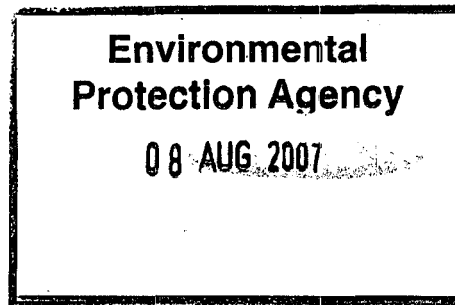


Dr. Ian Marnane
 Inspector
 EPA [Waste Licencing Section]
 Po box 3000
 Johnstown Castle Estate
 Co. Wexford
 29/06/07

Baile Na Ridire
 Lusk
 Fingal
 County Dublin



Ref ; W0231-01

Dear Dr. Marnane,

You are probably aware of the Environmental Liability Directive, it is a very detailed Directive [ELD]. The ELD is about preventing and remedying environmental damage. It aims to hold operators whose activities have caused environmental damage financially liable for remedying this damage . The ELD goes beyond simply implementing the polluter pays principle ; it also seeks to prevent environmental damage . Fingal County Council FCC and RPS are trying to put a landfill on a regional gravel aquifer R3 , beside industrial wells R4 [zoc extends into Nevitt] , beside a public water supply R4 [seven pathways to the Nevit, on a future water supply at the Nevitt [KT Cullen] , in the center of the biggest cleanest food producing aquifer in Ireland at Nevitt and of course hundreds of wells [R4 and others] down gradient of this proposed landfill [water flowing West to East.] FCC and RPS have already admitted that the proposed landfill will leak and there will be risks. First of all, a monkey would have would picked a better site and second our water supplies ,our food supplies and peoples health should not be put at any risk ie zero risk.

If the EPA gives a licence , what will happen?

A future water supply will be destroyed [Nevitt]

A Public water supply will be destroyed [7 pathways to the Nevitt]

The huge Horticultural industry destroyed [gravel aquifer ,water flowing West to East]

Hundreds of farmers and thousands of jobs gone.

The biggest natural asset in Fingal , the aquifer destroyed.

Peoples health effected [people have died eating contaminated food in America, people have died drinking contaminated water in Canada , Galways water supply is contaminated [many people ended up in hospital] and now Tipperary County Council Clonmel water supply is contaminated. We need to put huge fines [up to 60 million euros] , prison terms in place and you will find an immediate improvement in the protection of our water supplies and our food supplies. One thing for sure, you will not see the likes of FCC and RPS trying to put a landfill on a water supply [KT Cullen ,Artesian wells, and physical pump tests] in the Nevitt.

The costs involved in cleaning up the mess.

One , the source of pollution would have to be removed and that means moving the entire landfill out of this aquifer .

Two, there will be huge claims from the Horticultural industry for loss of farms income and future loss of income.

Three, claims from people whose health are effected.

Four, the cost of trying to get back the quality of the water in the aquifer, that is present at the moment for future generations.

Five, EU Fines [Irelands environmental record is not good]
Six, And other costs.

A very important stage is to identify all people[individuals] , organisations and naming all Nationally and at EU level [prison terms have been mentioned ELD]. Using the ELD process, all costs will be met by the polluters [at this stage you cannot claim State -of- the - art - Defence]. We estimate the costs involved , when everything is added up , to be approximately 1000 million euros. A huge mistake has been made and we will go to Europe to protect our water supplies , food supplies and peoples health if we have to.



On behalf of NLAG ; Deaglan De Faoite
BSc [hons]

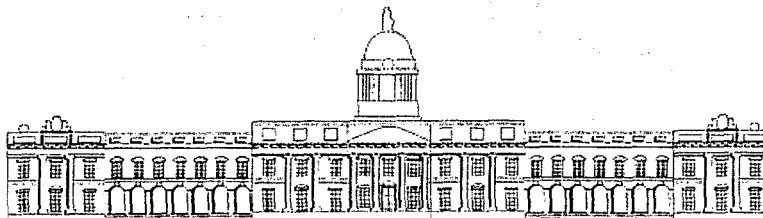
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Environmental Liability Directive

Screening Regulatory Impact Analysis

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Environment Policy Section,
Department of the Environment,
Heritage and Local Government
July 2007.



AN ROINN COMHSHAOIL, ODHREACHTA AGUS RIALTAIS ÁITIÚIL
**DEPARTMENT OF THE ENVIRONMENT, HERITAGE
AND LOCAL GOVERNMENT**

Screening Regulatory Impact Analysis

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Executive Summary

Screening Regulatory Impact Analysis

Purpose

The purpose of this document is to outline the options for transposing the Environmental Liability Directive (ELD), to discuss the legal and operational issues in transposing specific articles of the ELD, and to seek views on the contents of this document.

Structure of the document

The first part of the document is a Regulatory Impact Analysis of the options for transposing the ELD into Irish law. The main features of the ELD are summarised in **Appendix 1** and a copy of the ELD is available separately on the Department's website, www.environ.ie and on the European Commission's website, <http://ec.europa.eu/environment/liability/index.htm>. **Appendix 2** provides details of existing domestic legislation in the areas of genetically modified organisms, habitats and species, water, waste, integrated pollution prevention and control, and air. **Appendices 3 and 4** discuss the transposition of the various articles of the ELD, including the adoption or otherwise of the discretionary provisions contained in the ELD. **Appendix 5** outlines the proposed enforcement powers to be given to the ELD's competent authority.

What is the ELD about?

The Environmental Liability Directive is about preventing and remedying environmental damage. It aims to hold operators whose activities have caused environmental damage financially liable for remedying this damage, and it aims to hold those whose activities have caused an imminent threat of environmental damage liable for taking preventive actions.

Environmental damage is defined in the ELD as including damage to protected species and natural habitats, water damage and land damage where the damage is caused by occupational activities. Although liability provisions vary depending on the activity concerned, the ELD has implications for **all occupational activities**. Annex III of the ELD outlines specific occupational activities which are considered to be of higher risk to the environment and which attract 'strict' liability provisions.

Some occupational activities are licensed/permitted and regulated by regulatory authorities such as local authorities, the Environmental Protection Agency, the Minister for the Environment, Heritage and Local Government (National Parks and Wildlife Service), Department of Communications, Energy and Natural Resources, Department of Agriculture, Fisheries and Food, Department of Transport and the Marine, the Health and Safety Authority, and the Regional Fisheries Boards. As such, the ELD may have implications for these regulatory authorities.

Who will be the ELD's competent authority?

The designation of the ELD's competent authority is explored in the first part of the document and under Article 11 in Appendix 4. The interaction of this authority with regulatory authorities generally is also discussed under Article 11.

It is possible to designate either a single competent authority or multiple authorities to fulfil the duties provided for in the ELD. A decision on the designation of the ELD's competent authority has

not been taken yet. However, designation of the Environmental Protection Agency as competent authority is an option particularly in view of its expertise and other functions and duties.

Proposed Transposition of the ELD

It is proposed to transpose the ELD by adopting some of the discretionary provisions contained in the ELD - these provisions address circumstances where operators may be exempt from liability. However, the final decision on the adoption or otherwise of these discretionary provisions will be decided in light of the comments submitted in response to this consultation document. The discretionary provisions involved are to:

- exempt operators from liability where the operator demonstrates that the damage was caused by activity/emission expressly authorised by a regulatory authority i.e. 'permit' defence;
- exempt operators from liability where the activity/emission was not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time i.e. 'state-of-the-art' defence;
- enable third parties to request action in the case of an imminent threat of environmental damage subject to certain restrictions; and
- exclude the spreading of sewage sludge as an Annex III activity.

In relation to the other discretionary provision, it is proposed not to extend the protection of habitats and species beyond those listed in the Birds and Habitats Directives. The basis for the adoption or otherwise of these discretionary provisions is discussed in greater detail in Appendix 3 of the document.

The various articles of the ELD present legal and operational issues, and these are explored in Appendix 4 of the document. Articles which may be of general interest include:

- definitions in Article 2 which are common to existing legislation and which have a particular interest in an Irish context - "environmental damage", "protected species and natural habitats", "operator", and "costs";
- scope of the ELD outlined in Article 3 and the integration of the proposed ELD regime with existing domestic legislation is also outlined under this Article;
- prevention and remediation liability provisions outlined in Articles 5 and 6 of the ELD; and
- costs of preventing and remediating environmental damage in Article 8.

It is intended to provide assistance to the ELD's competent authority to promote compliance by operators with their duties outlined in the ELD and the directions given by a competent authority. The specific enforcement provisions are outlined in Appendix 5 of the document.

The Department intends to await the responses to this consultation document before finalising its decision on the option to be chosen to transpose the ELD. It is proposed to effect the transposition of the ELD by secondary legislation.

Consultation

Comments are invited on any aspect of this document including the appropriateness of a single competent authority or other options for the designation of a competent authority/ies. Comments must be received by **19 September 2007**.

Screening Regulatory Impact Analysis

1. INTRODUCTION

- 1.1 This is a Screening Regulatory Impact Analysis (RIA) of the options for the transposition into Irish law of EU Directive 2004/35/EC on environmental liability. The Environmental Liability Directive (ELD) is a common framework for the prevention and remediation of environmental damage.
- 1.2 This Screening RIA will be subject to further amendment and refinement in light of the consultation process and as part of the development of the transposition instrument.

2. DESCRIPTION OF POLICY CONTEXT, OBJECTIVES AND OPTIONS

2.1 Policy Context

- 2.1.1 In January 2002, the European Commission published its legislative proposal on environmental liability with a view to the adoption of a comprehensive Community scheme aimed at preventing and remedying environmental damage. This proposal arose from the Commission's White Paper on Environmental Liability which explored how a Community regime on environmental liability might best be shaped.
- 2.1.2 The initial impetus for the ELD was a number of large scale incidents of environmental damage in Europe in the 1980s and 1990s, in some cases affecting more than one European country. The Commission also sought to address the loss of biodiversity as a result of environmental degradation. Their view was that the severity of the environmental damage and the absence of suitable regimes at Member State level for dealing comprehensively with the damage pointed to a need for a Community-wide instrument.
- 2.1.3 The Environment Council reached political agreement on the ELD in June 2003 and its Common Position on the ELD was formally adopted in September 2003. Following further discussions, amendments and a conciliation process, a joint text was approved by the Council and the European Parliament in March 2004. A copy of the ELD is available on the Department's website (www.environ.ie) and on the European Commission's website (<http://ec.europa.eu/environment/liability/index.htm>).
- 2.1.4 The ELD establishes a framework for environmental liability based on the 'polluter pays' principle with a view to preventing and remedying environmental damage. The principle according to which the polluter pays when environmental damage occurs is already set out in the Treaty establishing the European Union. As it helps to deter breaches of environmental standards, it promotes compliance with Community environmental policy.
- 2.1.5 The ELD aims at preventing environmental damage to water resources, soil, fauna, flora and natural habitats and at making the polluters pay whenever damage occurs. The ELD introduces a liability scheme which will not only compensate for damage to the environment, in accordance with the 'polluter pays' principle, but which should also assist in preventing such damage.

- 2.1.6 The central aim of the ELD is to hold operators whose activities have caused environmental damage financially liable for remedying this damage. In addition, the ELD holds those whose activities have caused an imminent threat of environmental damage liable for taking preventive actions. Both aspects should result in a higher degree of environmental protection throughout Europe. The main features of the ELD are outlined in Appendix 1.
- 2.1.7 The ELD cuts across domestic legislative codes in which there are already some requirements for remediating damage. Details of relevant Irish legislation are set out in Appendix 2. Transposition of the ELD needs to take account of these provisions and to put in place either an appropriate interface with them, to substitute them with provisions transposing the Directive, or to allow the existing provisions to co-exist with the ELD as transposed.

2.2 Objectives

- 2.2.1 The main objective is to transpose the ELD into Irish law.
- 2.2.2 In transposing the ELD, the objective is to give effect in domestic law to a scheme (a legal framework) whereby environmental damage is prevented and remedied. Subject to certain exceptions, operators who cause environmental damage or who have given rise to an imminent threat of such damage occurring have a duty to prevent damage occurring or, where damage does occur, to take measures to remedy the losses to the environment. The operators concerned must ultimately bear the cost associated with those measures.
- 2.2.3 The ELD goes beyond simply implementing the 'polluter pays' principle; it also seeks to prevent environmental damage by requiring preventive measures to be taken where an imminent threat of such damage arises. Enforcement provisions involving criminal sanctions seem to be required to give full effect to the latter objective as liability provisions alone appear to fall short of what is required.
- 2.2.4 The proposed scheme should be as clear as possible so that operators are aware of their responsibilities and the consequences of causing environmental damage. Clarity will also assist in its implementation and enforcement by the competent authority or authorities designated for this purpose. The requirements of the ELD and existing legislation should, where possible and desirable, be aligned and harmonised to promote ease of understanding and operation for operators and public authorities. At a minimum, existing domestic legislation and the ELD as transposed should not be in conflict.

2.3 Identification of Options

2.3.1 Option 1: Do Nothing/No Policy Change

- 2.3.1.1 This option would involve taking no action to transpose the ELD. Failure to transpose the ELD would result in a breach of our EU obligations and, probably, prosecution by the European Commission and imposition of sanctions by the European Court. It would also be contrary to our policy of, and support for, protecting the environment.

2.3.1.2 While there are some provisions in existing Irish legislation requiring remediation of damage to the environment, they are somewhat incidental to other regulatory provisions aimed mainly at protecting the environment through the creation of statutory obligations, in respect of which non compliance attracts criminal sanctions involving financial penalties and imprisonment. Neither do they provide for the same incentive to prevent or remediate environmental damage as is the case with the ELD. At any rate, these liability provisions are far less comprehensive than those of the ELD.

2.3.1.3 This option is not considered to be realistic but is presented as a baseline to quantify the costs and benefits that would accrue by adopting other options.

2.3.2 Option 2: Transposition by adopting none of the discretionary provisions contained in the ELD

2.3.2.1 The ELD provides for a number of circumstances where operators may be exempt (referred to as "exceptions" in the ELD) from liability. These exceptions include mandatory exceptions and other exceptions which are subject to the discretion of Member States. The mandatory exceptions listed in the ELD are discussed in greater detail in Appendix 3.

Discretions

2.3.2.2 The other exceptions, i.e. the discretionary provisions in the ELD are as follows:

- extending the protection of habitats and species beyond those listed in the Birds and Habitats Directives (Article 2(3)(c));
- exempting operators from liability where the operator demonstrates that the damage was caused by activity/emission expressly authorised by a regulatory authority i.e. 'permit' defence (Article 8(4)(a));
- exempting operators from liability where the activity/emission was not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time i.e. 'state-of-the-art' defence (Article 8(4)(b));
- enabling third parties to request action in the case of an imminent threat of environmental damage (Article 12(5)); and
- excluding the spreading of sewage sludge as an Annex III activity (Annex III).

2.3.2.3 Option 2 provides for transposition by adopting none of these discretionary provisions.

Legal and Operational Issues

2.3.2.4 In transposing the ELD - and regardless of whether Option 2 or Option 3 below is chosen - a number of the articles pose legal and operational issues. These issues relate to transposing specific articles of the ELD into Irish law and are separate from issues relating to the mandatory exceptions and the discretionary provisions. These issues are relevant to both Option 2 and Option 3 and are explored in greater detail in Appendix 4.

Summary

2.3.2.5 Option 2 would mean that: operators would not enjoy any of the specific exemptions from liability provided in the ELD (i.e. the 'permit' and 'state-of-the-art' defences); application of the Directive would be limited to the specific habitats and species protected by the Habitats and Birds Directives; third parties would not be permitted to request the designated

competent authority to take action in cases of imminent threat of environmental damage; and the spreading of sewage sludge would not be excluded from Annex III.

2.3.2.6 Option 2 would facilitate transposition, but it is considered that without some element of enforcement, the ELD would not be implemented in full, as it is required to be. The absence of the defences would have the potential to cause unreasonable difficulties for the commercial viability of certain operators and generally for the compatibility with other existing regulatory regimes. Adopting Option 2 would entail transposition by secondary legislation i.e. by regulations.

2.3.3 Option 3: Transposition by adopting some of the discretionary provisions contained in the ELD

2.3.3.1 Option 3 provides for transposition by adopting some of the discretionary provisions contained in the ELD. The mandatory exceptions, outlined in Appendix 3 would also be provided for under this option. In addition, it is considered that the issue of enforcement needs to be assessed also.

Discretions

2.3.3.2 As noted under Option 2 above, the discretionary provisions in the ELD are as follows:

- extending the protection of habitats and species beyond those listed in the Birds and Habitats Directives (Article 2(3)(c));
- exempting operators from liability where the operator demonstrates that the damage was caused by activity/emission expressly authorised by a regulatory authority i.e. 'permit' defence (Article 8(4)(a));
- exempting operators from liability where the activity/emission was not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time i.e. 'state-of-the-art' defence (Article 8(4)(b));
- enabling third parties to request action in the case of an imminent threat of environmental damage (Article 12(5)); and
- excluding the spreading of sewage sludge as an Annex III activity (Annex III).

2.3.3.3 Option 3 involves the adoption of some of these discretionary provisions. The basis for the adoption or otherwise of these discretionary provisions is discussed in greater detail in Appendix 3.

Legal and Operational Issues

2.3.3.4 As noted in Option 2 above, a number of articles pose legal and operational issues. These issues are also relevant to Option 3 and are explored in greater detail in Appendix 4.

Enforcement

2.3.3.5 Enforcement, as set out below, is the enhanced probability that the operator will behave in an environmentally acceptable manner due to the availability of criminal sanctions to a competent authority - rather than reliance solely on the deterrent power of the Directive by reference to the costs of remediating environmental damage, for example. It is intended in the transposing instrument to provide assistance to a competent authority to further promote compliance by operators with the duties relating to preventive and remedial action and the directions given by a competent authority. Such enforcement provisions would

reflect the policy adopted for many other existing environmental protection regimes already in place in Ireland. The specific enforcement provisions are outlined in Appendix 5.

- 2.3.3.6 The need to resort to criminal sanctions against operators is unlikely often to arise. The provision of guidance from a competent authority, the integration of good environmental practices into normal day-to-day operations by operators, and the changes in attitudes and behaviours of individual operators due to liability provisions in the ELD should all reinforce this. Essentially, the threat of criminal sanctions should normally suffice in circumstances where an operator might otherwise behave in a non-compliant manner.

Summary

- 2.3.3.7 The Department intends to await the responses to this consultation document before finalising its decision on the adoption or otherwise of the discretionary provisions within Option 3. Enforcement provisions would be included in Option 3. Adopting Option 3 would entail transposition by secondary legislation i.e. by regulations.

3. IDENTIFICATION OF COSTS, BENEFITS AND IMPACTS

3.1 Risks and Assumptions

- 3.1.1 In the case of Options 1 or 2, there is a heightened risk that without some element of enforcement (by recourse to criminal sanctions) some irresponsible operators would not have a sufficient incentive to become compliant. In adopting Option 2, it has been argued that there is a risk that not allowing operators to avail of the 'permit' and 'state-of-the-art' defence could cause uncertainty for both industry and competent authorities, and could impact negatively on the commercial viability of some operators.
- 3.1.2 In adopting Options 2 or 3, it is assumed that the majority of operators will comply with their obligations outlined in the ELD. It is also assumed that operators or third parties who cause environmental damage are usually identifiable.
- 3.1.3 It is not possible accurately to predict the number of incidents, or potential incidents of environmental damage that will occur in the future and what the necessary response to such damage will be.

3.2 Costs

- 3.2.1 There are no direct costs associated with Option 1 but Ireland would face significant penalties/fines imposed by the EU for the non transposition of the ELD.

Competent Authority

- 3.2.2 It can be argued that it is not necessary to establish a new body as competent authority for the purposes of the ELD but rather to designate an existing regulatory authority. In adopting Options 2 or 3, a competent authority would be in a position to build on the experience and expertise already available to it as a regulatory authority. It can again be argued that it would be more coherent to allocate the competent authority function to a body with existing functions relating to environmental protection. However, the new liability regime being provided by both of these Options necessitates the allocation of additional

powers and functions to the authority. Some additional resources would be required by the authority for this purpose. Nonetheless, combining the ELD competent authority functions with other environment regulatory functions may offer most potential for synergies and, therefore, minimise administrative costs.

3.2.3 A decision on the identity of the competent authority has not been taken yet. However, designation of the Environmental Protection Agency as competent authority is an option particularly in view of its expertise and other functions and duties. Other options including multiple competent authorities are of course possible.

3.2.4 In addition to "setup" costs (such as familiarisation with a complex Directive), other costs that would be incurred by the competent authority or authorities include costs associated with:

- setting up appropriate systems and procedures to respond to incidents of environmental damage, irrespective of whether such incidents may or may not occur;
- developing and providing advice for those on which the ELD will impact;
- training staff;
- liaising with other regulatory authorities especially where damage occurs or is threatened;
- investigating incidents of environmental damage or suspected threats of environmental damage;
- assessing damage and remedial measures;
- enforcing requirements;
- obtaining legal and other specialist advice; and
- monitoring and reporting to the Department and the EU.

3.2.5 A competent authority would be in a position to recover some of these costs (costs are defined in the ELD, see Appendix 4 for further details) from operators. However, the amount recoverable will depend on such factors as: the incidents that occur; the remedial measures that are undertaken; and whether costs are disputed. The initial costs required to gear up to implement the ELD would not be recoverable.

3.2.6 If the ELD operates as it is intended to, the State should be relieved of the costs of making good environmental damage, where, heretofore, the polluter could not be made to do so. Furthermore, unremediated environmental damage incurs indirect costs in reduced potential for economic activity from sectors which depend on a clean environment - such as agriculture and tourism.

3.2.7 Depending on the circumstances of a particular incident or threat of environmental damage, a competent authority may incur costs in preventing and remediating environmental damage where the operator who caused the environmental damage cannot be identified or is insolvent or fails to comply with its obligations. Such instances are discussed in greater detail in Appendix 4. While these one-off costs cannot be estimated, it is considered that such incidents would be the exception rather than the rule.

3.2.8 A competent authority may incur legal costs where members of the public, environmental non-governmental organisations or operators initiate reviews of a competent authority's decisions.

- 3.2.9 Other regulatory authorities would incur costs through their liaison with a competent authority and in assessing damage and remedial measures. The extent of resource implications for regulatory authorities arising will depend on the incidents and potential incidents (and their frequency) of environmental damage that may occur. The regulatory authorities would be expected to bear the liaison aspect of such costs, while the other costs should be recovered by a competent authority from the relevant operator.
- 3.2.10 Depending on the practical implementation of the ELD and the extent of compliance by operators, the enforcement costs incurred by a competent authority should be kept to a minimum under Option 3. However, there is a risk of such costs increasing depending on the circumstances of individual incidents. Nonetheless, these enforcement costs would be recoverable from the operator. As Option 2 does not provide for enforcement, there are no enforcement costs under that option. In the main, the costs of enforcement would be likely to fall on non-compliant operators against whom a competent authority was obliged to take action.
- 3.2.11 For both Options 2 and 3, the costs would primarily be met by the Exchequer through funding of a competent authority and regulatory authorities. Some element of the costs may be recovered from operators.

Operators

- 3.2.12 Clearly, operators are likely to be faced with costs arising from the implementation of the ELD, whichever option (2 or 3) is chosen. The costs of familiarisation with the Directive - including guidance issued in relation to it, assessing risks, taking additional precautions such as investing in measures to reduce their exposure to liability, the taking of preventive measures and the remediation of damage not heretofore taken by operators - is likely to be offset by lower insurance costs and fewer instances of environmental damage which would have necessitated remediation even before transposition of the ELD.
- 3.2.13 Where an incident of environmental damage occurs, and where the operator is liable under the Directive, the operator would incur costs associated with assessing the damage caused and remediating such damage. Depending on the level of damage caused, the remediation costs associated with compliance with the ELD could be significant. Those businesses with potential to cause environmental damage may consider it more prudent to invest in prevention so as to avoid incurring significant costs in remediating any damage that would be caused without such investment.
- 3.2.14 The level of the above costs for operators will vary across the different sectors of business. Larger businesses would normally be in a better position than smaller businesses to absorb such costs. That said, the ELD is likely, in practice, to apply to the activities of larger operators than smaller ones due, for example, to IPPC (Integrated Prevention Pollution Control) thresholds. The scale of environmental damage that may arise could be greater for higher risk occupational activities than for other occupational activities as the damage caused may involve damage to water, land as well as habitats and species. However, it is acknowledged that other occupational activities may cause significant environmental damage to habitats and species where the operator of such activities has been at fault or negligent.

3.2.15 There are higher costs associated with Option 3 in that the costs associated with enforcement would not be included in Option 2. Where an operator chooses not to comply with their obligations under the ELD, and where a competent authority initiates enforcement proceedings against it, the operator would probably be liable for the enforcement costs. As against this, availability of criminal sanctions should promote a greater degree of compliance with the requirements of a competent authority thereby minimising the potential for, or extent of, environmental damage.

3.2.16 As such, compliance costs would mainly be incurred by businesses who do not act responsibly and who cause environmental damage. For other business who are proactive in preventing environmental damage, such compliance costs should not be an issue.

3.3 Benefits

3.3.1 There are no benefits associated with Option 1.

3.3.2 The benefits of adopting Options 2 or 3 should include:

- improved compliance with, and enforcement of, environmental standards;
- protection of the public;
- less environmental damage arising from better preventive measures by operators;
- more rapid prevention and remedial measures;
- more environmental damage being notified to regulatory authorities than previously;
- operators taking more and better remedial action in response to actual damage caused than previously;
- remediation being funded by operators who have caused the damage where it was previously funded by public funds;
- reduced costs to society overall especially when the long-term costs of environmental damage are taken into account; and
- meeting our obligations under EU Treaties.

3.3.3 The benefits of adopting Option 3 outweigh Option 2 in that compliance with the ELD would be more effective and efficient because of the enforcement provisions available to a competent authority under Option 3.

3.4 Other Impacts

3.4.1 Impacts on national competitiveness

3.4.1.1 In adopting Options 2 or 3, there would be some additional costs arising for Irish operators (offset, at least partially, by the lower probability of environmental damage occurring) comparable to those for similar operators throughout the EU in order to comply with the ELD. By adopting Option 3 (availing of the permit and state-of-the-art defences), Irish businesses would, it has been said, operate with more certainty.

3.4.1.2 Failure to adopt the ELD, by adopting Option 1, would result in lower risks of incurring costs for environmental damage for Irish businesses but it would not impact negatively on

national competitiveness (except to the extent that a clean environment, benefiting certain economic sectors in particular, would be compromised).

3.4.1.3 There would be no significant impact on national competitiveness by the adoption of Options 2 or 3.

3.4.2 Impacts on the socially excluded or vulnerable groups

3.4.2.1 There would be no negative impacts on the socially excluded or vulnerable groups by the adoption of Options 1, 2 or 3.

3.4.3 Impacts on the Environment

3.4.3.1 Option 1 would have no negative impact on the environment but the advantages below would be foregone.

3.4.3.2 Adopting Options 2 or 3 would give effect to the 'polluter pays' principle, improve environmental protection and have a positive impact on the environment going forward.

3.4.4 Significant policy change in whether the proposals involve an economic market, including an examination of the impacts on consumers and competition

3.4.4.1 By adopting Options 1, 2 or 3, there would be no significant policy changes in an economic market. Also, there would be no negative impacts on consumers and competition.

3.4.5 Impacts on the rights of citizens

3.4.5.1 By adopting Options 1, 2 or 3, there would be no negative impacts on the rights of citizens or other members of the public.

3.4.6 Whether the proposal involves a significant compliance burden

3.4.6.1 Adopting Options 2 or 3 should not impact on the majority of responsible operators who comply with environmental standards, but it would impact on those who flout environmental law and cause pollution. As such the compliance burden for the latter group of operators would be significant but not unjust or disproportionate.

3.5 Summary of Costs, Benefits and Impacts

3.5.1 Option 1 has no costs and benefits. As it is not practicable in light of EU obligations it is included only to serve as a baseline and reference point. Option 3 would entail marginally higher costs than Option 2 but would deliver greater benefits compensating for such costs. With regard to the impacts, there is no significant difference between the 2 options.

3.5.2 The Department intends to await the responses to this consultation document before finalising its decision on the adoption or otherwise of the discretionary provisions within Option 3, and on whether to choose Option 2 or 3 to transpose the ELD.

4. CONSULTATION

4.1 The European Commission engaged in an extensive consultation process on the *White Paper on Environmental Liability* which led to the proposed Directive on environmental liability. This Department engaged in consultation with Government Departments,

agencies and key stakeholders in the context of the negotiations on the ELD. This Screening RIA is being placed on the Department's website and circulated to key stakeholders. *(The outcome of this consultation process including the response to views submitted and any other further consultations that may arise in transposing the ELD will be recorded in the final version of the RIA.)*

5. ENFORCEMENT AND COMPLIANCE

- 5.1 The designated competent authority or authorities will be responsible for implementing, ensuring compliance and enforcing the ELD. As mentioned above, the competent authority issue is discussed in Appendix 4.
- 5.2 The scope of a competent authority's powers and the sanctions available are considered in greater detail in Appendix 5.
- 5.3 There are no specific compliance targets proposed in either the ELD or in the transposing instrument.

6. REVIEW

- 6.1 In accordance with Article 18 of the ELD, Ireland is required to report by April 2013 to the European Commission on the experience gained in the application of the ELD. The report is required to provide details of instances of environmental damage and liability as well as details relating to the implementation of the ELD. The specific information and data to be included in the report is outlined in Annex VI of the ELD. Arrangements will need to be made to ensure that the relevant information and data and other appropriate information is captured by the competent authority or authorities.
- 6.2 Article 14 of the ELD provides that the European Commission will report before April 2010 on the effectiveness of the ELD in terms of actual remediation of environmental damages, on the availability at reasonable costs and on conditions of insurance and other types of financial security for the activities covered by Annex III of the ELD.
- 6.3 It is considered that both these milestones will provide an opportunity for the competent authority or authorities and the Department to consider issues and to review the transposing instrument, as appropriate.

Appendix 1

Main Features of the Environmental Liability Directive

The Environmental Liability Directive (ELD) is about preventing environmental damage from occurring, and, if it occurs, ensuring that it is remedied. An operator (i.e. the natural or legal person who controls the activity concerned) whose activity has caused the environmental damage or the imminent threat of such damage is financially liable.

What environmental damage is covered?

The ELD is concerned with preventing and remedying environmental damage which has been defined in the ELD to include damage to protected species and natural habitats, water damage and land damage. Specifically, this is:

- damage which has significant adverse effects on reaching or maintaining favourable conservation status of species and natural habitats protected under EU legislation;
- damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential of waters falling within the scope of the Water Framework Directive;
- land contamination that creates a significant risk of human health being adversely affected as a result of direct or indirect introduction in, on or under land of substances, preparations, organisms or micro-organisms.

Who is liable?

The ELD provides for two distinct but complementary liability regimes.

The first applies to operators engaged in activities considered to be of relatively high risk to the environment. An operator of these activities can be held liable even if s/he has not committed any fault (Strict liability). These activities, listed in Annex III of the ELD, include, amongst others, industrial and agricultural activities requiring permits under the 1996 Integrated Pollution Prevention and Control Directive, waste management operations including the transboundary shipment of waste, authorised discharges into surface and groundwater, water abstraction, the manufacture, storage and use of various substances, the transportation of dangerous goods, operations that cause air pollution, the contained use and transport of genetically modified micro-organisms and the deliberate release of genetically modified organisms as well as the management of mining and other extractive waste. The regulatory authorities for these activities include the Environmental Protection Agency, local authorities, the Department of Agriculture, Fisheries and Food, Department of Transport and Marine, Department of Communications, Energy and Natural Resources and the Health and Safety Authority.

The second liability regime applies to all occupational activities other than those listed in Annex III but an operator will only be held liable if s/he was at fault or negligent and if s/he has caused damage to protected species and natural habitats protected at EU level under the 1992 Habitats and 1979 Birds Directive (Fault-based liability).

Strict liability means that it is sufficient that there is a causal link between the occupational activity and the environmental damage. It is not necessary to demonstrate that there has been fault or negligence attributable to the operator of the occupational activity.

Fault-based Liability means that the operator of the occupational activity, through a deliberate action or omission, or negligence, has caused the environmental damage.

What exceptions are provided in the ELD?

A certain number of exceptions from environmental liability are provided for in the ELD. The liability scheme does not apply in the case of damage or imminent damage resulting from:

- an act of armed conflict, hostilities, civil war or insurrection;
- a natural phenomenon of exceptional, inevitable and irresistible character;
- activities the main purpose of which is to serve national defence or international security;
- activities the sole purpose of which is to protect from natural disasters;
- activities covered by specified international conventions listed in Annex IV;
- activities where there is a limit of the operator's liability under the Convention on Limitation of Liability for Maritime Claims, 1976 or the Strasbourg Convention on Limitation of Liability in Inland Navigation, 1988; and
- activities covered by the Treaty establishing the European Atomic Energy Community or activities covered by specified international instruments listed in Annex V; and
- damage caused by pollution of a diffuse character (where it is not possible to establish a causal link between the damage and the activities of individual operators).

The ELD does not apply to damage caused by an emission, event or incident that took place before the date of the Irish transposition of the ELD; damage caused by an emission, event or incident which takes place on or after the date of the Irish transposition of the ELD but which is derived from a specific activity that took place and finished before that date; and damage caused by an emission, event or incident that took place more than 30 years earlier.

The ELD aims to avoid overlapping with civil liability regimes that exist in Member States and as such personal injury and damage to goods and property (referred to as "traditional damage") remains to be dealt with under national civil liability legislation.

What discretions are available to Member States?

The ELD contains a number of discretionary provisions which Member States may choose to invoke. These are:

- extending the liability regime to habitats and species beyond those listed in the Birds and Habitats Directives (Article 2(3)(c));
- exempting operators from liability where the operator demonstrates that the damage was caused by activity/emission expressly authorised by a regulatory authority i.e. 'permit' defence (Article 8(4)(a));
- exempting operators from liability where the activity/emission was not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time i.e. 'state-of-the-art' defence (Article 8(4)(b));
- enabling third parties to request action in the case of an imminent threat of environmental damage (Article 12(5)); and
- excluding the spreading of sewage sludge as an Annex III activity (Annex III).

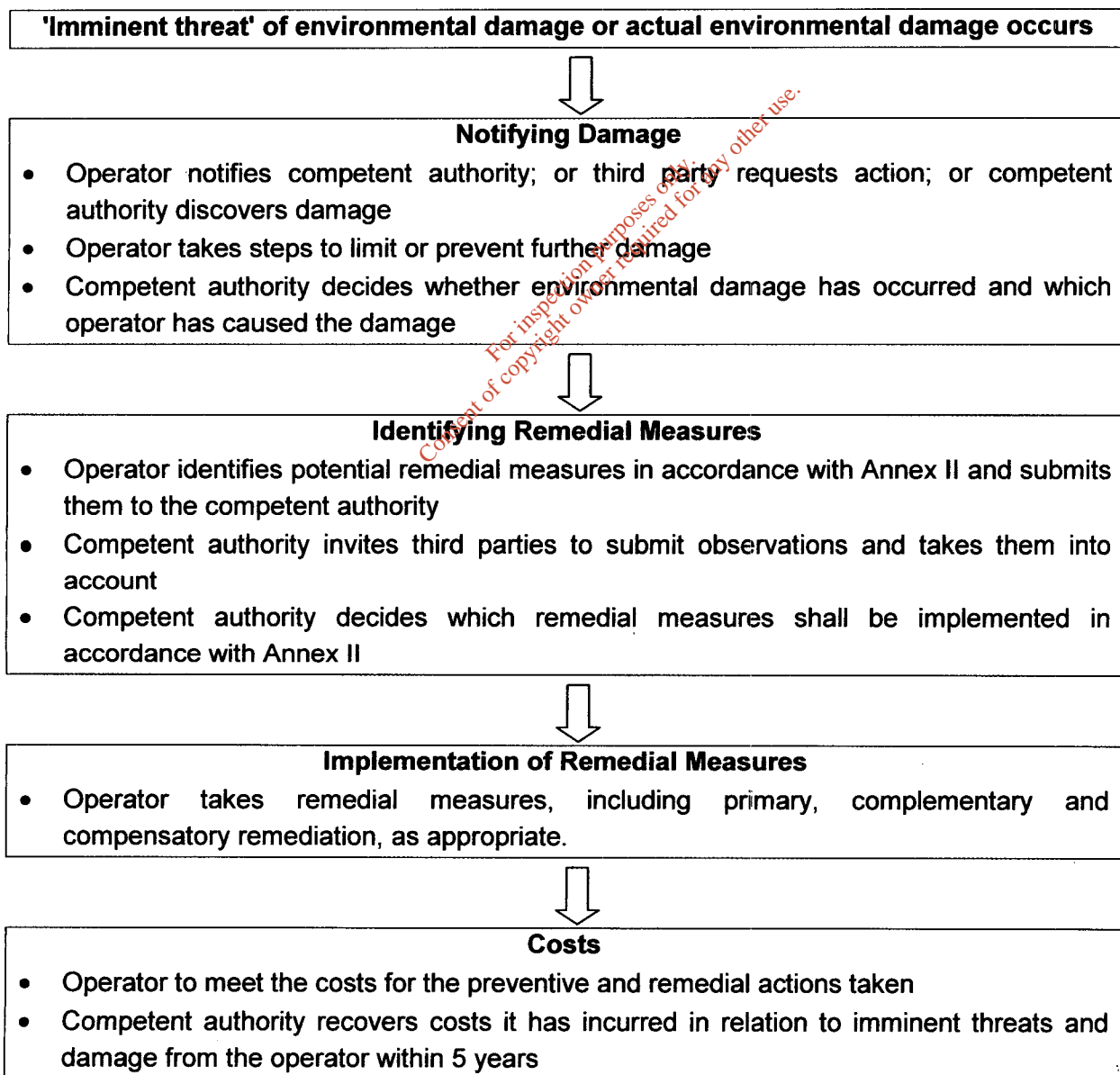
How will damage be prevented and remedied?

Consistent with the 'polluter pays' principle, the primary responsibility for taking preventive or remedial action in relation to environmental damage is placed on the operator.

Where there is an imminent threat of environmental damage, the competent authority will require the operator to take the necessary preventive measures or it will take such measures itself and recover the costs it has incurred at a later date.

Where environmental damage has occurred, the competent authority will require the operator concerned to take the necessary remedial measures, or it will take such measures itself and recover the costs incurred at a later date. Where several instances of environmental damage have occurred, the competent authority may determine the order of priority according to which they must be remedied.

A tabular presentation of the operation of the ELD is set out below.



What are the remedial measures?

Environmental damage may be remedied in different ways depending on the type of damage. The ELD identifies the different types of remedial measures at Annex II.

Who pays for the measures taken?

In general, the operator who caused the environmental damage or the imminent threat of such damage is required to bear the costs of the preventive and remedial actions taken. An operator may not have to pay for such measures if he can prove that the damage, or the imminent threat of such damage, was caused by a third party or resulted from requirements issued by a public authority. Where an operator fails to undertake the required measures, the competent authority can recover the costs it incurs from the operator concerned.

In the event of several identifiable operators causing the damage, the costs of the measures taken may be allocated on the basis of joint and several or proportional liability.

In transposing the ELD, Member States have discretion whether or not to invoke the so called 'permit' and 'state-of-the-art' defences. If these defences are provided for, operators who can establish that they were not at fault and

- (a) in the case of the 'permit' defence, acted in accordance with the relevant regulatory procedure (typically, in accordance with a licence),
 - (b) in the case of the 'state-of-the-art' defence, acted in accordance with best practice based on the state of scientific and technical knowledge available at the time the damage occurred,
- will not be required to bear the costs of the remedial actions concerned.

There is no financial limit on the amount that polluters to which the ELD applies will be required to pay to remedy environmental damage.

If the polluter cannot be identified or is insolvent, the competent authority will decide themselves whether this "orphan damage" is to be remedied or not.

What are the responsibilities of the operator?

The operator shall:

- take the necessary preventive measures where there is an imminent threat of environmental damage;
- notify the competent authority if preventive measures fail;
- provide information on any imminent threat of environmental damage in accordance with instructions from the competent authority;
- undertake preventive measures in accordance with instructions from the competent authority;
- notify the competent authority in the event of environmental damage;
- take all practicable steps to immediately control, contain, remove or otherwise manage the relevant contaminants and/or any other damage factors;
- take the necessary remedial measures;
- provide supplementary information on any environmental damage that has occurred in accordance with instructions from the competent authority;
- undertake remedial measures in accordance with instructions from the competent authority;
- identify and make proposals for remediating damage in accordance with Annex II;

- implement remedial measures in accordance with instructions from the competent authority; and
- bear the costs for the preventive and remedial actions taken.

What are the duties and responsibilities of the competent authority?

It is the duty of the competent authority to establish which operator has caused the damage or the imminent threat of damage, to assess the significance of the damage, and to determine which remedial measures should be taken with reference to Annex II.

The competent authority may, at any time:

- require the operator to provide information on any imminent threat of environmental damage or in suspected cases of such a threat;
- require the operator to take, or give instructions to the operator on, the necessary preventive measures;
- take the necessary preventive measures itself;
- require the operator to provide supplementary information on any environmental damage;
- take, require the operator to take, or give instructions to the operator on all practicable steps to immediately control, contain, remove or manage the relevant contaminants;
- require the operator to take, or give instructions to the operator on, the necessary remedial measures; and
- take the necessary remedial measures itself.

The competent authority may:

- take the necessary remedial measures itself, as a means of last resort;
- empower or require third parties to carry out the necessary preventive or remedial measures; and
- decide not to recover the full costs where the expenditure required to do so would be greater than the recoverable sum or where the operator cannot be identified.

The competent authority shall .

- be entitled to require the relevant operator to carry out his/her own assessment and to supply any information and data necessary;
- require that the preventive measures are taken by the operator;
- require that the remedial measures are taken by the operator;
- decide which remedial measures are to be implemented in accordance with Annex II;
- be entitled to decide the priority for remedial measures where several instances of environmental damage have occurred and have regard to damage and remediation issues;
- invite submissions from relevant persons on the remedial measures to be taken and take them into account;
- be entitled to initiate cost recovery proceedings against the operator or a third party, as appropriate;
- recover the costs in relation to the preventive or remedial actions taken; and
- consider a request for action and give the relevant operator an opportunity to make his views known and respond to the request as soon as possible, giving its decisions.

What costs are envisaged?

The ELD does not require operators to take out insurance and there is no financial limit per se on the amount that liable polluters will be required to pay to remedy environmental damage. However, remediation measures that are unreasonable given the costs involved are not envisaged. In general, operators are required to bear the costs for preventive and remedial actions taken. Where multiple operators are involved, the costs may be allocated by the competent authority as appropriate.

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Appendix 2

Existing Liability Regimes - Existing Domestic Legislation

Remediation of environmental damage under existing regimes

Sector	Legislative Provisions	Duty of Regulator	Scope of Damage Covered	Liability Regime	Restoration Standards
Genetically Modified Organisms	Consent for the contained use of genetically modified organisms and genetically modified micro-organisms under the Genetically Modified Organisms (Contained Use) Regulations 2001 and Environmental Protection Agency Act 1992 (section 111) as amended	<p>EPA is responsible for consenting to the first time use of a premises for a particular class of contained use, and for other classes of contained use.</p> <p>In granting consent, the EPA is required to examine the notification with respect to the correctness of the assessment carried out into the risks to human health and the environment which may be associated with the contained use, and the suitability of the containment measures, and the waste management and emergency response measures. The procedures to be adopted in the event of an accident are outlined in the Regulations.</p>	To avoid adverse effects on human health or the environment	<p>EPA may suspend or terminate the contained use where the EPA is not satisfied that the contained use is being carried out in accordance with the appropriate procedures.</p> <p>EPA may apply to the High Court to prohibit or restrict any activity involving a contained use.</p> <p>EPA may serve a notice on a user to take measures necessary in order to protect human health or the environment.</p> <p>A person shall not be entitled solely by reason of compliance with the Regulations to carry out a contained use.</p>	None specified

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Remediation of environmental damage under existing regimes

Sector	Legislative Provisions	Duty of Regulator	Scope of Damage Covered	Liability Regime	Restoration Standards
<p>Genetically Modified Organisms (continued)</p>	<p>Consent to the deliberate release of a genetically modified organisms under the Genetically Modified Organisms (Deliberate Release) Regulations 2003, Environmental Protection Agency Act 1992 (section 111) as amended</p>	<p>EPA is responsible for consenting to the deliberate release of a genetically modified organism for purposes other than placing on the market.</p> <p>In granting consent, the EPA is required to evaluate the environmental risk assessment and examine the notification for compliance with the Regulations. The notification is required to include information on emergency response plans such as plans for protecting human health and the environment in case of the occurrence of an undesirable effect.</p>	<p>To avoid adverse effects on human health or the environment</p>	<p>EPA may suspend or terminate a deliberate release where the EPA becomes aware of information which in its view could have significant consequences for the risks to human health or the environment.</p> <p>EPA may apply to the High Court to prohibit or restrict any activity involving a deliberate release.</p> <p>EPA may serve a notice on a notifier to take measures necessary in order to protect human health or the environment.</p> <p>A person shall not be entitled solely by reason of compliance with the Regulations to deliberately release or place on the market a genetically modified organism.</p>	<p>None specified</p>

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Remediation of environmental damage under existing regimes

Sector	Legislative Provisions	Duty of Regulator	Scope of Damage Covered	Liability Regime	Restoration Standards
<p>Genetically Modified Organisms (continued)</p>	<p>Consent to place a product containing/consisting of a genetically modified organism on the market under the Genetically Modified Organisms (Deliberate Release) Regulations 2003 Environmental Protection Agency Act 1992 (section 111) as amended</p>	<p>EPA is responsible for consenting and renewing consent to the placing of a product containing or consisting of a genetically modified organism on the market.</p> <p>In granting or renewing consent, the EPA is required to evaluate the environmental risk assessment and examine the notification for compliance with the Regulations. The notification is required to include information on emergency response plans such as plans for protecting human health and the environment in case of the occurrence of an undesirable effect; and a monitoring plan which should identify the occurrence of adverse effects of the genetically modified organism or its use on human health or the environment which were not anticipated in the environmental risk assessment.</p>	<p>To avoid adverse effects on human health or the environment</p>	<p>EPA may provisionally restrict or prohibit the use of the placing on the market of a product where the EPA has detailed grounds for considering that the product constitutes a risk to human health or the environment.</p> <p>EPA may apply to the High Court to prohibit or restrict any activity involving a contained use.</p> <p>EPA may serve a notice on a user to take measures necessary in order to protect human health or the environment.</p> <p>A person shall not be entitled solely by reason of compliance with the Regulations to deliberately release or place on the market a genetically modified organism.</p>	<p>None specified</p>

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Remediation of environmental damage under existing regimes

Sector	Legislative Provisions	Duty of Regulator	Scope of Damage Covered	Liability Regime	Restoration Standards
<p>Habitats and Species</p>	<p>Designation of Natural Heritage Areas (NHAs) under the Wildlife (Amendment) Act 2000 (sections 16 to 21), refuges for either or both fauna and flora under the Wildlife Act 1976 (section 17) and the Wildlife (Amendment) Act 2000 (section 28).</p>	<p>Minister responsible for designating NHAs and to indicate the works which would be considered liable to destroy or to significantly alter, damage or interfere with the integrity of the area and indicate the protective measures for the protection of the area.</p> <p>Minister responsible for designating refuges and to indicate the protective measures for the protection of the habitat requirements of such fauna and flora</p> <p>Where steps have not been taken to restore the land designated or proposed as a NHA, Minister may take necessary action and may, through the courts, recover the expenses from the person concerned.</p>	<p>Deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated.</p>	<p>The Minister may apply to a court of competent jurisdiction to prohibit works on lands proposed or designated as NHAs where such works are liable to have an adverse effect on the integrity of the area.</p> <p>The Minister may issue directions to restore the land designated or proposed as a NHA, in accordance with the direction. Offence not to comply with direction;</p> <p>Offence to carry out or cause or permit to be carried out on land where there is a subsisting NHA order any works, or any works specified in a notice designating the land as a NHA, which are liable to destroy or to significantly alter, damage or interfere with the features unless they have the Minister's consent or it is in accordance with the terms of an agreement relating to the management of land.</p> <p>Convictions attract fines and/or imprisonment.</p>	<p>To restore the land designated or proposed as a NHA, as directed</p>

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Remediation of environmental damage under existing regimes

Sector	Legislative Provisions	Duty of Regulator	Scope of Damage Covered	Liability Regime	Restoration Standards
<p>Habitats and Species (continued)</p>	<p>Designation of special areas of conservation (SACs) and the identification of sites of community importance (SCI) under the European Communities (Natural Habitats) Regulations 1997, European Communities (Natural Habitats) Regulations (Amendment) 1998 and European Communities (Natural Habitats) (Amendment) Regulations 2005</p>	<p>Minister responsible for identifying SCI.</p> <p>Minister responsible for designating SACs and for establishing appropriate conservation measures and to take the appropriate steps to avoid the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated.</p> <p>Where steps have not been taken to restore the land designated or proposed as a European site, or a site on the candidate list of European sites, or a site where consultation has been initiated in accordance with article 5 of the Habitats Directive following the issue of a direction, Minister may take necessary action and may, through the courts, recover the expenses from the person concerned.</p>	<p>Deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated.</p>	<p>The Minister may apply to a court of competent jurisdiction to prohibit works on a European site, or a site on the candidate list of European sites, or a site where consultation has been initiated in accordance with article 5 of the Habitats Directive to safeguard the integrity of the site concerned and ensuring that the overall coherence of Natura 2000 is protected.</p> <p>The Minister may issue directions to restore the land designated or proposed as a European site, or a site on the candidate list of European sites, or a site where consultation has been initiated in accordance with article 5 of the Habitats Directive, in accordance with the direction.</p> <p>Offence not to comply with direction; or to impede/obstruct a person from entering on land for the purpose of carrying out any required works.</p> <p>Offence, without reasonable excuse to carry out an operation or activity on any land included in a SAC or a as a European site, or a site on the candidate list of European sites unless they have the Minister's consent or it is in accordance with the terms of a management agreement.</p> <p>Convictions attract fines and/or imprisonment.</p>	<p>To restore the land designated or proposed as a European site, or a site on the candidate list of European sites, or a site where consultation has been initiated in accordance with article 5 of the Habitats Directive, as directed</p>

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Remediation of environmental damage under existing regimes

Sector	Legislative Provisions	Duty of Regulator	Scope of Damage Covered	Liability Regime	Restoration Standards
<p>Habitats and Species (continued)</p>	<p>Protection of species of flora, wild birds and wild animals and the granting of licences for scientific, educational or other purposes in respect of protected species of flora, wild birds and wild animals under the Wildlife Act 1976 (sections 21 to 23) and the Wildlife (Amendment) Act 2000 (section 29 to 31), and under the European Communities (Natural Habitats) Regulations 1997, European Communities (Natural Habitats) Regulations (Amendment) 1998 and European Communities (Natural Habitats) (Amendment) Regulations 2005</p>	<p>Minister may declare species of flora to be protected, identify by regulations wild birds and wild animals to be protected.</p> <p>Minister may grant a licence in respect of protected species of flora, wild birds and wild animals for scientific, educational or other purposes.</p> <p>Minister shall take measures to establish a system of strict protection for the fauna consisting of animal species set out in Part I of the First Schedule.</p> <p>Minister may by direction take measures to ensure that the taking in the wild of specimens of species of wild fauna and flora outlined in Part II of the First Schedule is compatible with their being maintained at a favourable conservation status.</p>	<p>Protection of flora, wild birds and wild animals</p>	<p>Offence to damage, destroy, interfere with, etc. the habitat or environment of any species of flora which are declared to be protected, or to hunt, injure, including damage or destroy a breeding site or resting place etc. wild birds and wild animals which are protected unless in accordance with a licence. Other specific exemptions are provided.</p> <p>Convictions attract fines and/or imprisonment.</p> <p>Good defence mechanism available for prosecution/proceedings in respect of offences relating to protected species of flora, wild birds and wild animals - i.e. the protected species of flora was lawfully imported, the capturing or killing complained was urgently necessary for the purpose of stopping damage being caused by the wild birds or wild animals.</p> <p>Offence not to comply with a direction relating to the taking in the world of fauna and flora species. Good defence for the accused to prove that s/he was not aware of the direction.</p>	<p>None</p>

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Remediation of environmental damage under existing regimes

Sector	Legislative Provisions	Duty of Regulator	Scope of Damage Covered	Liability Regime	Restoration Standards
<p>Water</p> <p style="text-align: right;">Screening RIA (version 1)</p>	<p>Licence for discharge of trade and sewage effluent - Local Government (Water Pollution) Act 1977 (sections 1, 3, 4, 10 to 14, 26A), Local Government (Water Pollution) Amendment Act 1990 (sections 3, 7 - 10, 20 - 21), Waste Management Acts 1996 (section 66), Environmental Protection Agency Act 1992 (section 84(3)) as amended</p> <p>A person shall not cause or permit any polluting matter to enter waters</p> <p>Preparation of Nutrient Management Plans</p>	<p>Local authority is responsible for issuing the licence and is required to have regard to the objectives of the water quality management plan including the prevention and abatement of pollution and they may attach conditions to the licence.</p> <p>Local authority is responsible for approving nutrient management plan.</p> <p>Where a notice or court order requiring the person to mitigate or remedy the effects of the entry of polluting matter to waters, is not complied with, the local authority may take the necessary steps to mitigate or remedy any effects of the activity and the costs incurred may, through the courts, be recovered from the person concerned.</p> <p>For the purpose of preventing the entry of polluting matter to waters, the local authority may take appropriate measures and may, through the courts, recover the costs from the person concerned.</p>	<p>Preventing or eliminating the entry of polluting matter to waters which would render those or any other waters poisonous or injurious to fish, spawning grounds or the food of any fish, or to injure fish in the value as human food, or to impair the usefulness of the bed and soil of any waters as spawning grounds or their capacity to produce the food of fish or to render such waters harmful or detrimental to public health or to domestic, commercial, industrial, agricultural or recreational uses</p>	<p>Notices may be served and/or court order may be sought requiring the person to terminate the entry or discharge, to mitigate or remedy the effects discharged, caused or permitted or to pay the costs incurred in investigating, mitigating or remedying the effects.</p> <p>Offence to cause or permit polluting matter to enter waters; to discharge trade or sewage effluent without a licence; not to comply with a notice or order.</p> <p>Convictions attract fines and/or imprisonment.</p> <p>Good defence mechanism available for prosecution/proceedings i.e. the act complained of is authorised by a licence; that all reasonable care taken to prevent the entry to waters; and that activity is in accordance with an approved nutrient management plan</p> <p>Civil liability provision - a person may recover damages in respect of any injury, loss or damage caused by the trade effluent, sewage effluent or other polluting matters entering waters - some exemptions including if activity is in accordance with a licence.</p> <p>Provision about person not being entitled to cause pollution by reason of a licence</p>	<p>To mitigate or remedy any effects of the entry or discharge e.g. - the replacement of fish stocks, the restoration of spawning grounds, the taking of measures to prevent the continuance of the entry or discharge, the removal of polluting matter from waters, the treatment of affected waters so as to mitigate or remedy the effects of the entry or discharge, the making of alternative arrangements for the supply of water for domestic, commercial, industrial, fishery (including fish-farming), agricultural or recreational purposes, the making good of any damage to plant or equipment or to any water abstraction or treatment work and any consequential losses incurred by reason of the entry of polluting matter into waters</p>

Remediation of environmental damage under existing regimes

Sector	Legislative Provisions	Duty of Regulator	Scope of Damage Covered	Liability Regime	Restoration Standards
<p>Waste</p>	<p>Licence for holding, disposing, controlling, collecting waste - Environmental Protection Agency Act 1992 (section 84(3)) as amended and Part 3 of the Protection of the Environment Act 2003, Waste Management Acts 1996 to 2005 (sections 39, 40, 47, and 53 to 58),</p> <p>Waste Management (Licensing) Regulations 2004, and Waste Management (Permit) Regulations 1998</p>	<p>EPA is responsible for issuing the licence and is required to be satisfied that the activity would not cause environmental pollution and they may attach conditions to the licence in relation to the prevention limitation, elimination, abatement or reduction of environmental pollution.</p> <p>Where a notice or court order requiring the person to mitigate or remedy the effects of any environmental pollution caused or likely to be caused by the activity, is not complied with, the EPA may take the necessary steps to mitigate or remedy any effects of the activity and the costs incurred may, through the courts, be recovered from the person concerned.</p> <p>For the purpose of preventing or limiting environmental pollution, the EPA authority may take appropriate measures and may, through the courts, recover the costs from the person concerned</p>	<p>Environmental pollution - harmful to human health or the quality of the environment, result in damage to material property, or impair or interfere with amenities and other legitimate uses of the environment</p>	<p>Notices may be served and/or court order may be sought requiring the person to mitigate or remedy the effects of any environmental pollution caused or likely to be caused by the activity.</p> <p>Offence not to comply with a notice; offence not to comply with a licence or not to comply with conditions attached to a licence.</p> <p>Convictions attract fines and/or imprisonment.</p> <p>Good defence mechanism available for prosecution/proceedings i.e. the act complained of is authorised by a waste licence.</p> <p>Provision about person not being entitled to cause pollution by reason of a licence</p>	<p>To prevent or limit environmental pollution or prevent a recurrence of such pollution, to mitigate or remedy any effects including the treatment of affected lands or waters</p>

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Remediation of environmental damage under existing regimes

Sector	Legislative Provisions	Duty of Regulator	Scope of Damage Covered	Liability Regime	Restoration Standards
IPPC	<p>IPPC Licence for activities as specified in the Environmental Protection Agency Act 1992 (Part IV and 1st Schedule) as amended</p> <p>Environmental Protection Agency Act (Licensing) Regulations 1994 to 2004</p>	<p>EPA is responsible for issuing the licence and is required to be satisfied that the emissions will not cause environmental pollution, that BAT is applied, and that the licensee is a fit and proper person (i.e. financially capable of operating the licence, remedying accidents, and closing/decommissioning the site). EPA can attach conditions to the licence.</p>	<p>Environmental pollution - harmful to human health or the quality of the environment, result in damage to material property, or impair or interfere with amenities and other legitimate uses of the environment</p>	<p>Court order may be sought requiring the person to refrain from or cease doing any act including any specified emission.</p> <p>Offence not to comply with an order; offence not to comply with a licence or not to comply with conditions attached to a licence; offence to carry on an activity without a licence.</p> <p>Convictions attract fines and/or imprisonment. In imposing the penalty, the court shall have regard to the risk or extent of damage to the environment and any remediation required.</p> <p>Good defence mechanism available for prosecution/proceedings i.e. the act complained of is authorised by a licence.</p> <p>Provision about person not being entitled to cause pollution by reason of a licence</p>	<p>To avoid any risk of environmental pollution, to rectify the site of the activity to a satisfactory state</p>

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Remediation of environmental damage under existing regimes

Sector	Legislative Provisions	Duty of Regulator	Scope of Damage Covered	Liability Regime	Restoration Standards
Air	Licence in relation to industrial plants - Air Pollution Act 1987 (sections 24 - 32, 59), Environmental Protection Agency Act 1992 (sections 18, 84(3) and 3 rd Schedule) as amended	<p>Local authority is responsible for issuing the licence and is required to be satisfied that the emission would not result in contravention of any relevant air quality standard and any emission will not cause significant air pollution and they may attach conditions to the licence.</p> <p>Where a notice or court order requiring the person to mitigate or remedy the effects of the emission concerned, is not complied with, the local authority may take the necessary steps to mitigate or remedy any effects of the activity and the costs incurred may, through the courts, be recovered from the person concerned.</p> <p>Where urgent measure are necessary, the local authority may take steps to prevent or limit air pollution and may, through the courts, recover the costs from the person concerned</p>	Air pollution - a condition of the atmosphere in which a pollutant is present in such a quantity as to be liable to be injurious to public health or have a deleterious effect on flora or fauna or damage property or impair or interfere with amenities or with the environment	<p>Notices may be served and/or court order may be sought requiring the person to mitigate or remedy the effects of any environmental pollution caused or likely to be caused by the activity.</p> <p>Offence not to comply with a notice; offence to cause or permit an emission without a licence.</p> <p>Convictions attract fines and/or imprisonment.</p> <p>Good defence mechanism available for prosecution/proceedings i.e. the act complained of is authorised by a licence</p> <p>Civil liability provision - a person may recover damages in respect of any injury, loss or damage caused by an emission.</p>	To prevent or limit air pollution or prevent a recurrence of such pollution, to mitigate or remedy any effects

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Appendix 3 Exceptions and Discretions

Exceptions

1. A number of exceptions from the liability scheme are provided in Article 4 of the ELD. These are mandatory exceptions and as such environmental damage or imminent damage resulting from the following are excluded from the scope of the ELD:
 - (i) an act of armed conflict, hostilities, civil war or insurrection;
 - (ii) a natural phenomenon of exceptional, inevitable and irresistible character;
 - (iii) activities the main purpose of which is serve national defence or international security;
 - (iv) activities the sole purpose of which is to protect from natural disasters; and
 - (v) damage caused by pollution of a diffuse character (where it is not possible to establish a causal link between the damage and the activities of individual operators).

International Conventions and Instruments listed in the ELD

2. In addition, the ELD refers to a number of International Conventions and Instruments in Articles 4(2), 4(3) and 4(4) and their exclusion from the scope of the ELD. These are discussed in the following paragraphs.
3. Article 4(2) of the ELD states that *This Directive shall not apply to environmental damage or to any imminent threat of such damage arising from an incident in respect of which liability or compensation falls within the scope of any of the International Conventions listed in Annex IV, including any future amendments thereof which is in force in the Member State concerned.* The International Conventions are listed below - some of these have been ratified by Ireland, others have not and some of these Conventions have yet to enter into force internationally. The relevant ratification instruments are also identified below.

International Convention listed in Annex IV of the ELD	Ratification Instrument which brought Convention into force in Ireland
International Convention of 27 November 1992 on Civil Liability for Oil Pollution Damage	Oil Pollution of the Sea (Civil Liability and Compensation) (Amendment) Act 1998
International Convention of 27 November 1992 on the Establishment of an International Fund for Compensation for Oil Pollution Damage	Oil Pollution of the Sea (Civil Liability and Compensation) (Amendment) Act 1998
International Convention of 23 March 2001 on Civil Liability for Bunker Oil Pollution Damage	The Sea Pollution (Miscellaneous Provisions) Act 2006 gives effect to this Convention. However, the Convention has not yet been ratified, and the Convention has yet to enter into force internationally.
International Convention of 3 May 1996 on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea	The Sea Pollution (Hazardous Substances) (Compensation) Act 2005 gives effect to this Convention. However, the Convention has not yet been ratified, and the Convention has yet to enter into force internationally.

International Convention listed in Annex IV of the ELD	Ratification Instrument which brought Convention into force in Ireland
Convention of 10 October 1989 on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation	not ratified, and the Convention has yet to enter into force internationally.

4. Any environmental damage or any imminent threat of such damage arising from an incident in respect of which liability or compensation falls within the scope of the following conventions:

- International Convention of 23 March 2001 on Civil Liability for Bunker Oil Pollution Damage;
- International Convention of 3 May 1996 on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea;
- Convention of 10 October 1989 on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation;

will be subject to the requirements of the ELD as these 3 Conventions have not been ratified by Ireland, and these 3 Conventions have yet to enter force internationally. This issue will be kept under review.

5. Article 4(3) of the ELD states that *This Directive shall be without prejudice to the right of the operator to limit his liability in accordance with national legislation implementing the Convention on Limitation of Liability for Maritime Claims (LLMC), 1976, including any future amendment to the Convention, or the Strasbourg Convention on Limitation of Liability in Inland Navigation (CLNI), 1988, including any future amendment to the Convention.* Details of the ratification by Ireland of these Conventions are set out below.

International Convention	Ratification Instrument which brought Convention into force in Ireland
Convention on Limitation of Liability for Maritime Claims (LLMC), 1976	Merchant Shipping (Liability of Shipowners and Others) Act 1996
Strasbourg Convention on Limitation of Liability in Inland Navigation (CLNI), 1988	not ratified

6. Article 4(4) of the ELD states that *This Directive shall not apply to such nuclear risks or environmental damage or imminent threat of such damage as may be caused by the activities covered by the Treaty establishing the European Atomic Energy Community or caused by an incident or activity in respect of which liability or compensation falls within the scope of any of the international instruments listed in Annex V, including any future amendments thereof.* The list of instruments in Annex V is reproduced below - Ireland is not party to any of these international instruments:

International Instrument listed in Annex V of the ELD

Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy and the Brussels Supplementary Convention of 31 January 1963

Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage

Convention of 12 September 1997 on Supplementary Compensation for Nuclear Damage

Joint Protocol of 21 September 1988 relating to the Application of the Vienna Convention and the Paris Convention

Brussels Convention of 17 December 1971 relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material

Discretions

7. Other than Article 4 of the ELD as discussed above, there are other exceptions provided in the ELD and these are subject to the discretion of Member States. These discretionary provisions are explored below.

Extension of Habitats and Species

8. Article 2(3)(c) of the ELD provides that a Member State may decide to designate any habitat or species, not listed in the relevant Annexes of the Birds and Habitats Directives, for equivalent purposes to those laid down in these two Directives. Exercising this discretion would, in effect, extend (for the purposes of the ELD) the species and habitats listed in the Annexes of the Birds and Habitats Directives to other species and habitats covered specifically by Irish legislation (i.e. Flora and Fauna Protection Orders).
9. All birds are required to be protected by the Birds Directive, but only certain species of birds are identified in the Annexes of the Birds Directive. As such, exercising Article 2(3)(c) with respect to birds would involve protecting birds not listed in the Annex to the Birds Directive, these birds would include the crow, magpie, robin, wren, blackbird, red grouse and grey partridge. All of these birds currently enjoy protection under domestic wildlife legislation.
10. Exercising Article 2(3)(c) with respect to animals and plants would involve protecting those species of animals and plants that are not listed in the Annexes of the Habitats Directive, these animals would include the badger, hedgehog, pine marten, pygmy shrew, stoat, hare and red squirrel; and the species of plants would include the kerry lily, globe flower and purple milk vetch. All of these animals and plants currently enjoy protection under domestic wildlife legislation.
11. It is considered that resources should be prioritised to those species that are most in need of protection including species that are threatened or vulnerable at an EU level. Exercising the discretion available in Article 2(3)(c) to the other species listed above would impose undue administrative costs and burdens on both regulatory authorities and those regulated which would not be justified on conservation grounds particularly in view of the existing protection afforded to these species.

12. As implementation and operation of the ELD will be complex and place significant demands on both regulatory authorities and those regulated, it is not intended to extend the scope of the ELD at this time. This issue will be kept under review.
13. The habitats and species that will enjoy protection under the ELD is explored in greater detail in Appendix 4 under the definition of "protected species and natural habitats" (Article 2).

Permit Defence

14. In Article 8(4)(a) of the ELD, a Member State may decide to exempt from liability costs, operators who have caused environmental damage if they demonstrate that the damage was caused by activities or emissions expressly authorised by regulatory authorities and if they can also prove that they were not at fault or negligent - this is normally referred to as the 'permit defence'. Exercising this discretion would, in effect, mean that an operator will not be held liable for the costs of remediating environmental damage resulting from an activity if the operator acted fully in accordance with the terms and conditions of a licence and if the operator did not act negligently. This exemption can only arise in relation to those activities listed in Annex III of the ELD.
15. It could be argued that the fact that most of the activities listed in Annex III are regulated and enforced suggests that damage of a serious scale would not be a common occurrence. The permit defence, where invoked by an operator, would be considered by a competent authority and the weight to be given to any such defence would depend on the circumstances of the incident.
16. It may also be argued that the availability of a permit defence would be reasonable having regard to the view taken by the relevant regulatory authority at the time their licence or permit was granted. It could further be argued that the absence of a permit defence would result in businesses being unable to undertake their activities with confidence. On the other hand, there is a view that a permit defence might result in tightening, by the relevant regulatory authority, of conditions attached to a licence for the activity in question so as to minimise the possibility that damage might be caused (despite compliance with the conditions attached to a licence) and left unremediated or left to a competent authority to consider remediating.
17. In addition, it may be argued that a permit defence would have the effect of converting the strict liability regime which the ELD requires for activities falling within Annex III to a fault-based regime. A case can be made that this accords with principles of natural justice where an operator had acted in good faith and in compliance with all conditions set out by the relevant competent authority.
18. In existing environmental protection regimes, operators may avail of a good defence mechanism in prosecutions or proceedings i.e. where the act complained of is authorised by a licence.
19. Were the permit defence to be adopted in the transposing instrument, an operator would still be required to take the necessary measures to prevent an imminent threat of damage

occurring or where damage occurs, to take the immediate response (emergency remedial actions) so as to avoid further damage occurring. In consulting with a competent authority on the determination of appropriate remedial measures, the operator and authority would review the circumstances of the damage caused, including the issue of the operator's compliance with the particular licence. The costs of remedial action would then be considered as well as the appropriate body to undertake these remedial measures. A competent authority would be left with some discretion to assign costs to an operator where, despite compliance with licence conditions, the operator failed to take reasonable steps to prevent the environmental damage concerned.

20. The Department has an open mind in relation to the arguments for and against the adoption of the permit defence. It intends to await the responses to this consultation document before finalising its decision on the adoption of the permit defence.

State-of-the-art Defence

21. In Article 8(4)(b) of the ELD, a Member State may decide to exempt operators from liability if operators demonstrate that their activities or emissions were not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the emissions were released or the activity took place - normally referred to as the 'state-of-the-art' defence. Exercising this discretion would, in effect, mean that an operator should not be held liable for remediating environmental damage where the operator had acted (including the use of a product) in a manner consistent with a reasonable expectation of no environmental damage occurring in light of the state of scientific and technical knowledge then prevailing.
22. The argument has been made that where a product has been developed and the state of scientific and technical knowledge at the time did not suggest that it would cause environmental damage, then the user of that product should not be held liable for damages that may arise from its use in situations where the user was not at fault or negligent. This applies also to actions on the part of the operator where it was reasonable for the operator to expect that no environmental damage would occur in light of the state of scientific and technical knowledge then prevailing.
23. It could also be argued that the non-adoption of the state-of-the-art defence would place an undue burden on operators who act in good faith in accordance with best scientific and technical knowledge available.
24. The Department has an open mind in relation to the arguments for and against the adoption of the state-of-the-art defence. It intends to await the responses to this consultation document before finalising its decision on the adoption of the state-of-the-art defence.

Third Parties - Request for Action

25. In Article 12(5) of the ELD, a Member State may decide not to allow the parties defined in Article 12(1) to request, as a right, action in cases where there is an imminent threat of environmental damage but no damage has actually occurred. Exercising this discretion would mean in effect that these parties would not have a statutory right to engage with a competent authority in cases of the imminent threat of such damage. Article 12(1) defines these parties as natural or legal persons:

- affected by the environmental damage;
- having a sufficient interest in environmental decision making relating to the environmental damage; and
- alleging the impairment of a right (where the law of a Member State requires this as a precondition).

NGOs promoting environmental protection and meeting any requirements in national law are deemed to fall within both of the latter two categories.

26. Under Article 12 of the ELD, the parties referred to above would be entitled, as of right, to inform a competent authority of instances of environmental damage and to request a competent authority to take action under the ELD. Where it is 'plausible' that environmental damage exists, a competent authority is required to consider any such observations and requests for action and provide an opportunity for the operator to make his/her views known. A competent authority is required to inform the persons who submitted the observations, of its decisions to agree to, or refuse, the request for action and the reasons therefor.
27. In the case of an imminent threat of environmental damage, it may be argued that exercising this discretion would avoid a competent authority having to engage in formal exchanges when time is short in assessing immediate threats or dealing in detail with requests which are clearly vexatious. A formal requirement to investigate requests about imminent threats could create extra and unnecessary costs for both a competent authority and operators if such requests were made regularly without adequate justification, or if the threats to which they refer were more perceived than real.
28. On balance, it is considered that, where there is an imminent threat of environmental damage and where it appears to a competent authority that the request is not vexatious, frivolous or without substance or foundation, a competent authority should treat the request as if it was a request for action for an instance of environmental damage.
29. In effect, we would be exercising our discretion in relation to Article 12(5) with certain restrictions. This would be similar to actions taken by planning authorities in respect of unauthorised development provided for in section 152 of the Planning and Development Act 2000.

Sewage Sludge

30. In Annex III of the ELD, a Member State may decide to exclude the spreading of sewage sludge from urban waste water treatment plants, treated to an approved standard, for agricultural purposes. Exercising this discretion would in effect mean that this activity would not become an Annex III activity, and as such, the operator of this activity would only be liable if s/he was at fault/negligent and if s/he caused damage to protected species and natural habitats.
31. Currently, the spreading of sewage sludge for beneficial agricultural purposes or ecological improvement is required to comply with the Waste Management (Use of Sewage Sludge in Agriculture) Regulations 1998 to 2001 and the European Communities (Good Agricultural Practice for Protection of Waters) Regulations 2006 and there is also a mandatory *Code of Practice for the use of Biosolids in Agriculture* which will be made statutory after the Commission's proposals for a revision of Directive 86/278/EEC have been received. The

standards that have been developed for this activity are in excess of those set by the EU and utilise best international practice. It could be argued that in view of these high standards, the activity should not be included in Annex III.

32. The Department has an open mind in relation to the arguments for and against the exclusion of sewage sludge from Annex III. It intends to await the responses to this consultation document before finalising its decision on the exclusion of sewage sludge.

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Appendix 4

Legal and Operational Issues: Articles 2 to 17

1. These issues relate to the transposition and implementation of the Environmental Liability Directive (ELD) and do not include issues relating to any of the ELD's exceptions or discretions as these are discussed in Appendix 3.
2. Throughout this Appendix, reference is made to using some definitions in the transposing instrument as are used in the ELD. It is considered that this will provide for accurate transposition of the Directive.

Article 2 - Definitions

environmental damage

3. 'environmental damage' means:

(a) **damage to protected species and natural habitats**, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species. The significance of such effects is to be assessed with reference to the baseline condition, taking account the criteria set out in Annex I;

Damage to protected species and natural habitats does not include previously identified adverse effects which result from an act by an operator which was expressly authorised by the relevant authorities in accordance with provisions implementing Article 6(3) and (4) or Article 16 of Directive 92/43/EEC or Article 9 of Directive 79/409/EEC or, in the case of habitats and species not covered by Community law, in accordance with equivalent provisions of national law on nature conservation.

4. In the context of the definition of "environmental damage", the significance of the damage must be assessed with reference to a baseline condition taking account of the criteria set out in Annex I.
5. As outlined in Annex I, the most straight-forward test for identifying whether environmental damage has occurred is to consider whether the damage has a proven effect on human health. If it has, then it must be classified as significant damage.
6. To ascertain if environmental damage to protected species and habitats has occurred, it is necessary to consider the scope of 'protected species and habitats' that are covered by the ELD, their 'favourable conservation status' and their 'baseline condition'. The ELD defines these terms and details are outlined below.
7. The significance of any damage that has adverse effects on reaching or maintaining the favourable conservation status of habitats or species has to be assessed by reference to the conservation status at the time of the damage, the services provided by the amenities they produce and their capacity for natural regeneration.
8. Using the criteria detailed in Annex I, a competent authority is required to determine whether there has been significant adverse changes to the baseline condition and to ascertain if

environmental damage in respect of protected species and habitats has occurred. The specific data necessary to do this are:

- the number of individuals, their density or the area covered;
- the role of the particular individuals or of the damaged area in relation to the species or to the habitat conservation, the rarity of the species or habitat (assessed at local, regional and higher level including at Community level);
- the species' capacity for propagation (according to the dynamics specific to that species or to that population), its viability or the habitat's capacity for natural regeneration (according to the dynamics specific to its characteristic species or to their populations); and
- the species' or habitat's capacity, after damage has occurred, to recover within a short time, without any intervention other than increased protection measures, to a condition which leads, solely by virtue of the dynamics of the species or habitat, to a condition deemed equivalent or superior to the baseline condition.

9. A competent authority may not have ready access to such data and it may have to consult and rely on information available to other regulatory authorities and organisations, published research and scientific work by non-governmental organisations and agencies, both in Ireland and across the Community. A competent authority may also require the operator concerned to carry out its own assessment and to supply any information and data necessary.

10. Details are given in Annex I of specific circumstances which are not considered as significant damage, these are:

- negative variations that are smaller than natural fluctuations regarded as normal for the species or habitat in question;
- negative variations due to natural causes or resulting from intervention relating to the normal management of sites as defined in habitat records or target documents or as carried on previously by owners or operators; or
- damage to species or habitats for which it is established that they will recover, within a short time and without intervention, either to the baseline condition or to a condition which leads, solely by virtue of the dynamics of the species or habitat, to a condition deemed equivalent or superior to the baseline condition.

11. Some exceptions to damage to protected species and natural habitats are provided for: these include permissions granted to operators in accordance with Articles 6(3) and 6(4) of the Habitats Directive (Articles 15 and 32 of the 1997 Natural Habitats Regulations); Article 16 of the Habitats Directive (Article 25 of the 1997 Natural Habitats Regulations); or Article 9 of the Bird Directive (Article 25 of the 1997 Natural Habitats Regulations).

12. It is considered that each incident of damage to protected species and natural habitats should be examined and assessed by a competent authority on a case by case basis to determine whether or not such damage comes within the scope of the ELD.

13. It is intended to use the ELD's definition of environmental damage with respect to damage to protected species and natural habitats in the transposing instrument.

14. To provide transparency in a competent authority's decision making process and to ensure a greater understanding of the issues involved, a competent authority will be required to develop

and produce guidance for operators and the public in general on how it will assess damage to protected species and habitats. Such guidance should be produced, *inter alia*, having regard to any research and developments on this issue at EU level. This process would also assist in raising awareness of the potential impact of activities on those habitats and species which enjoy the protection of the ELD.

15. The integration of damage to protected species and habitats with the existing regime for the protection of species and habitats is explored under Article 3 below.

Definition of environmental damage: part (b)

(b) **water damage**, which is any damage that significantly adversely affects the ecological, chemical and/quantitative status and/or ecological potential, defined in Directive 2000/60/EC, of the waters concerned, with the exception of adverse effects where Article 4(7) of that Directive applies;

16. In the Water Framework Directive (2000/60/EC), the terms 'ecological status', 'good ecological potential', 'quantitative status', 'good surface water chemical status' and 'good groundwater chemical status' are defined. In transposing that Directive into Irish law by the European Communities (Water Policy) Regulations 2003, those terms have attracted the same meaning as that set out in the Directive. Article 4(7) of the Water Framework Directive (referred to in Article 12(1)(a) of the Water Policy Regulations) identifies circumstances where Member States would not be in breach of the Directive.
17. Our corpus of legislation for water and the existing liability regime for water (outlined in Appendix 2) deals with 'polluting matter' entering water. It could be argued that polluting matter entering water is incorporated in the definition of water damage but only to the extent that the resultant effect is that the damage caused has significantly adversely affected the ecological, chemical and/quantitative status and/or ecological potential of the water concerned.
18. It is considered that each relevant incident of water damage should be examined and assessed by a competent authority on a case by case basis to determine whether or not such damage comes within the scope of the ELD.
19. It is intended to use the ELD's definition of environmental damage with respect to water damage in the transposing instrument.
20. A competent authority will be required to develop and produce guidance for operators and the public in general on how it will assess water damage. Such guidance should be produced, *inter alia*, having regard to any research and developments on this issue at EU level.
21. The integration of water damage with the existing regime for water is explored under Article 3 below.

Definition of environmental damage: part (c)

(c) **land damage**, which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms.

22. This definition makes reference to 'substances, preparations, organisms or micro-organisms'. The substances and preparations would appear to relate to dangerous substances and preparations as referred to in the Directives listed in Annex III, while the organisms and micro-organisms appear to relate to genetically modified organisms and micro-organisms also referred to in the Directives listed in Annex III. Effectively, land damage is where the land has been contaminated to the extent that it poses a significant risk to human health.
23. Land damage and land contamination have not been expressly defined in existing Irish legislation. Land has been defined in the Environmental Protection Agency Act 1992, as amended, as including soil.
24. IPPC licensing provides for the protection of soil through conditions attached to a licence. Under waste legislation, the risk to land by the holding, transport, recovery or disposal of waste in a manner which would to a significant extent endanger human health or harm the environment is considered to be environmental pollution. In addition, contaminated soils/sites are required to be considered in the waste management plans of local authorities and the EPA's National Hazardous Waste Management Plan. However, these sites primarily relate to historical damage rather than present damage. It could be argued that possible future land damage could result from illegal waste management operations.
25. The proposed EU Directive on establishing a framework for the protection of soil (COM(2006)232) has implications for contaminated sites and their remediation. Indeed, that proposed Directive also intends to amend the ELD.
26. Under GMO legislation, all appropriate measures are required to be taken to avoid adverse effects on human health and the environment where a user is carrying out an activity involving a contained use; and where a person is deliberately releasing a GMO or placing a GMO on the market. An emergency plan must be put in place where the assessment of risk shows that a failure of the containment measures could lead to significant danger, whether immediate or delayed, to humans or the environment. Emergency response plans for protecting human health and the environment in case of the occurrence of an undesirable effect are necessary where a person is carrying out a deliberate release of a GMO or placing a product containing or consisting of a GMO on the market. The liability regime for GMOs is outlined in Appendix 2.
27. It is considered that each relevant incident of land damage should be examined and assessed by a competent authority on a case by case basis to determine whether or not such damage comes within the scope of the ELD.
28. It is intended to use the ELD's definition of environmental damage with respect to land damage in the transposing instrument.

29. A competent authority will be required to develop and produce guidance for operators and the public in general on how it will assess land damage. Such guidance should be produced, *inter alia*, having regard to any research and developments on this issue at EU level.
30. The integration of land damage with the existing regime for land is explored under Article 3 below.

damage

31. 'damage' means a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly.
32. In general, the term 'damage' has not been expressly defined in Irish legislation but it has been referred to in such legislation. It is intended to use the ELD's definition in the transposing instrument.

protected species and natural habitats

33. 'protected species and natural habitats' means:
- (a) the species mentioned in Article 4(2) of Directive 79/409/EEC or listed in Annex I thereto or listed in Annexes II and IV to Directive 92/43/EEC;
 - (b) the habitats of species mentioned in Article 4(2) of Directive 79/409/EEC or listed in Annex I thereto or listed in Annex II to Directive 92/43/EEC, and the natural habitats listed in Annex I to Directive 92/43/EEC and the breeding sites or resting places of the species listed in Annex IV to Directive 92/43/EEC; and
 - (c) where a Member State so determines, any habitat or species, not listed in those Annexes which the Member State designates for equivalent purposes as those laid down in these two Directives.
34. The Wildlife Acts 1976 to 2000 provide for the protection of wildlife (birds, animals and plants) and the control of activities which may impact adversely on the conservation of wildlife. EU Regulations such as the European Communities (Natural Habitats) Regulations 1997, European Communities (Natural Habitats) (Amendment) Regulations 1998, European Communities (Natural Habitats) (Amendment) Regulations 2005, and the European Communities (Conservation of Wild Birds) Regulations 1985, together with provisions in the Wildlife Acts 1976 and 2000 address the transposition into Irish law of the Birds Directive (79/409/EEC) and the Habitats Directive (92/43/EEC) and strengthen the protection afforded to wildlife.
35. In addition, this corpus of domestic wildlife legislation provides for the designation of Special Areas of Conservation and Special Protection Areas (Natura 2000 sites), Natural Heritage Areas and Proposed Natural Heritage Areas, Nature Reserves, Refuges for Flora and Fauna, and Flora and Fauna Protection Orders. Many sites are covered by more than one designation. Under these designations, specific species and habitats are protected. The existing liability regime for habitats and species is outlined at Appendix 2.
36. This corpus of **domestic wildlife legislation** provides for the protection of all species of wild birds including protection by the regulation of sustainable hunting of certain game species and

of the control of certain species where they are causing serious damage to crops or property or posing a threat to public health and safety. This regulation is done by way of licences, permits, and orders that permit and regulate the taking, killing and disturbance of stated species.

37. In order to consider the species and natural habitats that will be protected under the ELD, the definition of protected species and natural habitats is discussed in greater detail below.

Definition of protected species and natural habitats - part:

(a) the species mentioned in Article 4(2) of Directive 79/409/EEC or listed in Annex I thereto or listed in Annexes II and IV to Directive 92/43/EEC

38. *The species mentioned in Article 4(2) of Directive 79/409/EEC or listed in Annex I thereto* are species of birds. These species of birds, identified in the Birds Directive, 79/409/EEC (listed in Annex I of that Directive and referred to in Article 4(2) of that Directive) already enjoy protection under domestic wildlife legislation. Under the ELD, this protection will be strengthened by the addition of liability provisions to existing penalties, but this will not impact on lawful hunting or lawful control measures.
39. *The species listed in Annexes II and IV to Directive 92/43/EEC* concern species of animals and plants. The species of animals and plants, identified in the Habitats Directive, 92/43/EEC (listed in Annex II and not in Annex IV) only enjoy protection under domestic wildlife legislation where instances of such species have been designated in specific areas as outlined above. Outside of these designated areas, these species of animals and plants, for example the white-clawed crayfish, common and grey seals, freshwater pearl mussel, shining sickle moss and petalwort do not currently enjoy protection.
40. The species of animals and plants, identified in the Habitats Directive, 92/43/EEC (listed in Annex II and also in Annex IV) enjoy protection under domestic wildlife legislation wherever such species occur; these species include the bottlenose dolphin, harbour porpoise, Killarney fern and the Kerry slug.
41. The species of animals and plants, identified in the Habitats Directive, 92/43/EEC (listed in Annex IV and not in Annex II) also enjoy protection under domestic wildlife legislation wherever such species occur; these species include: the natterjack toad; all species of whales and dolphin except the bottlenose dolphin and harbour porpoise; and all species of bat except the lesser horseshoe bat.
42. Under the ELD, the protection afforded to the species of animals and plants listed in Annexes II and IV of the Habitats Directive will now be strengthened by the application of liability provisions in relation to these species wherever they occur throughout Ireland.

Definition of protected species and natural habitats - part:

(b) *the habitats of species mentioned in Article 4(2) of Directive 79/409/EEC or listed in Annex I thereto or listed in Annex II to Directive 92/43/EEC, and the natural habitats listed in Annex I to Directive 92/43/EEC and the breeding sites or resting places of the species listed in Annex IV to Directive 92/43/EEC;*

43. *The habitats of species mentioned in Article 4(2) of Directive 79/409/EEC or listed in Annex I thereto concern habitats of species of birds. These habitats of species of birds identified in the Birds Directive, 79/409/EEC (listed in Annex I of that Directive and referred to in Article 4(2) of that Directive) only enjoy protection under domestic wildlife legislation where instances of these habitats have been designated in specific areas as outlined above. Outside of these designated areas, the habitats of these species of birds (for example hen harrier, merlin, corncrake, little egret) do not currently enjoy protection. Under the ELD, the habitats of these particular species of birds, wherever they occur throughout Ireland, will attract the provisions of the ELD.*
44. *The habitats of species listed in Annex II to Directive 92/43/EEC concern habitats of species of animals and plants. These habitats of species of animals and plants identified in the Habitats Directive, 92/43/EEC (listed in Annex II of that Directive) only enjoy protection under domestic wildlife legislation where instances of such habitats have been designated in specific areas as outlined above. Outside of these designated areas, the habitats of those species of animals and plants, for example the white-clawed crayfish, common and grey seals, freshwater pearl mussel, shining sickle moss and petalwort do not currently enjoy protection. Under the ELD, the habitats of these particular species of animals and plants will attract the liability provisions of the ELD, wherever they occur, throughout Ireland.*
45. *The natural habitats listed in Annex I to Directive 92/43/EEC concern natural habitat types. These natural habitats identified in the Habitats Directive, 92/43/EEC (listed in Annex I of that Directive) only enjoy protection under domestic wildlife legislation where instances of such habitat types have been designated in specific areas as outlined above. Outside of these designated areas, these habitats types such as sand dunes and raised bogs do not currently enjoy protection. Under the ELD, these habitat types will attract the liability provisions of the ELD, wherever they occur, throughout Ireland.*
46. *The breeding sites or resting places of the species listed in Annex IV to Directive 92/43/EEC concern animals and plants. These breeding sites or resting places of the species, listed in Annex IV of the Habitats Directive, 92/43/EEC are protected under domestic wildlife legislation. Such legislation provides for the protection of those species of animals listed in Annex IV(a) for example the breeding and resting places of any bat species and of otters; and the protection of those species of plants in Annex IV(b) to the extent that they are protected from the deliberate picking, collecting, cutting, uprooting or destruction of such plants in their natural range in the wild. Under the ELD, the breeding sites or resting places of these particular species will be protected, wherever they occur, throughout Ireland.*

Definition of protected species and natural habitats: part (c)

47. Part (c) of this definition is one of the discretions available to Member States and is dealt with in Appendix 3.

Transposition of protected species and natural habitats: parts (a) and (b)

48. The phrase 'protected species and natural habitats' is not defined in domestic wildlife legislation - the term 'natural habitats' is defined as follows: *means terrestrial or aquatic areas distinguished by geographic, abiotic and biotic features, whether entirely natural or semi-natural*; the 'protection of species' is referred to in legislation but the term 'protected species' is not separately defined.
49. It is intended to use the ELD's definition of 'protected species and natural habitats' ((a) and (b) above) in the transposing instrument.

conservation status

50. 'conservation status' means:
- (a) *in respect of a natural habitat, the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species within, as the case may be, the European territory of the Member States to which the Treaty applies or the territory of a Member State or the natural range of that habitat;*

The conservation status of a natural habitat will be taken as 'favourable' when:

- *its natural range and areas it covers within that range are stable or increasing,*
- *the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and*
- *the conservation status of its typical species is favourable, as defined in (b);*

- (b) *in respect of a species, the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within, as the case may be, the European territory of the Member States to which the Treaty applies or the territory of a Member State or the natural range of that species;*

The conservation status of a species will be taken as 'favourable' when:

- *population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats,*
- *the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and*
- *there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis;*

51. The definition of 'conservation status' in the ELD is similar to that in the Habitats Directive, with the exception of the territorial aspect of the definition. In transposing the Habitats Directive into Irish law, the definition of 'conservation status' in that Directive was utilised in that the term attracted the same meaning as that of the Directive. It is intended to use the ELD's definition of 'conservation status' in the transposing instrument.

waters

52. 'waters' mean all waters covered by Directive 2000/60/EC.

53. The definition of 'waters' in the ELD differs to definitions of 'waters' and 'water' in existing Irish legislation. It is necessary to consider how these various definitions of water interrelate and also to consider the scope of the ELD from the perspective of the stretch of water covered by the ELD.
54. The Local Government Water Pollution Acts defined 'waters' as follows: *includes - (a) any (or any part of any) river, stream, lake, canal, reservoir, aquifer, pond, watercourse or other inland waters, whether natural or artificial, (b) any tidal waters, and (c) where the context permits, any beach, river bank and salt marsh or other area which is contiguous to anything mentioned in paragraph (a) or (b), and the channel or bed of anything mentioned in paragraph (a) which is for the time being dry, but does not include a sewer.*
55. The Maritime Jurisdiction Acts defined 'internal or inland waters of the State' as: *shall extend to all sea areas which lie on the landward side of the baseline of the territorial seas and all such sea areas shall be subject to the jurisdiction of the State to the same extent in all respects as its ports and harbours, bays, lakes and rivers, subject to any right of innocent passage for foreign ships in those sea areas which previously had been considered as part of the territorial seas or of the high seas.*
56. The Maritime Safety Act 2005 defined 'Irish waters' as: *includes the territorial seas, the waters on the landward side of the territorial seas, and the estuaries, rivers, lakes and other inland waters (whether or not artificially created or modified) of the State. These Acts also defined the outer limit of the territorial seas is the line every point of which is at a distance of 12 nautical miles from the nearest point of the baseline. The Maritime Jurisdiction Acts defined the outer limit of the territorial seas is the line every point of which is at a distance of 12 nautical miles from the nearest point of the baseline.*
57. In terms of the ELD, the definition of 'waters' refers to *all waters covered by Directive 2000/60/EC*. The purpose of the latter Directive (Water Framework Directive) is to establish a framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater. That Directive defines 'surface water', 'groundwater', 'inland water', 'river', 'lake', 'transitional waters', and 'coastal water' and in defining 'surface water' it refers to *'including territorial waters'*. In transposing the Water Framework Directive, these definitions have been utilised in that the terms attract the same meaning as those of that Directive.
58. It would therefore appear that the ELD applies to all waters from rivers to lakes to coastal waters out to 12 nautical miles (i.e. including the territorial seas). In effect the ELD applies to a greater stretch of water than that covered by the Local Government Water Pollution Acts. The area between 12 nautical miles and the 200 mile exclusive fishery limits does not appear to be covered by the ELD in terms of waters.
59. However, it is noted that as the Birds and Habitats Directives apply to Member States' territorial waters as well as to the exclusive economic zones, the scope of the ELD insofar as it covers protected species and natural habitats extends to the 200 mile exclusive fishery limit.
60. It is intended to use the ELD's definition of 'waters' in the transposing instrument.

operator

61. 'Operator' has been defined in the ELD to mean *any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity.*
62. This definition of 'operator' is similar to definitions of 'operator' contained in other Directives, e.g. 96/61/EC (IPPC) and 99/31/EC (landfill). In transposing those Directives into Irish law, 'operator' was not separately defined in the transposing instrument. Definitions such as 'occupier', 'person in charge', 'holder' have been defined in Irish environmental law, and in other cases, the reference to 'person' has been used. The use of terms other than 'operator' for defining the appropriate person or persons for the purposes of the ELD would create complexities and might not result in correct and accurate transposition in the context of ensuring assignment of responsibilities. It is intended in transposing the ELD to use 'operator' as defined in the ELD.
63. It should be noted that a local authority or a state-authority may be an operator for the purposes of the ELD.

occupational activity

64. 'occupational activity' means *any activity carried out in the course of an economic activity, a business or an undertaking, irrespectively of its private or public, profit or non-profit character.*
65. In the Protection of the Environment Act 2003, 'activity' and 'established activity' have been defined but they relate to IPPC licensing activities. It is intended to use the ELD's definition of 'occupational activity' in the transposing instrument.

emission

66. 'emission' means *the release in the environment, as a result of human activities, of substances, preparations, organisms or micro-organisms.*
67. It is noted that organisms and micro-organisms are not subsequently defined in the ELD, but as noted above, reference is made to relevant Directives in Annex III such as those dealing with dangerous substances, dangerous preparations and GMOs.
68. In the Protection of the Environment Act 2003 and other Irish environmental legislation, e.g. Waste Management Acts, Environmental Protection Agency Act 1992, and Air Pollution Act 1987, 'emission' has been defined. The definition varies but in the 2003 Act, it is defined as: *'emission' means, in relation to an activity referred to in Part IV or IVA, any direct or indirect release of substances, heat or noise from individual or diffuse sources in the activity into the atmosphere, water or land and includes - (a) an emission into the atmosphere of a pollutant within the meaning of the Air Pollution Act 1987, (b) the release of a greenhouse gas or a precursor of a greenhouse gas into the atmosphere, (c) a discharge of polluting matter, sewage effluent or trade effluent within the meaning of the Local Government (Water Pollution) Act 1977, to waters or sewers within the meaning of that Act, or (d) waste, but does not include*

a radioactive substance within the meaning of Council Directive 96/29/Euratom, a genetically modified micro-organism within the meaning of Council Directive 90/219/EEC or a genetically modified organism within the meaning of Directive 2001/18/EC of the European Parliament and of the Council. This definition falls short of that in the ELD as it excludes in particular GMOs and therefore a new definition of emission would need to be used in the transposing instrument. It is intended in transposing the ELD to use 'emission' as defined in the ELD.

imminent threat of damage

69. *'imminent threat of damage' means a sufficient likelihood that environmental damage will occur in the near future.*
70. Section 63 of the Environmental Protection Agency Act 1992 as substituted by section 13 of the Protection of the Environment Act 2003 refers to 'imminent risk' of pollution, however, imminent is not defined. It is intended to use the ELD's definition of 'imminent threat of damage' in the transposing instrument.

preventive measures

71. *'preventive measures' means any measures taken in response to an event, act or omission that has created an imminent threat of environmental damage, with a view to preventing or minimising that damage.*
72. 'Preventive measures' have not been defined in Irish environmental legislation and it is intended to use the ELD's definition in the transposing instrument. It is noted that 'preventive measures' and 'preventive actions' are used throughout the ELD, and 'preventive actions' are not expressly defined.

remedial measures

73. *'remedial measures' means any action, or combination of actions, including mitigating or interim measures to restore, rehabilitate or replace damaged natural resources and/or impaired services, or to provide an equivalent alternative to those resources or services as foreseen in Annex II.*
74. 'Remedial measures' have not been defined in Irish environmental legislation and it is intended to use the ELD's definition in the transposing instrument. It is noted that 'remedial measures' and 'remedial actions' are used throughout the ELD, and 'remedial actions' are not expressly defined. It is considered that remedial measures, in the broad sense, include emergency remedial actions and long-term remedial actions.

natural resource

75. *'natural resource' means protected species and natural habitats, water and land.*
76. 'Natural resource' has been referred to in other Irish legislation but it has not been defined. It is intended to use the ELD's definition in the transposing instrument.

services and natural resources services

77. 'services' and 'natural resources services' mean the functions performed by a natural resource for the benefit of another natural resource or the public.
78. 'Natural resources services' has not been defined or referred to in other Irish legislation. It is intended to use the ELD's definition in the transposing instrument.

baseline condition

79. 'baseline condition' means the condition at the time of the damage of the natural resources and services that would have existed had the environmental damage not occurred, estimated on the basis of the best information available.
80. 'Baseline condition' has not been defined or referred to in other Irish legislation. It is intended to use the ELD's definition in the transposing instrument.

recovery and natural recovery

81. 'recovery', including 'natural recovery', means, in the case of water, protected species and natural habitats the return of damaged natural resources and/or impaired services to baseline condition and in the case of land damage, the elimination of any significant risk of adversely affecting human health.
82. 'Natural recovery' has not been defined or referred to in other Irish legislation. It is intended to use the ELD's definition in the transposing instrument.

costs

83. 'costs' means costs which are justified by the need to ensure the proper and effective implementation of this Directive including the costs of assessing environmental damage, an imminent threat of such damage, alternatives for action as well as the administrative, legal, and enforcement costs, the costs of data collection and other general costs, monitoring and supervision costs.
84. A competent authority, or a third party on its behalf, may incur costs in assessing environmental damage and an imminent threat of such damage and in identifying the relevant operator. A competent authority may recover such costs from the operator as provided in Article 10 of the ELD. It is intended to use the ELD's definition of 'costs' in the transposing instrument.

Article 3 - Scope

85. Article 3(1)(a) provides that an operator of certain occupational activities, identified in Annex III, is strictly liable for environmental damage caused by that activity and to any imminent threat of such damage occurring because of that activity. The activities listed in Annex III are activities which are regulated under various Irish statutes.

86. Article 3(1)(b) provides that for all other occupational activities, other than those listed in Annex III, the operator is liable for damage to protected species and habitats caused by that activity and to any imminent threat of such damage occurring because of that activity, where the operator has been at fault or negligent. As such 2 types of liability are provided for damage to protected species and habitats.
87. An 'occupational activity' is defined in Article 2 of the ELD as being '*any activity carried out in the course of an economic activity, a business or an undertaking, irrespectively of its private or public, profit or non-profit character*'.
88. Article 3(3) of the ELD provides that private parties are not given a right of compensation as a consequence of environmental damage or of an imminent threat of such damage.
89. It is intended to transpose the ELD in accordance with Article 3.

Integration with existing regime: species and habitats

90. For an Annex III activity, instances of damage to protected species and natural habitats which has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species may come within the scope of the ELD. Where such damage to protected species and natural habitats is assessed by a competent authority as coming within the scope of the ELD, then the operator is subject to the prevention and remediation requirements of the ELD. If, on the other hand, a competent authority considers that the damage does not come within the scope of the ELD, then the damage caused should be dealt with under existing domestic legislation, as appropriate and to the extent that such damage is addressed in this legislation. As such, the relevant regulatory authority/ies would be likely to take liability-related action in cases of environmental damage under the ELD or under the powers in domestic legislation (where these exists), but not under both sets of legislation.
91. For an occupational activity that is not included in Annex III, instances of damage to protected species and natural habitats which has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species may come within the scope of the ELD. Where such damage to protected species and natural habitats is assessed by a competent authority as coming within the scope of the ELD and where the operator of the activity has been at fault or negligent, then the operator is subject to the prevention and remediation requirements of the ELD. If, on the other hand, a competent authority considers that the damage does not come within the scope of the ELD, then the damage caused should be dealt with under the existing regime, as appropriate. As such, it is to be expected that liability-related actions to deal with damage to protected species and natural habitats would be taken under the ELD or under domestic legislation (where these exist) but not under both sets of legislation.

Integration with existing regime: water

92. For an Annex III activity, instances of water damage which have significantly adversely affected the waters concerned may come within the scope of the ELD. Where such water damage is assessed by a competent authority as coming within the scope of the ELD, then the operator is subject to the prevention and remediation requirements of the ELD. If, on the other hand, a competent authority considers that the damage does not come within the scope of the ELD, then the damage caused should be dealt with under the existing regime, as appropriate.

As such, it is to be expected that liability-related actions to deal with water damage would be taken under the ELD or under domestic legislation (where these exist) but not under both sets of legislation.

93. Where the activity is an occupational activity not included in Annex III, then regardless of the significance of the water pollution or damage caused, it does not come within the scope of the ELD and can only be dealt with under the existing domestic legislation, as appropriate.

Integration with existing regime: land

94. For an Annex III activity, where the instance of land damage is assessed by a competent authority as coming within the scope of the ELD, then the operator is subject to the prevention and remediation requirements of the ELD. If, on the other hand, a competent authority considers that the damage does not come within the scope of the ELD, then the damage caused should be dealt with under the relevant existing legislative regime - for example, breach of an IPPC licence, illegal waste management operation, or GMO. As such, it is to be expected that liability-related actions to deal with land damage would be taken under the ELD or under domestic legislation (where these exist) but not under both sets of legislation.

95. Where the activity is an occupational activity not included in Annex III, then regardless of the significance of the damage caused to land, it does not come within the scope of the ELD and can only be dealt with under the existing legislative regime, as appropriate.

Practical Examples

96. The following examples are fictitious and are presented somewhat simplistically. They bear no resemblance to any existing companies or activities but are presented here to try to demonstrate the practical application of the ELD.

Practical Example: Annex III Activity

97. A company is operating an activity which is included in Annex III (e.g. operation of installation subject to permit in pursuance of Council Directive 96/61/EC concerning integrated pollution prevention and control) and the company has been charged with a number of offences. The company was granted an IPPC licence. The alleged offences are:
- (i) causing emissions to the atmosphere which have the potential to have adverse effects on human health and the environment;
 - (ii) causing emissions which have resulted in the killing of 35 White Fronted Geese in the neighbouring Special Protection Area;
 - (iii) exceeding the air emission limits set out in the company's IPPC licence;
 - (iv) causing an odour nuisance to the local community;
 - (v) causing pollution to the local public water supply necessitating the discontinuation of its use due to the risk to human health and the sourcing of an alternative supply by the local authority;
 - (vi) engaging in unauthorised burning of waste on site;
 - (vii) felling 200 broadleaf trees without a felling licence in a neighbouring Special Area of Conservation;
 - (viii) interfering with the course of a river which contained a known population of freshwater pearl mussel (the river in question was not designated);
 - (ix) demolition of a stone barn in which there were breeding and roosting bats; and
 - (x) failing to submit an Annual Environmental Report to the EPA.

98. The offences - damage to the protected species of White Fronted Goose (ii above) and the broadleaf trees (vii above) come within the scope of the ELD in that these species and habitats are in designated areas and are protected species and habitats for the purposes of the ELD. The damage to the freshwater pearl mussel (viii above) and the interference caused to the bats (ix above) come within the scope of the ELD in that these species and habitats are protected species and habitats for the purposes of the ELD. The water damage (v above) would also appear to come within the scope of the ELD as it appears that it could have a significant effect on human health but whether it has significantly adversely affected the ecological, chemical and/or quantitative status etc. of the water concerned would need further investigation and a competent authority would have to decide on whether the water damage caused in this instance comes within the scope of the ELD.
99. The company would not be in a position to avail of the permit defence under Article 8(4)(a) in this case as the air emission limits exceeded those set out in the company's IPPC licence (iii above) and the company would appear to have been at fault/negligent; and the felling of trees (vii above) was carried out without a licence. As such, the company would be subject to the prevention and remediation requirements of the ELD for the damage that it caused to protected species and habitats, and possibly to water.
100. In relation to the other alleged offences - (i), (iii), (iv), (vi) and (x) above, these would not come within the scope of the ELD and would be dealt with under the existing liability regimes, as appropriate.

Practical Example: Non-Annex III Activity

101. If a lorry accidentally spills milk into a river, this would cause damage to water and would be subject to the existing liability regime for water, but it would fall outside the scope of the ELD in respect of the water damage because it is not an Annex III activity. The damage that would be caused to protected species and habitats may come within the scope of the ELD, depending on whether a competent authority assesses it as such and if the operator was at fault or negligent; if it does not come within the scope of the ELD, then the damage would be subject to the existing liability regime for species and habitats.
102. A similar result would occur in the case of land damage from a non-Annex III activity which also included damage to protected species and habitats.
103. As such an occupational activity that is not listed in Annex III could cause environmental damage but would be excluded from the ELD if the operator was not at fault or negligent.

Article 4 - Exceptions

104. This Article is dealt with in Appendix 3.

Article 5 - Preventive action

105. This Article deals with an imminent threat of environmental damage and it outlines the operator's responsibilities in such situations. The powers and responsibilities of a competent authority are also outlined.

106. An operator is required to take the necessary preventive measures where an imminent threat of environmental damage occurs. While there are similar provisions in existing legislation these are not as extensive as the corresponding provisions in the ELD. It is intended to allow these regimes to operate in parallel with the ELD especially as some of these provisions apply to damage to the environment outside the scope of the ELD.

107. This Article identifies situations where a competent authority may exercise its discretion to take the preventive measures itself, where:

- (i) an operator fails to comply with its obligations to take the necessary preventive measures with or without direction from a competent authority;
- (ii) the operator cannot be identified; or
- (iii) an operator may not be required to bear the costs of preventive actions i.e. when he can prove that the environmental damage or imminent threat of such damage was caused by a third party and occurred despite the fact that appropriate safety measures were in place, or resulted from compliance with a compulsory order or instruction emanating from a public authority other than an order or instruction consequent upon an emission or incident caused by the operator's own activities (Article 8(3)).

108. Where the operator fails to comply with its obligations or where the operator cannot be identified or indeed where the operator may be insolvent and depending on the circumstances of the imminent threat of environmental damage, a competent authority, taking all relevant factors into consideration, should decide whether it should take the necessary preventive measures itself. It would seem reasonable that, in such instances, the measures required to prevent further damage would be undertaken by a competent authority. In advance of taking the necessary measures, a competent authority would inform the operator of its intentions and the financial implications for the operator.

109. As regards (iii) in paragraph 102 above, the question arises as to whether the operator is required to take the necessary preventive measures first and engage with the issue of costs afterwards or, whether the issue of costs should be considered in the first instance and prior to any preventive measures being taken. It would seem reasonable that in the interest of environmental protection that the measures required to prevent further damage should be taken by the operator first and the issue of costs should then be considered in accordance with Article 8(3). There is also the consideration that it may, in some cases, be difficult accurately to estimate the costs of the preventive measures in advance of actually taking them.

110. It is intended to transpose the ELD in accordance with Article 5.

Article 6 - Remedial action

111. This Article deals with the occurrence of environmental damage and it outlines the operator's responsibilities. The responsibility of a competent authority is also outlined.

112. In general, an operator is required to take the necessary remedial measures where environmental damage occurs.

113. This Article identifies situations where a competent authority may exercise its discretion to take the remedial measures itself, as a means of last resort, where:
- (i) an operator fails to comply with its obligations to take the necessary remedial measures with or without direction from a competent authority;
 - (ii) the operator cannot be identified; or
 - (iii) an operator may not be required to bear the costs of remedial actions i.e. when he can prove that the environmental damage or imminent threat of such damage was caused by a third party and occurred despite the fact that appropriate safety measures were in place, or resulted from compliance with a compulsory order or instruction emanating from a public authority other than an order or instruction consequent upon an emission or incident caused by the operator's own activities (Article 8(3)).
114. Where the operator fails to comply with its obligations or where the operator cannot be identified or indeed where the operator may be insolvent and depending on the circumstances of the imminent threat of environmental damage, a competent authority, taking all relevant factors into consideration should decide on whether it should take the necessary remedial actions itself. It would seem reasonable that, in such instances, emergency remedial actions to prevent further damage would be undertaken by a competent authority. In advance of taking the necessary measures, a competent authority would inform the operator of its intentions and the financial implications for the operator.
115. As regards (iii) in paragraph 108 above, the question arises as to whether the operator is required to take the necessary remedial measures first and engage with the issue of costs afterwards or, whether the issue of costs should be considered in the first instance, prior to any remedial measures being taken. In relation to the costs of remedial actions, it is noted that the operator is required to identify the potential remedial measures and submit these to a competent authority for its approval and that a competent authority is required to decide which remedial measures should be implemented in cooperation with the relevant operator (Article 7).
116. An operator could argue that some remedial actions are medium/long term and would be undertaken by the operator at a significant cost and the recovery of such costs from a third party may present difficulties. In this scenario, it would seem reasonable that the necessary remedial actions to prevent further environmental damage occurring (i.e. emergency remedial actions) should be undertaken by the operator first, and that the issue of costs and additional remediation actions in accordance with Article 7 (i.e. long-term remedial actions) should then be considered in consultation with a competent authority having regard to the financial ability and existence of the third party. In this instance, a competent authority would need to consider whether, as a last resort, a competent authority should take the necessary remedial actions itself.
117. It is intended to transpose the ELD in accordance with Article 6.

Article 7 - Determination of remedial measures

118. This Article outlines the steps to be taken to identify the appropriate remedial measures, the submission of these for approval by a competent authority and the responsibilities of a

competent authority in consulting and prioritising the remedial measures to be taken where environmental damage has occurred.

Identification of Remedial Measures

119. As outlined in Article 6, and where environmental damage has occurred, an operator is required to take the necessary remedial measures and to do so in accordance with Article 7. The potential remedial measures are required to be identified by operators in accordance with Annex II of the ELD, and submitted to a competent authority for its approval. Where a competent authority has already taken the necessary remedial measures itself, the submission of potential remedial measures by an operator would not arise.
120. Annex II of the ELD provides assistance in identifying and evaluating the most appropriate measures to remedy environmental damage. The purpose of remedial measures is to restore the natural resource (i.e. the protected species and natural habitats, water and land) and/or its services (i.e. the functions performed by a natural resource for the benefit of another natural resource or the public) to its baseline condition. Guidance is being developed at EU level in relation to this matter generally. Nonetheless, it will, in the first analysis, be for a competent authority to decide as to what remedial measures are appropriate in a particular case.

Identification of Remedial Measures: Protected Species and Natural Habitats, and Water

121. The remedying of damage to protected species and natural habitats, and water may be achieved through primary, complementary and compensatory remediation measures. In addition, the remediation should remove any significant risk of human health being adversely affected.
122. Primary remediation is about restoring the damaged natural resource and/or its services to, or towards, baseline condition; this could involve either directly restoring the natural resource and/or its services on an accelerated time frame, or through natural recovery.
123. Complementary remediation is taken when primary remediation fails (i.e. where the damaged natural resource and/or its services do not, or are not likely to, return to their baseline condition) and may be taken in association with compensatory remediation. Complementary remediation involves providing a similar level of natural resource and/or services, including, as appropriate, at an alternative site, as would have been provided if the damaged site had been returned to its baseline condition. The alternative site, where possible and appropriate, should be geographically linked to the damaged site, taking into account the interests of the affected flora and fauna.
124. Compensatory remediation is about compensating for the interim loss of the natural resource and/or its services pending recovery of that resource/service. The interim loss is that which results from the fact that the damaged natural resources and/or services are not able to perform their ecological functions or provide services to other natural resources or to the public. Compensatory remediation may consist of additional improvements to protected natural habitats and species or water at either the damaged site or at an alternative site. It does not consist of financial compensation to members of the public.

Identification of Remedial Measures: Land

125. In remediating land damage the operator is required to ensure that the relevant contaminants are removed, controlled, contained or diminished so that the contaminated land, taking account of its current use or approved future use at the time of the damage, no longer poses any significant risk of adversely affecting human health. Risk assessment procedures are required to be used for this purpose. Natural recovery, in which there is no direct human intervention in the recovery process, may also be considered in remediating land damage. There is no requirement to return the damaged land to a baseline condition or to undertake complementary or compensatory remediation.

Evaluation of Remediation Options

126. Following the submission of the potential remedial measures, a competent authority decides, in cooperation with the relevant operator, the appropriate remedial measures to be implemented and the priority for these in situations where several instances of environmental damage have occurred. Under Article 7(4), a competent authority is required to invite comments from specified persons (Article 12(1)) and persons on whose land remedial measures would be carried out and is required to take them into account.

Evaluation of Remediation Options: Protected Species and Natural Habitats, and Water

127. The appropriate remediation option to be chosen in respect of the incident of environmental damage will depend on the particular circumstances of the incident and the natural resource and/or its services affected. Each incident would need to be considered on a case by case basis by a competent authority in this context.

128. In order to choose the most appropriate remediation option, a competent authority should evaluate the options using the best available technologies and on the basis of the following criteria:

- effect of each option on public health and safety;
- cost of implementing the option;
- likelihood of success of each option;
- extent to which each option will prevent future damage, and avoid collateral damage as a result of implementing the option;
- extent to which each option is of benefit to each component of the natural resource and/or service;
- extent to which each option takes account of relevant social, economic and cultural concerns and other relevant factors specific to the locality;
- length of time it will take for the restoration of the environmental damage to be effective;
- extent to which each option achieves the restoration of site of the environmental damage;
- geographical linkage to the damaged site.

129. A competent authority may decide in certain situations that no further remedial measures should be taken where the remedial measures already taken have resulted in removing the threat of a significant risk of adversely affecting human health, water or protected species and natural habitats; and where the cost of the remedial measures that should be taken to reach baseline condition or similar level would be disproportionate to the environmental benefits to be obtained.

Evaluation of Remediation Options: Land

130. The appropriate remediation option to be chosen in respect of the incident of environmental damage will depend on the particular circumstances of the incident and extent of the damage to the land. Each incident would need to be considered on a case by case basis by a competent authority.

Transposition and Further Guidance

131. It is intended to transpose the ELD in accordance with Article 7.
132. A competent authority will be required to develop and produce guidance for operators and the public in general on the identification and evaluation of remedial measures, including the development of risk assessment procedures in the case of land damage. Such guidance should be produced, *inter alia*, having regard to the outcome of research work being conducted at EU level on methods for determining the scale of remedial measures necessary adequately to offset environmental damage.

Article 8 - Prevention and remediation costs

133. In general, the operator is required to bear the costs of preventive and remedial actions taken. Costs are defined in Article 2 as including the costs of assessing environmental damage, an imminent threat of such damage, alternatives for action as well as the administrative, legal and enforcement costs, the costs of data collection and other general costs, monitoring and supervision costs. This is intended to give effect to the 'polluter pays' principle.

Article 8(2)

134. A competent authority will incur costs in relation to preventive or remedial actions taken. It may recover these costs from the operator who has caused the damage or the imminent threat of damage. It may also decide not to recover the full costs where the expenditure required to do so would be greater than the recoverable sum or where the operator cannot be identified. This Article specifies that the costs may be recovered via security over property or other appropriate guarantees.

Article 8(3)

135. An operator is not required to bear the costs of preventive or remedial actions taken when he can prove that the environmental damage or imminent threat of such damage was caused by a third party and occurred despite the fact that appropriate safety measures were in place, or resulted from compliance with a compulsory order or instruction emanating from a public authority other than an order or instruction consequent upon an emission or incident caused by the operator's own activities.
136. Where the operator proves that a third party caused the damage, and the operator does not have a contractual relationship with that third party, the operator must be able to recover the costs from the third party. It is proposed to provide that the operator can recover the relevant costs as a simple contract debt in a court of competent jurisdiction. It is not intended that a competent authority would seek the recovery of costs from the third party on behalf of an operator.

137. As noted under Article 5 above, it would seem reasonable that, in the interest of environmental protection, preventive action should be taken first and the issue of costs should then be considered. In relation to remedial action, and as noted in the section on Article 6 above, it would seem reasonable that the necessary remedial actions (i.e. emergency remedial actions) to prevent further environmental damage occurring should be undertaken by the operator and additional remediation actions in accordance with Annex II should then be considered in consultation with a competent authority having regard to the financial ability and existence of the third party.

138. Where the operator proves that the damage resulted from compliance with a compulsory order or instruction emanating from a public authority other than an order or instruction consequent upon an emission or incident caused by the operator's own activities, arrangements should be in place to enable the operator to recover the costs of the preventive actions taken. In this instance, a competent authority or public authority would be required to reimburse the operator. If the public authority fails to do so, it is proposed to provide that the operator can recover the relevant costs as a simple contract debt in a court of competent jurisdiction.

Article 8(4)

139. This Article is one of the discretions available to Member States and is dealt with in Appendix 3.

140. It is intended to transpose the ELD in accordance with Article 8.

Article 9 - Cost allocation in cases of multiple party causation

141. This Article provides for the allocation of costs in the case of multiple party causation. In recital 22 of the ELD, it states that Member States may take account of specific situation of users of products who might not be held responsible for environmental damage in the same conditions as those producing such products, and in this case, apportionment of liability should be determined in accordance with national law.

142. Costs may be allocated on the basis of *joint and several liability* i.e. where a group of operators are liable for the costs of remediation, each member of that group is also responsible for the whole amount, irrespective of their actual contribution to the damage; or the costs may be allocated on the basis of *proportional liability*, i.e. where each operator bears a proportion of the costs that are clearly identifiable as their contribution to the damage.

143. It is intended to transpose the ELD in accordance with Article 9. Proportional liability would be a more genuine implementation of the 'polluter pays principle'. However, Irish civil liability legislation would suggest that the allocation of the prevention and remediation costs would be apportioned on the basis of joint and several liability.

Article 10 - Limitation period for recovery of costs

144. This Article provides for the initiation of cost recovery proceedings by a competent authority to be taken within 5 years from the date on which the measures have been completed or the liable operator or third party has been identified, whichever is the later.

145. The 5 year period in this Article is 1 year shorter than the limitation period for tortious damage contained within the Statutes of Limitations. The Article will be transposed in accordance with the terms of the ELD and "notwithstanding the provisions of the Statutes of Limitations".
146. Where a competent authority takes the necessary preventive or remedial measures either because the operator fails to comply with its obligations, or the operator or third party cannot be identified, a competent authority will be required meet such costs itself and may not be in a position to recover such costs.

Article 11 - Competent authority

147. Under this Article, a competent authority shall be designated to fulfil the duties provided for in the ELD and it is open to Member States to designate more than one competent authority.
148. A number of regulatory authorities are designated for existing liability regimes and these include the Environmental Protection Agency, local authorities, the Minister for the Environment, Heritage and Local Government (National Parks and Wildlife Service), Department of Communications, Energy and Natural Resources, Department of Agriculture, Fisheries and Food, Department of Transport and Marine, the Health and Safety Authority, and the Regional Fisheries Boards.
149. In order to achieve consistency, develop expertise in the ELD, provide for ease of reporting incidents by operators particularly where the incident may cut across a number of areas and regimes, provide for ease of recovery of costs it can be argued that the duties provided in the ELD are best conducted by a single competent authority rather than by multiple authorities. Were a single competent authority to be designate, it is envisaged that other regulatory authorities would be involved in supporting the competent authority and that there would be coordination undertaken by the competent authority depending on the instances of environmental damage. It is appreciated that the competent authority may not necessarily have the requisite expertise for all aspects of environmental damage covered by the ELD but support mechanisms will be established and should follow a similar approach to those in place for emergency/contingency planning. Such mechanisms should provide for fast responses to any issue raised by the competent authority including cooperating with and making information available to the competent authority.
150. A decision on the identity of the competent authority or authorities has not been taken yet. However, designation of the Environmental Protection Agency as competent authority is an option particularly in view of its expertise and other functions and duties.
151. This Article also provides that a competent authority may empower or require third parties to carry out the necessary preventive or remedial measures. This would involve either third parties operating on behalf of a competent authority to carry out the measures or third parties who caused the environmental damage carrying out the measures or indeed the third party who is the owner of the land.
152. Any decision taken by a competent authority requiring the taking of preventive or remedial measures is required to be notified immediately (*'forthwith'*) to the operator stating:
- the exact grounds on which the decision is based;

- the legal remedies available to the operator; and
- the time limits for such remedies.

153. Effectively, Article 11(4) provides a legal appeal mechanism for operators. In view of the technical issues involved in imposing preventive or remedial measures, it is considered that an appeal of a competent authority's decision should be open to review by the Courts. Judicial review is a well established legal mechanism for the High Court to exercise its supervisory function over inferior courts, administrative bodies and individuals. It is considered that a review of the procedural and substantive legality of decisions of a competent authority should be open to be considered by the High Court by way of judicial review. Such a judicial review would reflect the practice adopted in other Irish environmental legislation.

154. It is intended to transpose the ELD in accordance with Article 11.

Article 12 - Request for Action

155. This Article defines *natural or legal persons* as those affected or likely to be affected by environmental damage, having a sufficient interest in environmental decision making or alleging the impairment of a right. The Article outlines the steps to be taken where the natural or legal person requests a competent authority to take action. A competent authority's subsequent decision and reasons for it are required to be outlined to the requester. A review of this decision making process is dealt with in Article 13.

156. Environmental non-governmental organisations, local authorities and other agencies are considered to be those who have a sufficient interest in environmental decision making. For the purposes of this Article, persons and organisations who are affected by environmental damage and environmental NGOs are considered to be the "natural or legal persons". Environmental NGOs will be defined consistent with section 10 of the Planning and Development (Strategic Infrastructure) Act 2006.

157. Article 12(5) is one of the discretions available to Member States and is dealt with in Appendix 3.

158. It is intended to transpose the ELD in accordance with Article 12.

Article 13 - Review procedures

159. The persons referred to in Article 12 (natural or legal persons affected by environmental damage and environmental NGOs) are required to have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of decisions, acts or failure to act of a competent authority.

160. As noted under Article 11 above, it should be open to the High Court to undertake a review of a competent authority's decisions by way of judicial review. It is intended to transpose the ELD in accordance with Article 13.

Article 14 - Financial security

161. Member States are required to take measures to encourage the development of financial security instruments and markets by the appropriate economic and financial operators including financial mechanisms in case of insolvency with the aim of enabling operators to use financial guarantees to cover their responsibilities.
162. Under existing Irish legislation for IPPC and waste licensing systems, licensees are required to have the necessary financial provision (bond or other form of security) in place so as adequately to discharge its financial commitments or liabilities. For this purpose, the EPA have recently introduced a system whereby licensees are required to conduct an Environmental Liability Risk Assessment as a condition of their licence. The EPA developed and published *Guidance on Environmental Liability Risk Assessment, Residuals Management Plans and Financial Provision* in which the assessment and establishment of financial provision is examined and consideration is given to appropriate financial instruments.
163. The development of appropriate financial security instruments to satisfy the ELD will be considered and explored with the financial security industry in light of progress with and experience gained from, the operation of the IPPC and waste licensing systems and the practical implementation of the EPA's Guidance document, and developments generally at European level on financial security instruments. In the final analysis, it will be for the financial/insurance industry to underwrite risk of environmental damage should they choose to do so.

Article 15 - Cooperation between Member States

164. This Article provides for cooperation between Member States with a view to ensuring that preventive action and where necessary, remedial action is taken in respect of any environmental damage. This cooperation has particular importance with respect to Northern Ireland, in particular, given that certain river basin districts are shared between the two jurisdictions. Arrangements for cooperation between the respective competent authorities will be put in place. (*The Northern Ireland authorities are being consulted on this Screening RIA.*)

Article 16 - Relationship with national law

165. This Article allows Member States to maintain or adopt more stringent provisions in relation to preventing and remedying environmental damage, including the identification of additional activities to be subject to prevention and remediation requirements and identification of additional responsible parties. It is not intended to widen the scope of the ELD beyond the minimum requirements at this time.
166. This Article also provides that Member States may prohibit double recovery of costs where double recovery could occur as a result of action both by a competent authority under the ELD and by a person whose property is affected by environmental damage. Personal injury, damage to goods and property, and economic loss is not covered by the ELD and Article 3(3) states that the ELD does not give private parties a right of compensation as a consequence of environmental damage or of an imminent threat of such damage. It is considered, therefore, that any action taken by a person whose property is affected by environmental damage is a

separate matter and should not interfere with any action taken by a competent authority under the ELD.

Article 17 - Temporal application

167. This Article outlines the time limits for application of the ELD. The "operative date" of the ELD in Ireland will be the date on which the transposing instrument comes into effect. As such, environmental damage caused by an emission, event or incident which takes place prior to the "operative date" is not covered by the ELD; and environmental damage caused by an emission, event or incident which takes place after the "operative date" but which has derived from a specific activity which took place and finished before the "operative date" is not covered by the ELD.

168. In addition, the Article provides that environmental damage caused by an emission, event or incident which took place 30 years previously is not covered by the ELD. This means that an operator would not be considered liable for an incident which caused environmental damage which has only come to light where that incident occurred more than 30 years previously.

169. It is intended to transpose the ELD in accordance with Article 17.

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Appendix 5

Enforcement

1. The ELD seeks to implement the 'polluter pays' principle mainly by making operators responsible for environmental damage that they cause. It is the costs of remediating environmental damage which operators, ultimately, will have to defray which should serve both to give life to the 'polluter pays' principle and to discourage the occurrence of environmental damage in the first instance. But the ELD is about other issues beyond simply the cost of damage; it also seeks to prevent damage occurring. For this reason, it seems necessary to provide for a mechanism to compel the relevant persons to take action - mainly at the behest of a competent authority - and to do so within reasonable timeframes which will prevent damage occurring or prevent it becoming more severe. Accordingly, it is proposed to provide for a system of criminal sanctions; these are considered necessary to give full effect to the Directive even though the ELD does not make specific provision for these.
2. In addition, situations may arise where a third party, be it a land owner or otherwise, may not cooperate with, or facilitate, the taking of preventive or remedial measures so as to prevent or remediate environmental damage for the purposes of the ELD. In such instances, a competent authority may have to compel such individuals to take particular action.
3. In relation to operators, it is considered that in a minority of cases operators may not take action as required by the ELD's competent authority. In those circumstances criminal sanctions will need to be available to a competent authority to ensure that operators take the required actions and do so within a reasonable time. The specific actions which would attract enforcement sanctions are failure by an operator to:
 - take the necessary preventive measures (Articles 5(1) and 5(3)(b));
 - inform a competent authority of all aspects of an imminent threat of environmental damage (Article 5(2));
 - provide information on any imminent threat of environmental damage or in suspected cases of such an imminent threat (Article 5(3)(a));
 - follow instructions on the necessary preventive measures to be taken (Article 5(3)(c));
 - inform a competent authority of an occurrence of environmental damage (Article 6(1));
 - take all practicable steps to immediately control, contain, remove or otherwise manage the relevant contaminants and/or any other damage factors (Article 6(1)(a));
 - take the necessary remedial measures (Articles 6(1)(b) and 6(2)(c));
 - provide supplementary information on any damage that has occurred (Article 6(2)(a));
 - follow instructions on the practicable steps to be taken to immediately control, contain, remove or otherwise manage the relevant contaminants and/or any other damage factors (Article 6(2)(b));
 - follow instructions on the necessary remedial measures to be taken (Article 6(2)(d));
 - identify potential remedial measures in accordance with Annex II (Article 7(1)); and
 - submit potential remedial measures to a competent authority (Article 7(1)).
4. Land owners may be required to cooperate with a competent authority and operators in implementing remedial measures. However, situations may arise where a land owner may refuse a competent authority and/or an operator access to their land which could impede the

implementation of such measures. It is intended that a competent authority be given powers to ensure access and implementation of remedial measures, as appropriate.

5. The enforcement powers to be given to a competent authority could include seeking fines and custodial sentences through prosecutions, statutory enforcement notices and court orders (either requiring that certain things be done or restraining certain things from being done). The transposing instrument will outline the relevant actions and appropriate sanctions and it will provide for penalties to be effective, proportionate and dissuasive.

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