

# The Environmental Liability Directive

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# Genesis

- 1989 Proposal on Civil Liability for Waste
- 1993 Green Paper on Environmental Damage
- 2000 White Paper
- 2001 Working Paper
- 2002 Formal Proposal
- April 2004 Directive 2004/05

# UK Approach

- White paper consultation
- Sept 2000 Govt formal response
- Response to working paper
- 2002 Condoc on Draft Directive
- DEFRA Explanatory Memorandum
- Overview of Existing Liability Regimes

# Scope of Directive

- Public law approach not civil
- No personal injury nor economic loss
- Environmental damage caused by any of the occupational activities listed in Annex III and to any imminent threat of such damage occurring by reason of any of those activities;

## Scope 2

- Damage to protected species and natural habitats caused by any occupational activities other than those listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities, whenever the operator has been at fault or negligent.

# Scope 3

- Environmental damage
  - damage to protected species and habitats
  - water damage
  - land damage
- Damage means a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly

# Scope 4

- “conservation status”
- Favourable for habitats
- Favourable for species
- “operator” and “operational activity”
- “natural resource”
- “imminent threat of damage”
- “remedial measures”

# Scope 5

- Annex I Criteria
- Test for significance and adverse effects
- Natural regeneration considered
- Recovery rate relevant
- Human health impact must be classed as significant



# Exceptions

- Force majeure categories
- Maritime convention liability including limiting liability under LLMC
- Euratom activities
- National defence or security
- Diffuse pollution

# Preventive and Remedial Measures

- Preventive measures can be required
- Notification and immediate steps
- Operator to specify measures and bear costs
- CA can recover expenses
- Third party damage or order of public authority

# Remedial Measures 2

- Defence of acting under authorisation
- State of art type defence
- Precondition of no fault or negligence
- Specific nature of wording
- Onus on operator to establish defence

# Procedural Issues

- Art 9: costs allocation rules in MS continue to apply
- CA has 5 years to recover from operator
- CA can require operator to carry out assessments
- Art 12& 13: NGO rights limited

# Financial Security

- No current obligation to provide
- Art 8 mentions security and guarantees
- Art 14 obligation to encourage development of instruments
- Commission to take forward over lengthy time scale
- Pre and post event?

# Temporal Application

- Emission event or incident post 30<sup>th</sup> April 2007
- Specific activities concluded before that date
- More than 30 years have passed since the emission event or incident resulting in the damage occurred

# Annex II: Remedying Env. damage

- Primary, complementary and compensatory measures
- Interim losses
- Baseline condition: available?
- Equivalence approaches
- Criteria for choice of remedial options: cost is a factor
- Disproportionate costs back to baseline

# Remediation of Land Damage

- Does this require changes to Pt IIA?
- ELD: “significant risk of human health being adversely affected”
- Part IIA: “significant possibility of significant harm”
- How would any change be made?
- Natural recovery an option



# Conclusions

- Negotiations and compromise have weakened the Directive
- Biodiversity damage high threshold for action
- Water impacts also have to be serious
- Land damage will be a start at harmonisation
- Very much a first step with many implementation uncertainties