

Making the Polluter Pay

The Environmental Liability Directive: Letting Down the Environment?

A report by GeneWatch UK and the RSPB

Summary

This report considers the implementation of the Environmental Liability Directive (ELD) in the UK, with a focus on England, Wales and Northern Ireland, and the important issues that are required to ensure it is an effective piece of law to meet its twin objectives of:

- **implementing the ‘polluter pays’ principle**
- **preventing environmental damage**

The ELD covers significant damage to water, land and certain EU protected habitats and species, which is caused by any loosely business-related activity in the case of biodiversity damage; or a range of potentially dangerous activities in the case of water, land and, biodiversity damage. These activities include for example, Integrated Pollution Prevention and Control (IPPC) regulated businesses, the use of genetically modified organisms (GMOs), the disposal and transport of waste and other dangerous substances, the abstraction of water and the discharge of pollutants.

The Government is conducting a consultation about its proposed approach to implementing the ELD.¹ In the implementation process there is scope both to improve on the ELD, or to weaken it. This is because the ELD allows countries to introduce higher levels of protection if they wish, and it contains discretionary provisions allowing Member States to improve the provisions of the Directive. Currently, the Government is reluctant to go further than the Directive and favours a “minimal” approach to implementation in England, Wales and Northern Ireland.

To prioritise environmental protection, the Government should:

- **Ensure that the “polluter pays principle” is properly and effectively applied** – the “polluter pays principle” is not only the guiding principle of the ELD, but also of the UK Sustainable Development Strategy “Securing the Future”. If it is to be applied effectively in relation to environmental liability, this means that discretionary and other provisions of the ELD that weaken or oppose the “polluter pays principle” should not be transposed into UK legislation. Instead they should be replaced by provisions that strengthen this principle. This could be achieved, for example, by widening of the imposition of strict liability for biodiversity damage caused by all activities, not just those listed in Annex III of the ELD; and by a decision not to implement the “permit” and “state of the art” defences, which allow businesses to escape from the obligation of having to pay for remediation of the environmental damage they cause, even though they are legally liable for causing that damage under the Directive.
- **Bring nationally protected biodiversity within the scope of environmental liability provisions** – particularly Sites of Special Scientific Interest (SSSIs) and UK Biodiversity Action Plan (UK BAP) habitats and species.

A variety of targets exist to ensure the nationally important site network is properly protected and managed². Leaving out nationally important wildlife sites may compromise the Government’s ability to meet its own targets.

According to the Government³, three thousand three hundred SSSIs in England alone will not be captured by the laws transposing the ELD, unless the scope of the laws are widened compared to the Directive. Around two thousand four hundred of these are biological SSSIs, covering around 22% of the land area of biological SSSIs, and around 900 are geological SSSIs. The SSSI system is an important pillar of nature conservation in the UK. An estimate of the costs to English Nature (now Natural England) of maintaining and improving SSSIs in England in 2002/03 were around £37.1m⁴.

In the UK, a Biodiversity Action Plan was launched in 1994. Species and habitats of conservation concern were identified and plans established to protect and improve their status. The Government has said⁵ that three hundred and seventy five UK BAP species (79% of species covered by UK BAP action plans) would not be covered, unless the scope of the UK’s implementing laws were widened, compared to the Directive. In Scotland, 233 of the 278 UK BAP species found there would not have automatic protection under the ELD.

Notable UK BAP species that are not included within the scope of the basic ELD include:

- the ciril bunting (*Emberiza cirilus*), corn bunting (*Miliaria calandra*), tree sparrow (*Passer montanus*), bullfinch (*Pyrrhula pyrrhulla*);
- the black grouse (*Tetrao tetrix*);
- the water vole (*Arvicola terrestris*), the red squirrel (*Sciurus vulgaris*), and the brown hare (*Lepus europaeus*); and
- many butterflies and moths.

Although the cost of implementing the vast majority of species action plans under the UK BAP is relatively low (a total of £21.8 m per annum for 391 SAPs, an average of £56k per plan⁶), there are some exceptions. For species subject to widespread decline and needing vital recovery work, costs can be significant. One example is the water vole, for which the Environment Agency estimates that current expenditure is £1.2 million per annum to implement the plans that are intended to improve the status of the species. The estimated future cost of delivering the water vole Species Action Plan (SAP) under the UK BAP is £1.4-£3.4 million per annum between 2006 and 2011⁷. Despite such public investment in the conservation of important species, the additional protection that the ELD could provide will probably not be available to them.

- **Ensure that all environmentally significant water bodies are covered –**
Because the ELD depends on the Water Framework Directive's approach to the type of water bodies it will cover, it is possible that the ELD may limit its basic protection to water bodies that are greater than 50ha (0.5Km²) in area and rivers that have a catchment area of over 10Km². This would mean that small streams, ponds and small lakes, which are often of high environmental significance, would not be included within the scope of any legislation unless it was extended.

The implementation of the Environmental Liability Directive in UK law gives an important opportunity to implement the 'polluter pays' principle and to encourage businesses to take a precautionary approach in their activities, conduct rigorous risk assessments and use the best available technology to avoid environmental harm. However, if only a very limited amount of the UK's biodiversity is included, and exemptions from having to pay for clean-up are allowed, the incentives to prevent harm will also be very limited.

Introduction

The Environmental Liability Directive (ELD) came into force in April 2004 and, by law, the Government has to implement the ELD in UK law by April 2007. However, it looks set to miss that date, largely due to the complexity and controversial nature of some of the issues involved and government internal processes.

The Directive is an important piece of environmental law intended to:

- **implement the ‘polluter pays’ principle and remedy environmental damage** by making businesses legally and financially responsible for environmental damage that they cause; and
- **prevent environmental damage** by requiring businesses to take preventive measures where there is a threat of imminent environmental damage, and by providing strong incentives to prevent damage because of the potential costs involved.

It covers significant damage to water, land and certain EU protected habitats and species (often termed “biodiversity” in this report for ease of reference) caused by:

- any loosely business-related activity in the case of biodiversity damage; or
- a range of potentially dangerous activities in the case of water, land and, slightly confusingly, also biodiversity damage (explained below). These activities include for example, IPPC regulated businesses, the use of genetically modified organisms (GMOs), the disposal and transport of waste and other dangerous substances, the abstraction of water and the discharge of pollutants.

In the UK, the ELD extends existing legal protection of wildlife, in particular because it protects the listed species and habitats on and **outside** designated sites. Because it deals both with prevention and remedying of biodiversity damage, it will hopefully create added incentives to prevent damage in the first place.

However, the ELD also has a number of very significant weaknesses, such as limitations imposed on the application of strict liability (see below), a weakening of the polluter pays principle (see below), very high damage thresholds, an unclear enforcement mechanism, no fall-back provision for restoration if the polluter cannot clean up, and certain Member State discretions (e.g. the permit and state of the art exceptions – see below) which could further weaken the ELD from an environmental point of view.

In addition, Member States do not have to include nationally protected biodiversity in their implementing legislation, although they have a discretion to do so. From an environmental point of view, it is vital that SSSIs should also be covered, as should all UK BAP habitats and species (see below). For GMOs, there is also an argument that the scope of protection should map onto that in the environmental safety assessments that are carried out before a GMO is licensed, which is not restricted to protected species and habitats but includes all elements of the natural environment.

Therefore, the provisions of the Directive itself are of mixed benefit in terms of their potential effectiveness in protecting the environment, with some important improvements, but also some significant weaknesses. However, in the implementation process there is scope both to improve on the ELD, or to weaken it. This is because the ELD allows countries to introduce higher levels of protection if they wish, and it contains discretionary provisions allowing Member States to improve the provisions of the Directive (for example the possibility of extending the regime to nationally designated biodiversity), but it also contains other discretionary provisions which, if introduced, will further weaken the impact of the Directive (for example the permit and state of the art exceptions – see below).

The Government has launched a consultation about its proposals for implementing the ELD and in these proposals is reluctant to go further than the Directive and favours a “minimal” approach to implementation in England, Wales and Northern Ireland.¹

In this report, GeneWatch UK and the RSPB examine some of the implications of taking such a “minimal” approach. First, it gives a brief overview of the basic provisions of the Directive and some of its possible shortcomings. Then it considers the scope of the Directive and, in particular, which important parts of the environment may not be given protection through the implementation of the ELD, e.g. certain endangered species. The report does not consider in detail all the environmentally important issues, but many of these have been considered in other GeneWatch and RSPB briefings.⁸

An overview of the Environmental Liability Directive

The Environmental Liability Directive (ELD) covers environmental damage to:

- *Biodiversity* – but this is limited to certain protected species and habitats under the 1979 Birds and 1992 Habitats Directives where there is a significant adverse effect on reaching or maintaining “favourable conservation status” (a defined benchmark introduced by the Habitats Directive for assessing the outlook of a habitat and species in terms of its maintenance and long-term survival). When damage to biodiversity occurs, an operator would be required to return the environment to its “baseline” condition (i.e. the condition it was in just before the damage happened). Details of important species and habitats that fall outside this definition are considered later.

- **Water** – where this is damage that has a significant adverse effect on the ecological, chemical or qualitative status of water as defined by the 2000 Water Framework Directive. When damage to water occurs, an operator would be required to return the environment to the baseline condition (see above). However, the Water Framework Directive gives minimum areas of water to be included within its scope - which are lakes: 0.5 – 1 km² (50 -100ha) and river catchment areas of: of 10 – 100 km². Therefore, many environmentally highly significant streams, ponds and some small lakes fall outside the scope of the basic Directive.
- **Land** – where damage from chemicals, organisms or micro-organisms contamination creates a significant risk of adverse effects on human health. When land damage occurs, the operator has to remove any significant risk to human health. Damage to land, that leads to environmental harm, is not covered by the Directive.

The person or company that is liable and has to pay remediation costs under the ELD is known as the ‘operator’. In the case of GMOs, the operator would be the farmer, doctor or veterinary surgeon using a GM crop or GM vaccine. In the case of a discharge of a chemical pollutant into a river the operator would be the company involved.

There are two classes of activity which are subject to the provisions of the Directive and which have different types of liability applied to them:

- **Annex III activities** – these are the potentially hazardous activities subject to the EU laws listed in Annex III to the Directive and include the deliberate and contained use of GM organisms; waste disposal; discharge of pollutants to water; water abstraction; the production and use of certain chemicals such as pesticides and the transport of dangerous goods. For these activities, where damage to biodiversity, water or land occurs, the operators conducting the activity are said to be ‘strictly’ liable. This means they are liable for environmental damage they cause under the ELD, even if they have not been negligent or at fault. However, the introduction of the permit and state of the art exceptions discussed below would derogate from the principle of strict liability.
- **All other (loosely business-based) activities** – for biodiversity damage only - operators are subject to fault- based liability. This means they are liable only if they acted negligently or were otherwise at fault. Obvious examples of non-Annex III activities which might lead to biodiversity damage include fishing, farming and land development. There is no liability with respect to water and land damage in relation to non-Annex III activities. Again, the imposition of fault-based liability in this context amounts to a derogation from the principle of strict liability in the ELD, and unless the Government uses its right to impose higher levels of protection (and thereby to extend the application of the principle of strict liability to all, not just Annex III, activities causing biodiversity damage), an illogical, inefficient, potentially unfair system will ensue.

Being liable requires operators to undertake:

- **preventive action without delay** – where there is imminent danger of harm arising;
- **immediate clean up and control** – to manage and limit the extent of damage;
- **long-term remedial action** – which, in the case of water and biodiversity, may be at the site affected or, where this is not possible, complementary action at another site. There may also have to be compensatory action to make up interim losses. For land damage, removal of the risk to human health is all that is required.

In each Member State there will be a ‘competent authority’ responsible for the operation of the Directive. In England, this is likely to be Natural England and the Environment Agency, in combination with certain other authorities. The competent authority can require that an operator takes remedial action as outlined above, or, as a last resort, undertake the work itself and recover the costs later.

Affected persons and non-governmental organisations (NGOs), with an interest in environmental protection (such as the RSPB or Bird Life International), can make a request for action to the competent authority by providing evidence of environmental damage. An NGO cannot take an operator to court to establish liability although they can challenge the competent authority’s decision not to act. Also, the ELD contains a discretion for Member States to withdraw this NGO/3rd party right in cases where there is an imminent threat of damage. Obviously, it is precisely in those cases, where such a right would be most useful, and an exercise of the UK’s discretion in this context (as the Government has indicated it wishes to do) would weaken the environmental effectiveness of the transposing legislation.

Exemptions from clean-up obligations

On the face of it, the ELD imposes strict liability for all environmental harm arising from Annex III activities – fault or negligence should not have to be established. However, it has already been shown that this is not always true. In addition, both the principle of strict liability, as well as the “polluter pays” principle on which the ELD is based, could be undermined if Member States exercise the following discretion contained in the Directive: The ELD allows Member States to exempt operators from the obligation to **pay** for clean-up, if the operator can demonstrate that he was not at fault or negligent and the environmental damage was caused by:

- an emission or event authorized in a permit relating to an Annex III activity (the “permit exception”);
- an emission or activity judged safe according to the state of scientific and technical knowledge at the time (the “state of the art” exception).

The UK Government is proposing to adopt these exemptions but if operators do not have to pay for the damage they cause, the “polluter pays” principle obviously no longer applies. In addition, this as good as amounts to a blanket introduction of fault-based liability through the back-door, because it would fundamentally mean that companies would not be liable, unless they were negligent or at fault, except under very limited circumstances e.g:

- where they did not possess the requisite authorisation under an Annex III law; or
- if the state of scientific and technical knowledge at the time of the authorisation or the damage indicated that damage was likely; or
- if they were unable to demonstrate that they had complied with their authorisation or operated according to the state of the art.

Moreover, there is a whole host of other important aspects which speak against introducing the permit and state of the art exceptions, including potentially enormous difficulties in making companies pay for cleaning up environmental damage they have caused as a result of the use of a GM crop or conducting one of the other potentially harmful activities included in the Directive. Companies are likely to argue that by gaining approval they should not have to pay for environmental damage.

The ELD shifts the burden of proof onto the operator to show that one of the exceptions applies in his specific case. However, the usefulness of this will depend on what level of proof is required and what is considered to be the state of the art in relation to scientific knowledge at the time.

Scope of Biodiversity protection

A number of protected species and habitats (under the 1979 Birds and 1992 Habitats Directives) are covered by the ELD as it stands, but what does this leave out?

SSSIs

According to Government figures⁹, around **three thousand three hundred Sites of Special Scientific Interest (SSSIs), forming 25% of the land area of SSSIs in the UK** are not also European sites, and **would therefore not be protected under the Government's proposed approach** (list available on www.genewatch.org). Of these, roughly 2,400 sites are biological SSSIs, which could be candidates for inclusion in the new liability legislation. Roughly 900 SSSIs are geological SSSIs and would, presumably, not be included in any strengthened legislation. In addition, SSSI designated features, which are not also part of the protective system of a Special Area of Conservation (SAC) or a Special Protected Area (SPA), even if they are at the same site as an SAC/SPA, may not be covered.

'SSSIs have been selected to contain the best examples of habitats and sites for flora, fauna, and geological or physiographical interest in the UK. Although the conservation value of the SSSI series, or that of individual SSSIs, cannot be quantified, it is of immense importance and largely irreplaceable.' DEFRA report, 2004¹⁰

The 'Sites of Special Scientific Interest' (SSSI) system is an important pillar of nature conservation in the UK. An estimate of the costs to English Nature (now Natural England) of maintaining and improving SSSIs in England in 2002/03 were around £37.1m.¹¹ DEFRA spent £13.36m in 2002 on Countryside Stewardship Scheme and Environmentally Sensitive Area agreements with owners of SSSIs and expenditure on restoration of SSSIs is expected to increase. Including SSSIs in the ELD implementing legislation could help the Government to achieve its Public Service Agreement target that 95% of SSSIs should be in favourable condition or unfavourable but recovering condition by 2010.

Despite the importance of SSSIs and the public investment in their maintenance, 25% of the area they cover (or 22% of the area covered by biological SSSIs) could fall outside environmental liability provisions. If an activity were to damage one of these SSSIs, it would not be possible to require the person or company causing the harm to pay for remediation under the ELD

Species covered by the UK Biodiversity Action Plan (UK BAP)

In the UK, a Biodiversity Action Plan was launched in 1994 to deal with the conservation of biodiversity in response to the Rio Convention¹². Species and habitats of conservation concern were identified and plans established to protect and improve their status. The list of UK priority species and habitats is currently being revised (completion date has been put back to March 2007) but the UK Biodiversity Action Plan provides the most up-to-date reflection of UK biodiversity priorities. Therefore,

UK BAP habitats and species might be expected to be given protection under environmental liability rules.

Government figures indicate that three hundred and seventy five UK BAP species would not be covered¹³. This represents 79% of the 475 species that are included in UK BAP species action plans (some of the 391 SAPs are grouped plans covering more than one species). Only 45 of the 278 UK BAP species that are found in Scotland would be automatically protected under the ELD¹⁴.

Notable UK BAP species that are not included within the Government's proposals for implementation of the ELD according to the Government and Scottish Natural Heritage include:

- the ciril bunting (*Emberiza cirilus*), corn bunting (*Miliaria calandra*), tree sparrow (*Passer montanus*), bullfinch (*Pyrrhula pyrrhulla*)
- the black grouse (*Tetrao tetrix*)
- the water vole (*Arvicola terrestris*), the red squirrel (*Sciurus vulgaris*), and the brown hare (*Lepus europaeus*)
- many butterflies and moths.

Although the cost of implementing most of the species action plans under the UK BAP is relatively low (a total of £21.8 m per annum for 391 SAPs, an average of £56k per plan¹⁵), there are some exceptions. For species subject to widespread decline and needing vital recovery work, costs can be significant. A 2006 report prepared for the Department of the Environment, Food and Rural Affairs,¹⁶ has made estimates of expenditure that will be needed to implement the SAPs for a sample of such UK BAP species. These figures are based on the costs of actions at the individual species level and do not include landscape level costs, such as agri-environment schemes. Therefore, they are underestimates of the total costs. Predicted costs of implementing schemes may not be actual costs, as actions may not be undertaken. Their figures for four such species not within the scope of the basic ELD are given below:

Water vole: the Environment Agency estimates that current expenditure is £1.2 million per annum. The estimated future cost of delivering the water vole SAP is £1.4-£3.4 million per annum between 2006 and 2011.

Red squirrel: between 1996/97 to 2000/01 it is estimated that £794,582 was spent on the red squirrel SAP. The estimated future cost of delivering the SAP is £1.37 million per annum between 2006 and 2011.

Ciril Bunting: The estimated future cost of delivering the ciril bunting SAP is £291,000 per annum between 2006 and 2011.

Corn bunting: The estimated future cost of delivering the corn bunting SAP is £235,000 per annum between 2006 and 2011.

Therefore, considerable public expenditure is being invested in efforts to protect particularly vulnerable species of conservation importance. However, if an activity causes damage to any of the huge number of species that fall outside the scope of basic ELD, there will be no requirement for the person or company undertaking the activity to pay for remediation to take place.

Water bodies

The reference to the Water Framework Directive in the ELD limits basic protection to water bodies that are greater than 50ha (0.5Km²) in area and rivers that have a catchment area of over 10Km². This would mean that small streams, ponds and small lakes, which can be of high environmental significance, would not be included within the scope of any legislation unless it was extended.

Conclusions

The implementation of the Environmental Liability Directive in UK law gives an important opportunity to implement the 'polluter pays' principle and to encourage businesses to take a precautionary approach to their activities, conduct rigorous risk assessments and use the best available technology to avoid environmental harm. However, if only a very limited amount of the UK's biodiversity is included, the incentives to prevent harm will also be very limited.

The Government's proposed approach only includes a portion of the environment within its scope. In the UK, this does not even include many species and sites that have been identified as of nature conservation importance. Whilst considerable amounts of public money are being invested in these species and habitats, the 'polluter pays' principle will often not apply. Even if the scope of biodiversity damage was extended to include all SSSIs and UK BAP habitats and species and in the UK's implementing legislation, a vast majority of the UK's biodiversity would remain outside its protection, but at least those species and habitats recognized by the government as being under the greatest threat would benefit from a measure of additional protection, if only in terms of added incentives on businesses to try and prevent damage from occurring.

The scope of the ELD itself is not its only limitation and how it is implemented in the UK will be a real test of the Government's commitment to the environment.

References

- ¹ The DEFRA consultation 'Environmental Liability Directive. Consultation on options for implementation of the Directive' is available at:
<http://www.defra.gov.uk/corporate/consult/env-liability>.
- ² See RSPB Advocacy Strategy 2006, p. 13.
- ³ Written Parliamentary Answer 23rd May 2006 (Hansard column 1690W) and detailed information subsequently provided.
<http://www.publications.parliament.uk/pa/cm200506/cmhansrd/cm060523/text/60523w0516.htm#06052520002445>
- ⁴ CJCConsulting (2004) Final report for the Department for Environment, Food and Rural Affairs. Cost Effectiveness Study of Approaches for Delivery of PSA Target Relating to SSSIs. <http://statistics.defra.gov.uk/esg/reports/sssi/>
- ⁵ Written Parliamentary Answer 22nd May 2006, (Hansard column 1299W) and detailed information subsequently provided.
<http://www.publications.parliament.uk/pa/cm200506/cmhansrd/cm060522/text/60522w0448.htm>
- ⁶ UK Biodiversity Action Plan: Preparing Costings for Species and Habitat Action Plans: Costings summary Report. Revised Report to Defra and Partners. Submitted by GHK Consulting Ltd in association with RPS Ecology. April 2006
<http://www.ukbap.org.uk/Library/BRIG/TargetsReview06/PreparingCostingsForSAPsAndHAPs.pdf>
- ⁷ UK Biodiversity Action Plan: Preparing Costings for Species and Habitat Action Plans Reviewing the Costs of Delivering Individual Species Action Plans. Final Report to Defra and Partners. Submitted by GHK Consulting Ltd in association with RPS Ecology. April 2006
<http://www.ukbap.org.uk/Library/BRIG/TargetsReview06/IndividualSAPCostings.pdf#search=%22cost%20water%20vole%20protection%22>
- ⁸ See GeneWatch UK web site section:
[http://www.genewatch.org/sub.shtml?als\[cid\]=530853](http://www.genewatch.org/sub.shtml?als[cid]=530853) and RSPB:
<http://www.rspb.org.uk/policy/sites/eld/index.asp>
- ⁹ Answers to Parliamentary Questions tabled by Alan Simpson MP: Written Parliamentary Answer 23rd May 2006 (Hansard column 1690W) and detailed information subsequently provided.
<http://www.publications.parliament.uk/pa/cm200506/cmhansrd/cm060523/text/60523w0516.htm#06052520002445>
- ¹⁰ CJCConsulting (2004) Final report for the Department for Environment, Food and Rural Affairs. Cost Effectiveness Study of Approaches for Delivery of PSA Target Relating to SSSIs. <http://statistics.defra.gov.uk/esg/reports/sssi/>
- ¹¹ CJCConsulting (2004) Final report for the Department for Environment, Food and Rural Affairs. Cost Effectiveness Study of Approaches for Delivery of PSA Target Relating to SSSIs. <http://statistics.defra.gov.uk/esg/reports/sssi/>
- ¹² The statutory basis for the list of BAP habitats and species is found in section 74 of the Countryside and Rights of Way Act 2000.
- ¹³ Answers to Parliamentary Questions tabled by Alan Simpson MP: Written Parliamentary Answer 23rd May 2006 (Hansard column 1690W) and detailed information subsequently provided.

<http://www.publications.parliament.uk/pa/cm200506/cmhansrd/cm060523/text/60523w0516.htm#06052520002445>

¹⁴ The Scottish Parliamentary answer to Mark Ruskell MSP : Scottish Parliament written answer, 4th September 2006.

<http://www.scottish.parliament.uk/business/pqa/wa-06/wa0904.htm>

¹⁵ UK Biodiversity Action Plan: Preparing Costings for Species and Habitat Action Plans: Costings summary Report. Revised Report to Defra and Partners. Submitted by GHK Consulting Ltd in association with RPS Ecology. April 2006

<http://www.ukbap.org.uk/Library/BRIG/TargetsReview06/PreparingCostingsForSAPsAndHAPs.pdf>

¹⁶ UK Biodiversity Action Plan: Preparing Costings for Species and Habitat Action Plans Reviewing the Costs of Delivering Individual Species Action Plans. Final Report to Defra and Partners. Submitted by GHK Consulting Ltd in association with RPS Ecology. April 2006

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