International Environmental Issues Team
Environmental Futures
Environment Group
Scottish Executive
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Dear Sir/Madam

ENVIRONMENTAL LIABILITY DIRECTIVE – A CONSULTATION

Thank you for providing the Scottish Environment Protection Agency (SEPA) with the opportunity to comment on the above consultation document.

SEPA fully supports the principles of the Environmental Liability Directive (ELD). Some of the innovative measures within the Directive to ensure that the polluter pays principle is applied in cases of serious damage to the environment represent a step forward in ensuring that Member States have the necessary tools to prevent and remediate accidents that threaten the environment around us.

As competent authority for a number of regimes described in Annex III of the Directive and a potential competent authority for ELD in Scotland, SEPA believes that the implementation of ELD should be complementary to regimes such as Pollution Prevention and Control, and that care must be taken in transposing the Directive to ensure that these regimes are not amended in a way that threatens their effective implementation. It is also important that ELD is transposed in a way that does not lead to duplication of requirements for operators in order to minimise the regulatory burden of this new regime.

SEPA supports the Scottish Executive’s statement that the transposing instrument for implementing ELD in Scotland will need to be clear in its designation of competent authorities and their roles and responsibilities. The instrument will also need to be clear in the obligations for operators under ELD.

SEPA’s comments on the consultation are provided in the attached Annex. Where possible comments are provided in response to the questions posed within the consultation document. There are four specific issues that SEPA would like to highlight:

- SEPA would like to emphasise that the contaminated land regime would not be a good vehicle for implementing ELD with regard to damage to land.

- SEPA seeks clarification as to the manner of implementing the requirements of ELD for events that occur after April 2007 but prior to the statutory instrument coming into force.

- It is important that the term ‘significant damage’ is clearly defined either within the transposing instrument or in guidance to provide clarity to the scope of the regime in Scotland.
The consultation document points to SEPA as a potential competent authority for ELD in Scotland. SEPA agrees with this provisional position, but the Agency emphasises the importance of clarifying the roles and responsibilities of the competent authority / authorities within the transposing instrument or within guidance issued by the Scottish Executive.

As a public body committed to openness and transparency, SEPA feels it is appropriate that this response be placed on the public record. If you require further clarification on any aspect of this correspondence, please contact Keir McAndrew, Principal Policy Officer, SEPA Corporate Office, at the address shown above.

Yours sincerely

Callum MacDonald
Director of Environmental and Organisational Strategy

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The following comments are provided by the Scottish Environment Protection Agency (SEPA) on the Scottish Executive's consultation concerning the Environmental Liability Directive. Where possible SEPA's response is provided against the questions posed within the consultation document. Further comments are provided at the end of this Annex.

Question 1 – Damage to biodiversity
Do you agree the Executive's approach?
Do you have evidence to suggest that inclusion of nationally-protected biodiversity should be considered now?

SEPA agrees with the Executive's approach. SEPA believes that nationally protected biodiversity is already subject to a regime under the Nature Conservation (Scotland) Act 2004 that provides powers of restoration, and consequently such sites should not be included within the scope of legislation implementing the Environmental Liability Directive in Scotland.

Question 2 – Damage to water
Do you agree the Executive’s approach?

SEPA agrees with the Executive’s approach with regard to damage to water under the Environmental Liability Directive. It is important that the transposing instrument to implement the Directive in Scotland is complimentary to the measures already in place to implement the Water Framework Directive. In particular it is important that damage includes damage as a result of changes in water levels as a result of abstraction and engineering works that could cause a deterioration in water class.

SEPA also notes that engineering activities are not included within the list of Annex III activities within the Directive. It would be logical for the suite of Water Framework Directive activities as detailed within the Controlled Activities Regulations, the Water Environment and Water Services Act and the Water Framework Directive itself to be provided the same status as Annex III activities within the implementing regulations.

Question 3 – Damage to land
Do you agree the Executive's provisional approach?

SEPA agrees with the Executive’s provisional preference towards prevention and adoption of the approach applied under current regimes such as PPC and waste management. SEPA also agrees that it is more appropriate to focus the attention of operators upon the opportunities of averting damage rather than having to subsequently deal with damage that has occurred in the past.
SEPA does not consider the contaminated land regime a good vehicle for ELD legislation. Under the Part IIA Contaminated Land regime the process of inspection and designation is iterative, complex and time consuming. The regime is aimed at dealing with historically contaminated land that may present a chronic risk over time. It is not aimed at, and procedurally unsuitable for, dealing with emergency situations. The process of remediation at a contaminated land site commences with a prioritisation being concluded by a local authority and this is followed by inspection, then assessment, identification of all the potentially liable parties, then if relevant identification (and possibly designation as a special site), which is followed by remediation. For any identified site there may be a number of appropriate persons determined and liability must be apportioned between such persons. This can be a lengthy and complex process.

SEPA considers the preventative approach modelled on existing PPC and waste regimes a more effective and appropriate way forward.

Question 4 – Permit defence
Do you support or not application of the option to give a permit defence ie that an operator might claim in mitigation in response to an allegation of liability?

SEPA agrees with the inclusion of a permit defence within the Scottish implementation of the Environmental Liability Directive. It is our understanding that a permit defence would apply only in respect of the new aspects of liability which go beyond the requirements of the existing law and that the powers which allow SEPA to require remediation, which are currently available to us in existing regimes (the civil liability), continue to apply and these existing obligations would not be subject to a permit defence. We agree with this approach. It is important when considering such a defence that it is made clear, as the consultation document suggests, that the defence would be a factor to be considered by a competent authority in mitigation against allegation of liability. It should not provide a blanket exemption from liability, and operators should still meet the costs relating to preventive measures when such measures should have been taken in order to comply with the legal provisions regulating their activities.

Question 5 - Permit defence
Do you support a case by case basis, ie a distinction between permits and their conditions, based upon the degree of reliance that might be placed upon the permit to safeguard the environment?

With the information presented on this issue, SEPA is not in favour of a ‘case by case’ approach. It is viewed that a case by case approach would be more complicated and not be clearly understood by industry. Albeit it would increase flexibility it is likely to increase the number of challenges/appeals made by industry.

It is recognised that most activities have been subject to some form of risk assessment and those considered to be high risk are covered by complex permits which address risk to the environment through permit conditions. Less complex activities, for example activities covered by notification or exemptions, should have much less potential to damage the environment to such an extent that they would be covered by the Directive. As less complex activities should be unlikely to cause significant environmental damage (providing the criteria for compliance with the exemption etc is adhered to) it is unclear what benefit a ‘case by case’ approach would provide.

If the Scottish Executive chooses to use a ‘case by case’ approach to permit defence it is important that statutory guidance is developed that clearly indicates when a permit defence would apply.
Question 6 – Mitigation in individual cases
Are there any criteria which might be used to judge the mitigation in individual cases?

SEPA has no comment on this question.

Question 7 – State of scientific and technical knowledge defence
Do you agree or not that the defence should be adopted, allowing an operator a claim in mitigation of liability of working to known state of scientific and technical knowledge?

SEPA agrees that this defence is justifiable.

Question 8 – Recovering costs
Do you agree the Scottish executive’s approach?

SEPA is broadly supportive of the Scottish Executive’s approach to recovering costs. In particular the proposed inclusion of measures to ensure that immediate and preventative action can be taken without having to wait to assign liability is to be commended. SEPA also strongly agrees with the Scottish Executive’s view that obliging the CA to reimburse the operator or otherwise bear the cost is contrary to the intention of the Directive and in effect would introduce Member State subsidiary liability.

The consultation document is however unclear where, for whatever reason, a competent authority has taken action and incurred ELD related costs and neither the operator nor any third party is found to be liable for that activity. It is important under such circumstances that a mechanism exists to ensure that the competent authority can recover such costs. In the absence of funding certainty competent authorities will be unlikely to take any action.

It is considered inevitable that prior to any action being taken, a significant volume of complex investigative and reporting work will be required to support any decision to take such action. The consultation does not address funding of any such environmental investigation of potential damage and liability brought to the attention of the CA or resulting from other monitoring and regulatory work but which we would not normally investigate further except where made necessary by the ELD. The Directive makes clear that operators should ultimately bear the cost of assessing environmental damage and, as the case may be, assessing an imminent threat of such damage occurring, and the implementation of the Directive in Scotland must provide clarity in this respect.

Question 9 – Recovering costs
Can you suggest any practical way of settling liability for costs quickly, in advance of or immediately upon discovery of a threat or of damage?

SEPA believes that remediation costs may be very high and difficult to predict. As such, efforts to quickly confirm liability ahead of taking recovery action, are likely to be subject to appeal(s) which will obstruct the prompt allocation of and confirmation of liability. Taking action ahead of such confirmation of liability is unlikely if the final responsibility for funding of costs is in any way uncertain. In the absence of government or other funding guarantees to cover costs for action taken by competent authorities, it is difficult to see how the processes of rapid action and remediation can be undertaken if uncertainty remains.
Comparison with the contaminated land regime would suggest that the contaminated land approach would not be feasible when dealing with an emergency situation where short timescales are required. In the contaminated land regime the process of determining appropriate persons and apportioning liability prior to remediation measures is complex and importantly, extremely time consuming. The procedure is set out in Part 3 of the Statutory Guidance and involves 5 distinct stages – Identifying potential appropriate persons and liability groups, characterising remediation actions, attributing responsibility to liability groups, excluding members of a liability group and apportioning liability between members of a liability group. When applying these stages each significant pollutant linkage and remediation action must be considered.

It is also important to ensure that the costs of preventive or remedial measures can be recovered by the competent authority within a reasonable period of time as provided within the Environmental Liability Directive.

**Question 10 – Recovering costs**
What arrangements would best meet the costs of prevention, remediation and other costs (including CA costs)?
It is important that any set up costs for the competent authority / authorities are met through grant-in-aid in order to ensure that relevant systems are in place prior to any incident. It would be unsatisfactory and inefficient to attempt set-up and consolidation on an incident by incident basis.

The recovery of prevention, remediation and other costs should be from the responsible operators or third parties where liability is established and funding available.

Recovery of other non attributable ELD costs could be met from annual baseline Grant in Aid for specified ELD dedicated staff and workload. Any exceptional expenditure could be subject to pre-expenditure agreement and an annual settlement above and beyond core Grant in Aid and other recoverable ELD costs incurred.

**Question 11 – Recovering costs**
What provision, if any, should the transposing instrument include to require the establishment of such an arrangement?

Any transposing instrument should confirm the duties of the competent authority to recover their costs from responsible operators or third parties and the mechanism whereby competent authority cost recovery will be ensured in the event that such responsible operators or third parties are absent, unwilling or unable to fund competent authority costs.

**Question 12 – Management of casework involving a number of CAs or supporting authorities.** Can you offer any good practice in the management of casework and/or costs where a number of CAs and/or supporting authorities are involved?

SEPA has no comment to make on this question.

**Question 13 – Multi-party causation**
Which of the above 2 options do you think should be adopted, and why?

SEPA has no practical experience of this type of situation. The contaminated land regime adopts a lengthy and complex process of apportionment of liability where multiple parties are involved and this is carried out prior to any remediation taking place. Given the complexity and timescales involved in apportioning liability, the contaminated land regime would suggest that joint and several liability route is the simplest option and would afford a more rapid procedure for dealing with immediate and emergency situations.
SEPA believes that the Scottish Executive should consider the establishment of national rules covering cost allocation in cases of multiple party causation as suggested within the Directive.

**Question 14 – Request for action**

*Do you think that the request for action provision of Article 12 should be reduced for cases of imminent threat and why?*

SEPA believes that the competent authority should have some discretion when responding to concerns raised by interested parties in relation to threats of imminent damage.

Investigation of all requests may prove costly and unnecessary in certain circumstances. Providing the competent authority with such discretion would allow the authority to adopt a pragmatic approach to concerns raised by interested parties whilst continuing to use valuable intelligence from such parties where necessary.

**Question 15 – Competent authorities**

*Do you agree or not the provisional thinking on CA roles?*

SEPA agrees with the provisional thinking of the Scottish Executive on competent authority roles. It must be stressed that once identified, the competent authority / authorities will need time to set up appropriate systems for implementing the Directive including details of roles and responsibilities, funding mechanisms and interaction with partner bodies.

It is also important that the roles and responsibilities of the competent authority are made clear within the implementing legislation or guidance issued by the Scottish Executive.

**Question 16 – Competent authorities**

*Is there any particular factor that should be reflected in the designation of competent authority and why?*

As advised in the consultation it is important that the competent authority would have expertise in both the type of damage and activity which has led to damage. Notwithstanding this, it is recognised that support is likely to be required from other organisations on a needs basis.

**Question 17 & 18 - Appeals**

*How would you wish to have appeals handled in the case of a dispute?*  
*Given the civil law approach, would you be willing to deal with such matters in court, say before the Sheriff; or to Scottish Ministers?*

SEPA believes that there may be advantages in providing an appeals process that does not require full court proceedings to be undertaken. A system of appeals to the Scottish Executive, taking into account independent specialist advice, may provide a more effective mechanism for appeals than using the Scottish Courts.

SEPA believes that it is important that a time limit is placed on appeals by operators in order to facilitate timely remediation where there is a need to assign liability. Any appeals system must make clear the timescales for appeal, as well as details of the full appeals procedure. SEPA would also encourage the development of an appeals process whereby individual appeal decisions can be used in the development of policy decisions to allow for greater consistency in implementation of ELD.
Question 19 – Appeals
Do you think that liability for longer-term remediation should be suspended while an appeal is heard?

Provided suitable action has been taken to prevent any further environmental damage, it makes sense to suspend longer-term remediation whilst an appeal is heard. In such situations it will be important to deal quickly with the appeal.

FURTHER COMMENTS

Remediation

SEPA would like to draw the Executive’s attention to the need for access issues to be addressed in order to allow remediation to take place where the operator or competent authorities require to undertake works on third party land. Current powers in relation to contaminated land allow a local authority (under s108 Environment Act 1995) powers of entry if and only if there is a reasonable possibility that at least one pollutant linkage exists on the land. These powers allow the authority to authorise an inspection which can include sampling, entering premises, remediation, and in some circumstances requiring information. These powers are insufficient for implementing ELD in Scotland and an alternative approach will be required.

Application of ELD to the Spreading of Sewage Sludge

Annex III Para 2. states

*For the purpose of this Directive, Member States may decide that those operations shall not include the spreading of sewage sludge from urban waste water treatment plants, treated to an approved standard, for agricultural purposes.*

SEPA considers that the spreading of sewage sludge from urban waste water treatment plants should be included within the Scottish implementing legislation. Such inclusion should not have any impact upon operators of this activity until an incident falling within the scope of ELD took place. Under these circumstances, the inclusion of this activity would provide the competent authority with a more effective tool for remedying the pollution caused when compared to present systems.

Offences and penalties

It is important that provision is made for offences and penalties where there is non-compliance with ELD requirements. In developing offences and penalties within the Scottish legislation SEPA would encourage the Scottish Executive to consider the results of the Macrory review of administrative penalties published in November 2006.

The economic part of the RIA

Costs assessment

SEPA has some concerns with the cost assessment provided within the Regulatory Impact Assessment. SEPA acknowledges that it is difficult to estimate the costs for operators, and in particular familiarisation with ELD, as well as the costs for competent authorities. However, SEPA believes that some of the costs identified may not reflect the actual costs when implementation of the Directive and transposing instrument begins. The costs for competent authorities will ultimately be dependent upon the number of authorities identified, but the present indication of costs appears to be an underestimate.
Emergency services; It was not clear from the consultation if it is the intention to exempt emergency services such as the fire authority from the liabilities of the Directive. Fire authorities may be likely, whilst dealing with certain emergency situations, to release large amounts of contaminated water etc from fighting fires and may if not made exempt be caught under the liabilities of the Directive. It would not appear to be in line with the Directive to make fire authorities liable in such situations. The Scottish Executive is requested to give consideration as to how such liability should be apportioned in such emergency situations, bearing in mind previous comments on recovery of cost.

SEPA
21 March 2007