

BirdLife International's and WWF's five key recommendations for the Environmental Liability Directive

- 1** Polluters – not taxpayers – should pay for environmental damage. Polluters must **not** escape liability for damage they cause to the environment because:
 - they have a permit or because they have complied with applicable laws
 - according to the state of scientific and technical knowledge at the time, an activity or emission was believed to be safe for the environment.
- 2** Liability insurance or dedicated funds must be made **compulsory**.
- 3** Liability must be imposed for damage to **all** species and habitats protected under international, EU and Member State legislation.
- 4** All directly affected individuals and public interest groups whose objective is to protect the environment must be given the right to take **direct** legal action in the case of imminent damage to the environment.
- 5** The list of regulated activities must cover **all** activities that pose a danger to the environment, in particular transport, mining, pesticides, GMOs, radiation, oil pollution and the use of all dangerous substances and activities.

Making the polluter pay

THE ENVIRONMENTAL LIABILITY DIRECTIVE

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Why do we need an EU environmental liability regime?

Environmental liability aims to make those who damage the environment legally and financially accountable for that damage.

Currently, liability for environmental damage in many Member States depends on ownership and the monetary value of property. Damage to 'un-owned' natural resources, such as fish stocks or woodland, is not usually covered by national rules on environmental liability.

This means that society at large, ie the taxpayer, pays for environmental damage and operators of environmentally damaging activities do not need to consider fully the environmental costs they cause. However, a legal regime on environmental liability should ensure that the operator – not the taxpayer – bears the costs of cleaning up after environmental damage has occurred. In this way, operators are given a strong financial incentive to avoid environmental damage.

The Commission's proposed Directive

Major environmental disasters – for example, the devastation of the Doñana wetlands in Spain and the *Erika* oil spill along the coast of Brittany – led the European Commission to adopt a proposal for a European Parliament and Council Directive on 'environmental liability with regard to the prevention and remedying of environmental damage' in January 2002 (COM 2002/17).

The aim of the proposed Directive is to achieve the prevention and remedying of environmental damage by implementing the 'polluter pays principle' through an environmental liability regime.

Fulfilling the basic aim of the Directive is only possible if the underlying regime is **robust and effective**. To be so, BirdLife International and WWF believe that it must comply with the following fundamental principles of environmental liability:

- Strict liability
- Compulsory financial security
- The comprehensive protection of all biodiversity protected under international, EU and Member State legislation
- Adequate access to justice
- The inclusion of all activities that may damage the environment.



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How should the Directive deal with the fundamental principles of environmental liability?

1 How should the Directive make polluters liable for environmental damage?

Strict liability means that operators are liable for environmental damage they cause regardless of whether they are at fault. The Commission's proposed Directive claims to be based on this principle. However, this is not strictly true. It derogates from the imposition of strict liability on operators in a number of ways, the most important of these being the introduction of grounds for exempting operators from liability, in particular in relation to the 'compliance with a permit' and the use of 'state of the art' technology and knowledge.

Under the proposed Directive, if an operator causes environmental damage but the emission or event that caused the damage is allowed in applicable laws and regulations, or in the permit or authorisation issued to the operator, then the operator is exempt – the 'compliance with permit' exemption. Similarly, where an activity or emission was believed to be safe for the environment according to the available scientific and technical knowledge at the time, the operator will not be liable for the damage – the 'state of the art' exemption.

Both exemptions counteract environmental principles enshrined in existing national legislation and directly oppose the 'polluter pays' principle. Environmental damage will not be prevented or remedied unless it is at the taxpayer's expense. Any incentive to prevent environmental damage is effectively eliminated.



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Recommendation 1

Polluters – not taxpayers – should pay for environmental damage. Polluters must **not** escape liability for damage they cause to the environment because:

- they have a permit or they have complied with applicable laws
- according to the state of scientific and technical knowledge at the time, an activity or emission was believed to be safe for the environment.

The Directive must not allow these exemptions, or any other exemptions or defences with similar objectives. The principle of strict liability must be effectively implemented.



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2 Should the Directive require operators to take out insurance?

The proposed Directive does not provide for compulsory financial security, in the form of insurance or a type of dedicated fund, for example. This, combined with the fact that the Directive requires public authorities to remedy environmental damage where the operator is not financially able to do so, creates a situation where the operator can evade liability if he or she is insolvent. Responsibility to clean up the damage would then lie with the public authority, and the financial burden would fall on the taxpayer. This is a disincentive for the operator to prevent environmental damage (see the case study as an example).

Moreover, if the operator has gone into liquidation, a lack of funds and resources may prevent public authorities from restoring environmental damage. Again, this would mean that the aims of the Directive would not be achieved.

Another critical issue is that the development of different insurance schemes across the EU could lead to a distortion of competition, as differing standards would apply in each Member State. Instead of having an incentive to develop more environmentally-friendly methods of operation, operators could forum shop to carry out their activities in the countries with the weakest insurance requirements or where there is no insurance requirement.

Recommendation 2

Liability insurance or dedicated funds must be made **compulsory**.

3 Protecting biodiversity: what should be covered?

The proposed Directive only applies to certain protected areas and species. It does not fully cover species protected under national legislation. It restricts biodiversity at EU level to the Annexes of the Wild Birds and Habitats Directives and omits areas and species that are protected under international legislation. On a generous estimation, only 20% of the EU's biodiversity would be covered. Soil contamination is only included where it creates serious harm to health.

This means that biodiversity outside the restricted scope of the Directive would not be protected. Consequently, there would be neither obligation, nor incentive, on operators to prevent or remedy environmental damage that occurs to such biodiversity. Damage would either not be remedied, or would be cleaned up at public cost. To ensure real, comprehensive protection of biodiversity and to achieve the prevention and remedying of environmental damage, it is crucial that all biodiversity protected under international, EU and Member State legislation is covered by the Directive.



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Recommendation 3

Liability must be imposed for damage to **all** species and habitats protected under international, EU and Member State legislation.

4 Who should be given access to justice?

The proposed Directive gives third parties – individuals who are directly affected and public interest groups whose objective is to protect the environment – only weak and indirect rights of ensuring that the Directive’s principles are met. They may only request the competent authority to take action and bring judicial review proceedings in relation to the competent authority’s decision. This normally entails lengthy delays. Public authorities, on the other hand, may face a conflict of interest, and be over-burdened by the demands of the regime. Against this background, and given that this Directive is very much linked to the public interest, the aims of the Directive could be more effectively achieved by allowing public interest groups and individuals to take action directly against polluters in the case of imminent damage to the environment.

Recommendation 4

All directly affected individuals and public interest groups whose objective is to protect the environment must be given the right to take **direct** legal action in the case of imminent damage to the environment.

5 Which activities should the Directive cover?

The proposed Directive introduces two systems of liability: one for environmental damage caused by a closed list of ‘dangerous activities’ and another, weaker, one for non-listed activities. In practice, however, Birdlife and WWF consider that it is the **actual** damage caused to the environment rather than the arbitrary nature of the activity causing the damage that is at stake. The current list of occupational activities covered by the Directive must be widened. The list should include all activities covered by EU environmental instruments eg the Seveso Directives (82/501/EEC and 96/82/EC) or the EIA Directive (97/11/EC).

The Directive should also include all activities related to transport, mining, GMOs, radiation and oil pollution, and all dangerous substances and activities which are not governed by EU instruments but which are hazardous to the environment.

Recommendation 5

The list of regulated activities must cover **all** activities that pose a danger to the environment, in particular transport, mining, pesticides, GMOs, radiation, oil pollution and the use of all dangerous substances and activities.



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(EPA)

Conclusion

The Commission's proposed Environmental Liability Directive is a step in the right direction. However, it must be significantly amended to comply with the five fundamental principles of environmental liability.

BirdLife International and WWF call on the Council of Ministers and the European Parliament to improve the Commission's proposed Directive, according to Recommendations 1-5.

These fundamental principles must be implemented, if the EU environmental liability regime is to meet its aim of preventing environmental damage and safeguarding Europe's precious natural heritage.



Case study – the Doñana mine spill, Spain

On 25 April 1998, Doñana, in south-west Spain, suffered a disaster that shocked the world. The tailings lagoon at the Aznalcollar zinc mine, north of the national park, burst, flooding the Guadiamar river with five million cubic metres of acidic water contaminated with heavy metals. Tens of thousands of birds were affected in this internationally-important conservation area, home to many species protected under EU nature conservation legislation, such as the Avocet, Purple Heron and Spanish Imperial Eagle.

The total costs of cleaning up the damage are estimated to be in excess of €180 million – of which around €72 million has come from EU funds. SEO/BirdLife demanded criminal liability from the responsible parties, and payment of compensation for the environmental damage caused. However, after more than two years, the charges were dismissed, without determining liability. BirdLife International and WWF believe that polluters – not taxpayers – should be made fully liable for the costs related to such environmental disasters.



Richard Brooks (RSPB Images)