Many companies thought that the ELD would not be the single factor determining whether or not to make operational changes but that it would be a consideration and in some cases make the difference between making an investment or not.

Baseline assessment

Remediation of water and biodiversity damage requires return to baseline condition (the condition before the damage took place) which is to be estimated on the best information available and the directive only applies to damage that takes place from the date the Environmental Liability (Scotland) Regulations 2009 came into force. For these reasons some companies may decide to record the 'baseline condition' of the environment surrounding their operations. This might involve for example taking photographs, taking chemical samples and monitoring species.

Insurance

General insurance policies only cover environmental risk to a very limited extent. A separate 'Environmental Impairment Liability' market developed in the US in the early 1990s and US insurers have since opened markets in the UK and Europe. Cover in the UK is generally restricted to liability for historic contamination during property transactions. The purchase of policies for operational risk is not widespread.

Generally, companies do not purchase cover for operational risks and we do not expect that the ELD will trigger significant change. Although there is existing cover available for some of the requirements of the ELD, there is none for the aspects of the Directive that are expected to be responsible for most of the additional costs – particularly complementary and compensatory remediation. If there is limited demand for insurance it may take time for good value products to develop.

A best estimate of **£0.7m** is made for the costs of anticipatory measures. These have been derived from Defra focus groups and interviews with individual businesses and estimates were cross-checked with trade associations. More detail on the methodology for these estimates can be found in annex 2.

Benefits

There may be benefits associated with anticipatory measures particularly those that seek to reduce exposure to risk: by reducing the probability of causing damage or mitigating the consequences in the event of damage. In general, businesses are likely to take anticipatory measures where it is cheaper to do so than to bear risks. Annex 2 explains the methodology behind the assumption that the **benefits will tend to exceed the costs of actions taken.**

Option (2)

The costs and benefits associated with this option are the same as the draft regulations.

Option (4)

There are not expected to be any significant additional anticipatory costs associated with extending liability to cover biological SSSIs. Therefore, these costs and benefits are assumed to be the same as those in the draft regulations.

Familiarisation

Draft Regulations

Many businesses will take time to familiarise themselves with the new rules so that they know what the requirements are in the event of damage and whether they are likely to cause relevant damage. This time which is likely to be invested largely in the first year of operation, has a cost associated with it. An estimate is made of **£0.3m** based on assumptions about the resource input of businesses in different sectors. It is assumed, for example, that a proportion of smaller businesses may spend about an hour of someone's time whereas some larger businesses may take a month, including communicating to other staff. Trade associations and other representative organisations are likely to provide information to their members and stakeholders. It is assumed that some time will also be spent in subsequent years, for example, if new staff or businesses familiarise themselves with the rules or if more businesses decide to find out about the ELD following a high profile case.

Option (2)

The costs and benefits associated with this option are the same as the draft regulations.

Option (4)

The costs and benefits associated with this option are the same as the draft regulations.

Potential exposure of sectors to additional costs

1. Table 5 demonstrates how costs would be allocated by sector if on the basis of past patterns of environmental damage⁸.

Table 6 Potential exposure to additional costs of ELD by sector

Sector	Sectoral % of total costs
Agriculture	35%
Manufacturing	11%
Waste	15%
Water	12%
Transport	5%
Fisheries	4%
Other industry	9%
Other	8%
Total	100%

Agriculture is likely to face the highest proportion of costs (35%), borne largely by those who manage land with important habitats and species and those whose operations cause contamination of surface waters and groundwater.

⁸ This allocation is based at this stage upon data from England & Wales.

Farmers affected may spend time familiarising themselves with the new rules. It is unlikely that the ELD by itself will cause major operational changes but it may be one driver amongst others (such as measures required under the WFD and the Common Agricultural Policy's 'cross-compliance') for farmers to take measures to reduce their impact on the environment. Farmers may be subject to more uncertainty than other types of business as their operations are subject to the vagaries of the weather and animal behaviour. Overall the farming sector would be exposed to a potential increase in production costs of around 0.01%, but the costs to those who actually cause ELD damage are likely to be high in relation to their annual turnover.

On the basis of past damage **the water sector** would be exposed to 12% of the costs to operators. Failure of sewage treatment infrastructure causing water damage is also responsible for a large proportion of the estimate. To eliminate the risks of causing these types of damage would require investment of significant investment but it is considered that the additional costs of ELD remediation would not justify this level of investment.

On the same basis **the waste sector** would be exposed to 15% of costs. Additional costs of remediation may largely fall on operators who do not fully comply with existing requirements rather than those who are compliant. It is thought unlikely that the waste sector will take significant measures in response to the new rules. This is because the majority of waste businesses already control their risks to the environment adequately and those that do not are considered unlikely to do so as a result of this Directive.

Manufacturing businesses would be exposed to 11% of costs. Environmental damage covered by ELD could occur through slow leaks from infrastructure, systems failures and major accidents. Generally operators and their representatives stated that they would not take action as a direct result of the new rules but ELD may act with other drivers to encourage changes.

Land transport operators (largely road) would be exposed to around 3% of costs e.g. from land and water damage caused by road traffic accidents and leakages associated with transport depots and other facilities. In view of the large number of operators and low probability that any one will caused the type of damage covered by the Directive, it is unlikely to lead to significant operational changes in this sector.

In the **marine sector**, damage from shipping of oil, hazardous substances and radioactive substances will be covered by separate, existing arrangements (see annex IV and V of the Directive). On the basis of the assessment of marine damage, **fisheries** would be exposed to an estimated 4% of ELD costs. These relate largely to damage and imminent threats of damage caused potentially by bottom trawling over sensitive marine habitats. The principal precautionary measure that fisherman can take is not to fish in relevant areas and it is difficult to predict whether they would do this. There are some alternative measures that fishermen might adopt to reduce impacts, for example fitting 'pingers', which are alarms to deter cetaceans, on fishing nets. Enforcement in this area is complicated both on evidential grounds and by the nature of 'operators' who fall under the jurisdiction of the Common Fisheries Policy and many of whom are likely to be foreign registered vessels.

The construction sector would be exposed to a small proportion of costs relating, for example, to release of substances into watercourses, movement of contaminated soils

and major damage to bat roosts. The Energy sector is also likely to face a low level of costs from accidents at sites and damage to estuarine biodiversity from water abstraction.

The retail fuel sector is also likely to be affected as a result of more cases coming to attention.

Enforcement costs

Draft Regulations

Public authorities in Scotland responsible for enforcing and administering the new provisions may initially incurred some additional costs. Estimates of additional costs have been made with information from the authorities that are currently responsible for parallel existing regimes where they exist and on the basis of the estimated average levels of damage.

There will be costs in setting up the systems and procedures and training staff. There will also be ongoing annual costs. Some of these are recoverable from the liable party. They may include costs associated with investigating damage, assessing damage and remedial measures and enforcing works. Non-recoverable costs may include costs of investigating incidents that do not require any action, policy advice, and internal liaison, liaison with other authorities, legal and economic advice and reporting. There is discretion in the ELD to allow authorities to recover some general costs from operators which may reduce the costs outlined above and increase the costs to operators. Initial costs in table 6 below represent the costs before cost recovery, and final is after recovery. Those estimates are sensitive to a number of factors such as the level of damage, the extent to which cost recovery is possible and will depend on year to year fluctuations in the level of damage.

Table 7 Additional costs of enforcing and administering the ELD

	Costs £'000s		
	Initial pa	After cost recovery pa	Set-up
Scotland	212	156	214

Option (2)

The costs and benefits associated with this option are the same as the draft Regulations.

Option (4)

There are not expected to be significant additional enforcement costs associated with extending liability to cover biological SSSIs, given that there is likely to be a low number of cases per year. Increased costs would be of the order of 30% extra, given this option is forecast to result in 13 rather than 10 cases a year.

Costs and benefits through time

The following sections apply to the draft Regulations only.

We now turn to costs and benefits beyond this first year of implementation. We also considered the costs and benefits of incidents in the ELD's first ten years. As in consideration of the first year this takes account of the costs and benefits of voluntary action and of measures associated with incidents irrespective of when the benefits actually accrue.

Set-up costs for enforcement authorities and operators are one-off costs in the first year. Other costs and benefits recur each year. However, there are reasons to suggest that annual costs and benefits will decrease over time.

It is assumed that the average annual numbers of ELD incidents remain constant for the first ten years. Environmental protection legislation, voluntary actions taken as a result of the ELD and technological improvements are all likely to have a downward effect on the numbers of incidents. Some changes may increase the number of cases coming to attention e.g. increased rights to roam may mean that sensitive environmental areas are more accessible, mobile phones make it easier to report incidents and initiatives such as the Aarhus Convention⁹ encourage increased public participation in environmental matters. The assumption that damage is constant is a cautious assumption as the identifiable factors that are likely to influence the level of damage appear likely to reduce damage overall.

It is thought that a large proportion of measures taken to reduce exposure to liability will be taken at implementation of the ELD but that there will also be some ongoing investments. Large incidents subject to ELD requirements that attract media attention may happen at any time and may encourage other businesses to take measures. It is assumed that these costs will reduce by 80% after the first two years of the Directive.

Taking account of these assumptions the additional costs of ELD over 10 years are estimated to be £16.4m and the benefits are estimated to be in excess of £22m¹⁰. This is set out in more detail in table 7.

⁹ The Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. Adopted in 1998.

¹⁰ These (the figures for costs and benefits) are Present Values (PVs) calculated using a discount rate of 3.5%. A PV reflects the present value to society of future flows of costs and benefits. A discount rate is used to reflect the fact that costs and benefits are weighted more heavily now than in the future.

Total costs and benefits

Table 8 Costs and benefits of draft regulations

		Minimum: central estimates of benefits and costs £m	
		First year	PV in 2007 of impacts over 10 yrs
	Number of cases	10	
COSTS	Costs of additional remedial work:	1.4	12
	<i>Biodiversity</i>	0.3	
	<i>Water</i>	0.4	
	<i>Land</i>	0.3	
	<i>Assessment and admin</i>	0.4	
	Voluntary action	0.7	2.2
	Familiarisation	0.3	1
	<i>Total 'admin cost'</i>	0.5	5
	<i>Total admin cost saving</i>	/	/
	Annual authority costs	0.2	1
	Authority set-up	0.2	0.2
	Total costs	2.8	16.4
	BENEFITS	Benefits of remedial measures	2.3
Benefits associated with voluntary action (>)		0.7	2
Total benefits (>)		3.0	22

Costs in context

Table 8 places the estimated additional costs of the ELD in the context of annual turnover of sectors and of individual companies. Total estimated costs to operators associated with transposing the Directive might increase the current expenditure by industry on environmental protection¹¹ by 0.5%

¹¹ This is based on a UK survey of Environmental Protection Expenditure by industry: Defra 2005.

Table 9 Costs to business in context

Sector	Costs as % of sector turnover	Incident cost as % of turnover of micro business
Agriculture	0.04%	17%
Manufacturing	0.0008%	9%
Waste	0.06%	11%
Water	0.06%	NA
Transport	0.002%	6%
Fisheries	NA	NA
Other industry	0.0003%	5%
Other	0.0006%	10%

Wider costs and benefits

Economic

- There is unlikely to be a net gain to the economy associated with these new revenue streams as they would displace expenditure elsewhere in the economy. For example, companies may reduce expenditure on entertainment or advertising as a result.
- The permit defence (except for GMOs) may lead authorities to tighten permit conditions which could lead to costs to businesses. It may make insurers more willing to offer products. It may also lead to litigation.

Social

- There are likely to be health benefits associated with both measures taken in response to environmental damage and with measures that businesses choose to take to reduce risks.

Environmental

- Climate change may increase the amount of damage subject to the Directive.
- Additional and potentially more rapid measures taken in response to environmental damage may bring wider benefits for local environmental quality
- The prospect of paying for damage is intended to make those who might potentially cause damaging incidents amend their practices to avoid this possibility.

Risks

Risks associated with the new provisions are identified, in particular that

- i) The thresholds are interpreted more widely than anticipated leading to more cases of qualifying damage being caught
- ii) The Directive leads to litigation
- iii) Damage assessment leads to high costs if not used proportionately
- iv) ELD is misrepresented and businesses respond inappropriately
- v) Requests for action divert authorities and businesses from central activities
- vi) It is difficult to find appropriate remediation projects
- vii) The late transposition of the Directive causes uncertainty

Regulatory Impact Assessment

ANNEX 2: COSTS AND BENEFITS: METHODOLOGY

Costs and benefits of additional remediation

The approach to assessing the costs and benefits of additional remediation required under the ELD uses the past as a guide to the future. The first step was to establish which cases of damage from the recent past would have been caught had the ELD been in place. Data from one year was reviewed in detail to identify actual cases, with information from other years to moderate estimates. This provided an annual sample of the ELD cases in Scotland (and in parallel exercises for England and Wales).

The cases in England and Wales were then examined to see what actions were taken under existing legislation and what additional measures would have been required under the ELD. In most cases it was found that some primary remedial measures were already taken but further measures would have been required as complementary and compensatory remediation. Recognising that there are occasionally more severe cases with wider ranging consequences, in addition to the cases that might typically arise year on year, authorities were asked to identify the most serious cases from recent decades on the basis of which an estimate of the frequency of significantly larger cases was made.

Costs

The costs of the additional measures that would have been required were assessed with cost information from the Environment Agency of England and Wales, Scottish Natural Heritage and from Natural England. An estimate of costs per case was derived and applied to the estimated number of cases in Scotland. The potential costs of larger cases was assessed by characterising the nature and extent of these cases and the remedial requirements in response to them. A proportion of the costs of these larger cases was added to the annual estimates.

Benefits

In order to assess the benefits of remedial measures taken, the expected outcomes of measures was first identified: for example, number of kilometres of river improved to a particular standard or number of hectares of a particular type of habitat improved. The next stage was to assign a value to those outcomes. Valuing the benefits of environmental improvements is a challenging area but economic techniques have been developed in recent years and these have been applied to derive values for a wide range of environmental assets and improvements.

In general terms these techniques are either based on 'stated preferences' which involves interviewing people to find out how they would value 'non-market' environmental goods in a market situation; or on 'revealed preferences' which examines statistical data on actual market decisions such as where people choose to live in order to work out implicitly how people value environmental goods.

For this assessment it was considered that rather than undertaking a primary assessment, 'benefits transfer' which draws on primary valuation studies was the appropriate approach. Benefits transfer imputes a value for similar environmental goods or improvements from one or more existing studies to a policy scenario making adjustments for key differences between study and policy sites. For example, in one case it was estimated that the ELD would require improvement to 30 hectares of moorland. A 'per hectare' value of improving similar moorland was transferred from an existing study to provide a value of the benefits of improving 30 hectares. In each case differences between the study and policy scenarios were considered and in some cases adjustments were made. Overall the benefits of the ELD remedial measures were found to exceed their costs.

Uncertainties

Uncertainty arises because estimates of future damage are based on past cases. The number of past cases is small and therefore circumstances of individual cases significantly influence the conclusions. Percentages which result from small numbers sometimes suggest precision, where the intention is more to show **relative** weight of the factors. Tables 2-4 in Annex 1 show the ranges of possible costs, from which the estimated figures have been taken. There is also uncertainty in the assessment of benefits which relies on recently-developed approaches for benefits valuation and is constrained by the benefits studies that were available. In some areas of the assessment where Scottish data has not been available at this stage we have relied on extrapolation from UK work.

Efforts have been made to overcome the above shortcomings, for example through workshops, holding two consultation exercises and meeting with stakeholders.

Business response to ELD

Costs

The approach to assessing how businesses might respond to the ELD was to ask the businesses themselves. A first series of workshops was set up with each workshop dedicated to a business sector that was assessed as likely to be exposed to additional liabilities once the ELD is transposed into national law with representatives of different sized businesses within each sector. Workshops began by establishing what the new provisions were and how they would change existing rules for responding to environmental damage. Participants provided their view of what they, and other similar businesses, might do in response to the new rules and on the costs of any measures that they might take.

Estimates were then extrapolated to cover all UK businesses on the basis of data on the number and sizes of businesses in each sector. The overall results were then presented to representatives of each sector in a second series of workshops and adjusted according to comments received. This exercise was undertaken by Defra on behalf of the UK. The estimate for Scotland has been made by reference to the numbers of businesses in Scotland in comparison with the rest of the UK.

Benefits

Measures that businesses take in response to a change in liability rules will lead to environmental benefits to the extent that those measures reduce the amount of environmental damage that occurs or the consequences of incidents that do occur. It is important to note that in addition to reducing the likelihood of the ELD damage, measures taken may reduce the overall environmental impact of the operation. It is difficult to establish exactly what benefits measures that businesses choose to take will have but it is possible to draw some general conclusions by examining the circumstances under which businesses are likely to choose to take measures.

Businesses will choose to take action where they perceive that the costs of doing so would be lower than the costs of bearing the additional risk. Assuming businesses understand their risks accurately and how their actions can reduce those risks, they will take measures where it is cheaper to do so than to bear risks. Studies used as indicators for comparison of costs and benefits of remediation measures suggest that on average the environmental benefits of the ELD remedial measures in future should exceed the costs of those measures. Taking these two relationships together it follows that the environmental benefits of avoided damage should on average be greater than the costs of the measures taken to avoid that damage; and therefore that the total environmental benefits of measures should exceed their costs. This is a simplification but provides an indication of the relationship between the costs and benefits of measures that operators may take.

Declaration and Publication

I have read the Regulatory Impact Assessment and I am satisfied that the benefits justify the costs.

Signed by the Responsible Minister

.....
Roseanna Cunningham

Date

Contact

Any queries about this RIA should be addressed to: -

Heather McCabe

Scottish Government
Environmental Quality Directorate
Waste & Pollution Reduction Division
1-J/North
Victoria Quay
Edinburgh
EH6 6QQ
Tel: 0131-244-7814
Fax: 0131-244-0245

E-mail: ELD.consultation2@scotland.gsi.gov.uk

Scottish Government

Environmental Quality Directorate
March 2009

**THE ENVIRONMENTAL LIABILITY (SCOTLAND) REGULATIONS 2009
TRANSPOSITION NOTE FOR COMMISSION DIRECTIVE 2004/35/CE ON
ENVIRONMENTAL LIABILITY WITH REGARD TO THE PREVENTION AND
REMEDYING OF ENVIRONMENTAL DAMAGE .**

Transposition date: 30 April 2007.

Lead Minister: Roseanna Cunningham.

Lead Officials: Kevin Philpott/Heather McCabe

Directive 2004/35/CE relates to environmental liability with regard to the prevention and remedying of environmental damage to specified land, water and biodiversity. The principal aim of the Directive is to establish a new kind of civil mechanism based upon the ‘polluter pays’ principal. The key requirements may be transposed directly from the Directive but the Directive cuts across existing regimes which already contain some conditions within the legislation to repair any damage caused by an operator carrying out his activities.

The Environmental Liability Directive describes significant damage to: -

- **Biodiversity** (protected species and habitats) of European importance in terms of **the Birds Directive and the Habitats Directive**
- **Water** (to water bodies) in terms of the **Water Framework Directive** and,
- **Land** where public health is at significant risk of being adversely affected.

There can also be significant damage caused by an operator which will overlap, e.g. damage from land to water. Coastal and marine damage can also affect land, water and biodiversity.

Transposition Measures For Scotland

The Environmental Liability Directive in Scotland concerns issues which are devolved to the Scottish Ministers.

The following table demonstrates the key elements of the Environmental Liability Directive (ELD) provisions and how relevant provisions have been given effect in the **Environmental Liability (Scotland) Regulations 2009**.

Transposition Note
Title of implementing legislation; The Environmental Liability (Scotland)

Regulations 2009

Date Laid: 14 May 2009

Date approved: 12 May 2009

Article	Objective(s)	Implementation	Responsibility
2	Sets out the definitions which will apply.	Regulation 2(2) provides that generally the expression used in the Directive have the same meaning in the Regulations	

3.1	Sets out the scope and application of environmental damage. See also Annex III for the list of activities covered	Regulation 4(1) Schedule 1	
3.2	The Directive applies without prejudice to more stringent Community legislation regulating any of the activities falling within the scope of the Directive	Regulation 6(b)	
4	In conjunction with Annexes IV and V, sets out what the exemptions to the Regulations will be, even if actual environmental damage has been caused or if there is a risk of such damage.	Regulation 5 sets out the activities which are exempt. The relevant Conventions are set out in this Regulation.	
5.1 and 2	Action to be taken by an operator where environmental damage has not yet	Regulation 10 (1) and (2).	Operators whose activity gives rise to damage, or an imminent threat

	occurred but is likely to develop unless immediate action is taken by the operator		of damage.
5.3 and 4	Role/action of the CA in relation to what type of preventive action it can require of the operator and circumstances in which the CA may take measures itself	Regulation 10 (3) (4)and (5)	Scottish Ministers SEPA or SNH
6.1	Sets out steps which an operator must take to contain and control any damage which has occurred	Regulation 12(1) and Schedule 3	Operators whose activity gives rise to damage, or an imminent threat of damage.
6.2 and 3	Role/action of the CA in relation to what it can require of the operator in relation to remedial measures and circumstances in which the CA may take measures itself,	Regulation 12(2), (3) and (4).	Operators whose activity gives rise to damage, or an imminent threat of damage. Scottish Ministers, SEPA or SNH.
7.1	Sets out the requirement for an operator to identify potential remedial measures in accordance with Annex II and submit them to the CA for approval.	Regulation 11 (2)	Operators whose activity gives rise to damage, or an imminent threat of damage.
7.2	Places a duty on a CA to determine what remedial action shall be taken.	Regulation 11(6)	Scottish Ministers, SEPA or SNH
7.3	Where there is more than one instance of damage, the CA is to	Regulation 7 (3) to 7(6)	Scottish Ministers, SEPA or SNH

	decide which instance is to be remedied first.		
7.4	Requires a CA to obtain observations from certain persons and take them into account when forming a view about remedial measures to be implemented.	Regulation 11(4) to (5)	Scottish Ministers, SEPA or SNH
8.1	Places the onus on the operator to bear the costs for the preventive and remedial actions	Regulations 10, 11 and 12 require the operator to take action so this will be at the operator's cost.	Operators whose activity gives rise to damage, or an imminent threat of damage.
8.2	Gives the CA the right to recover from the operator who has caused the damage or imminent threat of damage the costs the CA has incurred in relation to action taken by it under the Directive.	Regulation 17(1)	Scottish Ministers, SEPA or SNH
8.3 and 4	Set out circumstances in which the operator shall, or may, be exempted from bearing the costs. Ensures that an operator can also recover costs from other relevant parties.	Regulation 17(2) and (3) Regulation 17(5)	
9	Provides that the	No provision	

	Directive is without prejudice to any national regulations in relation to allocation of costs in multiple party causation cases.	required	
10	Allows a CA to initiate cost recovery from an operator or a third party who has caused the damage or the threat of damage within 5 years from the date on which the measures were completed or the party identified, whichever is the later.	Regulation 17(6) and (7)	Scottish Ministers, SEPA or SNH

11.1	Puts a responsibility on Member States to designate appropriate CA(s) to ensure that the obligations in the Directive are carried out	Regulation 7(1)	Scottish Ministers
11.2	Sets out the duty of the CA to establish which operator has caused or is likely to cause environmental damage, to assess the significance of the damage to and determine which measures should be undertaken in relation to Annex II Entitles the CA to obtain necessary information from	Regulation 7(2) to (6) Regulation 10(4) and 12(3)	Scottish Ministers, SEPA or SNH

	the relevant operator in order to carry out assessment		
11.3	Allows for CAs to empower or require third parties to carry out the necessary preventative or remedial measures	Regulation 8	
11.4	Requires that a decision to impose preventive or remedial measures has to state the grounds on which it is based and that the operator must be notified.	Regulations 7(7) and 8(5)	Scottish Ministers, SEPA or SNH
12.1	Provides a means for certain persons to submit any observations to and request a CA to take action in relation to an imminent threat or actual damage to the environment. Such bodies shall specifically include environmental NGOs.	Regulation 14(1) and (2)	Scottish Ministers, SEPA or SNH
12.2	Requests for action by an interested person must be accompanied by information and supporting data.	Regulation 14(3)	Person or body making a submission to the CA
12.3 and 4	Action to be taken by a CA on receipt of a request for action from an interested person.	Regulation 14(4) to (6)	Scottish Ministers, SEPA or SNH
12.5	Allows Member States the option of deciding not to	No provision required as regulation 14 is to	

	apply paragraphs 1 to 4 to cases of imminent threat of damage.	apply to imminent threat of damage	
13	States that persons referred to in Article 12.1 should have access to a court or independent body to review the legality of any decisions or actions or failure on the part of the CA.	No provision necessary. The remedy of an application for Judicial Review is available	
14	Encourages Member States to develop financial security instruments and markets to enable operators to use financial guarantees. The Commission will report on the effectiveness of the Directive by 10 April 2010. In light of the report including a cost benefit analysis may if it finds it appropriate submit proposals for a system of harmonised mandatory financial security	No provision necessary No provision necessary. Will await Commission's report.	
15.1 and 2	Sets out the requirements for cooperation between Member States where the environmental damage affects or is likely to affect several Member	Regulation 15(1)	Scottish Ministers SEPA or SNH

	States.		
15.3	Sets out action for Member States when damage has occurred within its boundaries but where the damage was caused outside its territory. Also allows Member States to recover costs for any incurred while carrying out any preventive or remedial measures.	Regulation 15(2) and (3)	
16.1	Allows Member States to maintain or adopt more stringent provisions including the identification of additional activities to be subject to the provisions of the Directive and the identification of additional responsible parties	No provision required.	
16.2	Allows for Member States to adopt appropriate measures such as the prohibition of double recovery of costs should such situations occur.	No provision required	
17	Sets out situations where the Directive will not apply by reference to incidents which happened prior to the transposition of the Directive or if a certain period of	Regulations 5(f) to (i).	

	time has lapsed since the incident		
18	Requires Member States to report to the Commission on certain matters	No provision required	UK Government as the Member State
Annex I	Sets out the criteria referred to in Article 2.1(a) of the Directive in relation to significant adverse effects.	Regulation 4(2) to (5).	
Annex II	Sets out a common framework to be followed in order to choose the most appropriate measure to ensure the remedying of environmental damage	Schedule 3	
Annex III	Sets out the activities referred to in Article 3.1	Schedule 1 lists the occupational activities to which Regulation 4(1) applies.	
Annex IV	Contains the list of International Conventions referred to in Article 4.2 of the Directive which are exempt from the application of the Directive	Regulation 5 (c) lists exemptions in respect of the Conventions in Annex IV which have been adopted by the UK. The Conventions referred to in Article 4.2 and Annex IV (d) and (e) have not yet been adopted or ratified by the UK.	
Annex V	Lists International instruments referred to in Article 4(4) which are exempt from the application of the Directive	Regulation 5 (d) exempts the International Instruments in Annex V which have so far been adopted by the UK	
Annex VI	Lists information	No provision	

	and data to be included in the reports referred to in Article 18.1	required.	
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