



House of Commons  
Environment, Food and Rural  
Affairs Committee

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**Implementation of the  
Environmental Liability  
Directive: Government  
Response to the  
Committee's Sixth  
Report of Session  
2006–07**

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**Fourth Special Report of Session  
2006–07**

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## Environment, Food and Rural Affairs Committee

The Environment, Food and Rural Affairs Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Department for Environment, Food and Rural Affairs and its associated bodies.

### Current membership

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Mr Geoffrey Cox (Conservative, Torridge & West Devon)  
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### Powers

The Committee is one of the departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No. 152. These are available on the Internet via [www.parliament.uk](http://www.parliament.uk).

### Publications

The reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the Internet at

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### Committee staff

The current staff of the Committee are Chris Stanton (Clerk), Nerys Welfoot (Second Clerk), Marek Kubala (Inquiry Manager), Andy Boyd and John-Paul Flaherty (Committee Assistants) and Mandy Sullivan (Secretary).

### Contacts

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## Fourth Special Report

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The Environment, Food and Rural Affairs Committee reported to the House on *Implementation of the Environmental Liability Directive* in its Sixth Report of Session 2006–07, published on 12 July 2007 as HC 694. The Government's response to the Report was received on 12 September 2007.

## Government response

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### INTRODUCTION

The Government is grateful to the Select Committee for its report into the implementation of the Environmental Liability Directive (ELD).

The Government is currently considering the way forward on implementation of the Directive in England in the light of responses to the first public consultation which closed at the end of February and taking account of the Committee's views set out in its Report of 12 July. The Government's decisions will form the basis for draft regulations and it is anticipated that a second public consultation will commence in November. As the Committee recommends, the Government will set out clearly the basis for its decisions in this second consultation.

### RESPONSE TO CONCLUSIONS AND RECOMMENDATIONS

**1. We express our disappointment that the Government is vulnerable to further infraction proceedings from the European Commission in addition to those already pending.**

The United Kingdom is late in implementing the Directive, for which domestic implementing legislation should have been in place by 30<sup>th</sup> April 2007. This is a matter of profound regret to the Government, which is doing all it can to ensure a speedy progress towards implementation, which is expected in 2008 for England, Wales and Scotland, somewhat later for Northern Ireland.

Should Commission infraction proceedings lead to an adverse judgment by the European Court of Justice against the UK, then article 228 of the Treaty would allow the Commission to request the Court to impose a fine. However, it is not expected that fine proceedings would ensue in the case of the ELD as the Government expects to have implemented the Directive before any initial ECJ judgment.

**2. We recommend that before final decisions are taken on the policies to be adopted in transposing the Directive, the new Minister hold an open meeting with stakeholders at which they can discuss the key policy choices face to face. It is**

**important that the list of those stakeholders consulted in this way is representative and is published.**

The Government agreed with this recommendation and has acted upon it. The Minister for Climate Change, Biodiversity and Waste held a meeting with stakeholder organisations on 4<sup>th</sup> September to discuss the key policy issues involved in transposition of the Directive. The organisations invited reflected a representative range of those with an interest in the Directive. For the Committee's information, Annex A lists the organisations invited and those which attended. The Government is currently considering the range of views and arguments made at that meeting, together with consultation responses and the Committee's Report in deciding upon the way forward.

**3. We were disappointed that the Government was unable to provide complete clarity as to how the ELD will apply in the marine environment, including the distances from shore to which it will apply, or what the competent authority will be. The Department must provide that clarity in time for the next round of consultation on the draft regulations. It must also commit itself to resolving the question of how the ELD and the Common Fisheries Policy will interact.**

The regulations will apply to parts of the seabed and subsoil situated in any area designated under section 1(7) of the Continental Shelf Act 1964. They will also apply to waters out to a maximum of 200 miles from the baseline (i.e. within British Fishery limits).

Detailed consideration has already been given to the question of a competent authority in the marine area, particularly in relation to devolution and taking into account a future Marine Bill. The Government can assure the Committee that the position on this and in relation to competent authorities generally will be fully set out in the forthcoming second consultation.

The relationship between the Common Fisheries Policy (CFP) and the Birds and Habitats Directives has already been considered in the context of the Offshore Marine Conservation Regulations 2007. There are mechanisms under the CFP which allow measures to be taken which are aimed at the protection of species or sensitive areas, but the Environmental Liability Directive itself does not deal explicitly with this issue. The government will endeavour to explain the position as clearly as possible in its second consultation.

**4. In order to give complete clarity to interested parties, we recommend that the draft regulations for consultation this autumn make it clear that the ELD will only apply to incidents which occur after the regulations come into force.**

The Government agrees with this recommendation.

**5. The Government must, in the cases where its own analysis shows that there would be overall benefits from going beyond the minimum implementation requirement, properly explain the reasons for its policy choices. It should also make clear what sort of results a cost benefit analysis would have to show in order to justify it going beyond the minimum requirements of the Directive.**

When decisions have been made on the policy issues involved, the Government will explain the reasons for its choices in a second public consultation on draft regulations during the Autumn.

The Committee has noted that in a number of areas the Impact Assessment published as part of the first public consultation identified benefits greater than the costs of decisions to go beyond the minimum implementation requirement. The Assessment also identified the uncertainties inherent in predicting future incidents of environmental damage. Impact Assessments are one source of information assisting Ministers in reaching decisions on policy choices. However, a number of factors, in addition to those that can be quantified, are relevant to those decisions, including in this case the Government's presumption against goldplating EU Directives. Because a number of factors are relevant to decisions on policy, there is no unique and mechanistic relationship between the size of net benefits that can be quantified and the determination of the policy.

**6. We did not receive a clear answer as to why biodiversity damage from non-Annex III activities should be treated differently, other than the Minister's general preference not to over-implement 'unless there is a compelling case to do so'. The consultation document merely set out a number of pros and cons of applying strict liability in this case. The Government has also provided insufficient evidence to back up its assurance that existing controls are sufficient to protect against GM damage. In its response the Government must explain the reason for its choice not to extend strict liability for biodiversity damage to non-Annex III activities.**

The policy in this regard is still under consideration and was further explored at the stakeholder meeting on 4<sup>th</sup> September 2007. The Government takes note of the Committee's recommendation. The reasons for the policy decision in this area will be fully explained in the second consultation.

**7. The Minister failed to provide a clear reasoning of the Government's preference for the way it has chosen to apply the 'permit' and 'state of knowledge' defences. Defra must do so by the time it embarks on its second round of consultation on the form of the regulations to implement the Directive.**

Further consideration of these issues was given at the stakeholder meeting on 4<sup>th</sup> September. The policy in this area is still under consideration and will be fully explained in the second consultation.

**8. The Government must make clear in the regulations how it will give effect to the Minister's undertaking that the Government would be the first point of recourse for remediation in cases where the operator is not liable for any reason, and what role it will require the competent authorities to play. It must also make clear what resources will be made available to competent authorities to carry out this role, especially in the light of the expectation of a tight Comprehensive Spending Review for 2008–11.**

The directive provides for the enforcement authorities to recover their costs of investigation and, if necessary, remediation, from the operator. There is no requirement in the directive for member states to remediate in cases where the operator is not liable or cannot be identified. Under existing legislation, enforcement authorities make judgements about whether to undertake remediation themselves in circumstances in which the operator cannot be made to do so. The Government anticipates that these arrangements will continue after the ELD has been transposed.

The Impact Assessment published as part of the first public consultation contained estimates of the possible costs of enforcement based on historical incidents of damage. These sums are being considered as part of the normal departmental budget planning processes and in the context of the Comprehensive Spending Review.

**9. We question the Minister's claim that 90% of SSSIs will enjoy protection under the ELD and ask Defra to demonstrate how it reached this figure.**

The Minister, in his oral evidence to the Committee, said that "approximately 90% of SSSI's will contain some European features because of the overlap between Natura 2000 sites and the Birds and Habitats Directive and for other reasons."

The ELD protects the species and habitats listed in the Birds and Habitats directives (European features). These will lie (i) within sites designated under those directives (Natura 2000 sites) (ii) outside Natura 2000 sites but within SSSIs, and (iii) outside both Natura 2000 sites and SSSIs.

According to figures supplied by Natural England, 75% of SSSIs overlap with Natura 2000 sites (by area not number), and thus definitely contain European features.

Natural England estimates that a further 15% of SSSIs (again by area not number) are likely to contain some European features, although not in sufficient quantity or quality for such SSSIs to be designated as Natura 2000 sites.

The estimate of 90% was supported by the Joint Nature Conservation Committee.

**10. The Minister failed to make a convincing case for not extending the scope of the ELD so that, as well as protecting EU-protected biodiversity, it covers nationally-protected species and habitats too. We recommend that the Government should exercise its discretion to include nationally-protected species and habitats within the**

**scope of the Environmental Liability Directive. In so doing it would be able to trade off any criticism of 'gold plating' against the gains arising from a better and more consistent implementation of the Directive.**

The Government notes the Committee's recommendation. Responses to the first consultation indicated that NGOs, regulators and members of the public favoured extending ELD to national biodiversity, whereas business generally did not. This issue was further considered at the stakeholder meeting on 4<sup>th</sup> September. The policy in this area is under consideration. The Government's decision will be fully explained in the second consultation.

Department for Environment, Food and Rural Affairs

12 September 2007

## Annex A

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STAKEHOLDER MEETING HELD ON 4<sup>TH</sup> SEPTEMBER 2007

Chaired by Minister for Climate Change, Biodiversity and Waste.

Stakeholders attending:

Genewatch UK  
GM Freeze  
National Farmers Union  
Water UK  
Natural England  
Environment Agency  
Wildlife and Countryside Link  
Agricultural Biotechnology Council  
Confederation of British Industry  
LACORS (Local Authority Co-ordinators of Regulatory Services)  
Marine Conservation Society  
Association of British Insurers  
Royal Society for the Protection of Birds  
Engineering Employers Federation  
Environmental Services Association

Also invited but unable to attend:

Joint Nature Conservation Committee  
Friends of the Earth  
WWF-UK