



## **The European Directive on Environmental Liability – “Polluter Pays”: from principle to practice?**

*An Environmental NGO commentary on the Environmental  
Liability Directive:  
its adoption at EU level and what it means for the future*

July 2004

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### **Acknowledgements:**

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All views expressed in this document are those of the authors and do not necessarily reflect those of the organisations mentioned above.

### **Introduction:**

On 21 April 2004, the Council of Ministers and the European Parliament adopted the European Directive (2004/35/CE) on Environmental Liability with regard to the Prevention and Remedy of Environmental Damage. It entered into force at EU level on 30 April 2004 (date of publication in the Official Journal – L 143/56 – 30.4.2004) and Member States have until 30 April 2007 to bring these provisions into force at national level.

The need for a European environmental liability regime became apparent through a number of environmental disasters, starting with the accident at the industrial site Seveso in Italy in July 1976. First proposals for a European liability regime were made in 1989, followed by a Commission Green paper in 1993, a White Paper in 2000 and the weaker than expected Commission proposal in January 2002. The Directive, therefore, is a very important piece of European environmental legislation, which has been long awaited. In its development process it gave rise to much controversy and conflict. The final text bears the mark of this.

BirdLife International, EEB, Friends of the Earth, Greenpeace, and WWF (from now on called the “NGOs”) worked together during the entire European legislative process to strengthen key provisions of the Directive and to fight against attempts to weaken further the European Commission’s draft proposal.

The final text leaves options open for Member States in several key aspects of the Directive. This means that there is potential for stakeholders at national level to further influence in a substantial way the application of the Directive. NGOs at national level should be particularly vigilant as the debates on the transposition of the Directive into national legal systems could open the door to attempts to weaken existing national legislation or case law. In addition, Article 18 of the Directive

provides for the possible review of the Directive in certain areas on the basis of Member States' reports on implementation and Commission proposals by 2014. The potential revision presents opportunities and threats.

This document gives an overview of the key issues the NGOs tried to influence and an insight into the later phases of negotiations of the Directive. We hope that this document will help towards a better understanding of some of the compromise positions reflected in the provisions of the Directive and will provide useful background information for NGOs who will follow the transposition of the Directive at national level.

In view of the forthcoming transposition of the Directive into national laws, we would like in particular to draw attention on the one hand, to issues that could be used to weaken existing national legislation or case law and on the other hand to possibilities to use the options left open to Member States to go beyond the minimum standard set by the Directive.

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## ***I Timeline***

- 23 January 2002: publication of Commission's proposal for a Directive on Environmental Liability with regard to the Prevention and Remedy of Environmental Damage (COM (2002)17 final)
- July 2002: European Parliament votes in plenary session on conflict of competence between Environment and Legal Affairs Committee
- 4 March 2003: 1<sup>st</sup> Environment Council meeting under the Greek Presidency
- 29 April 2003: Vote in European Parliament Legal Affairs Committee
- 14 May 2003: European Parliament First Reading vote
- 13 June 2003: Political Agreement in Environment Council (Greek Presidency)
- 17 December 2003: Second Reading vote in the European Parliament
- 31 March 2004: Parliament's third reading vote of the Directive to adopt conciliation text
- 19 April 2004: Last plenary session of European Parliament
- 21 April 2004: Council and Parliament adopt the Directive
- 1 May 2004: 10 new countries join the EU



## II. How does the Directive work?

The Directive has two fundamental goals: the **prevention** and **remedying** of environmental damage. It aims to achieve these by applying the “polluter pays principle” and making businesses that damage the environment legally and financially accountable for that damage. Unlike existing laws in this area, which mainly depend on ownership and the monetary value of property, the Directive also covers biodiversity damage.

In principle, the Directive obliges “operators” of “occupational activities<sup>1</sup>” to prevent or to remedy environmental damage they cause or are likely to cause. Environmental damage could be to water, soil or biodiversity<sup>2</sup>. The rules on when operators are liable for the specific types of damage are complex:

- Only operators of a specified list of dangerous occupational activities<sup>3</sup> are caught in relation to the *entire* range of environmental damage.
- In those cases liability is “strict” which means operators are liable irrespective of whether or not they are at fault<sup>4</sup>.
- All operators (i.e. not only those caught by Annex III activities) can be liable for biodiversity (but not water and soil) damage, but only if they have been at fault.

Consequently, if an operator of an activity not listed in Annex III causes biodiversity damage without being at fault, or if he causes soil or water damage, he will not be caught by the Directive.

A variety of standard defences/exceptions from liability are available to operators. In addition, as a response to criticisms of a proposed clause exempting polluters from liability completely if they operated in “compliance with permit” (the so-called “compliance with permit” exemption) or if their activities were considered safe according to the state of scientific and technical knowledge at the time (the so-called *iclast-minpti hybri a proposwadd TDluded, 105 0 lia(ter or not*

### **III. Insight into the adoption process**

Sustained political unwillingness on the part of some Member States to proceed with environmental liability legislation meant that it took over 10 years before the Commission proposal was published. Under severe pressure from national governments and industry, many ideas and principles the Commission had introduced in earlier drafts of this Directive and in the Green and White Papers (See *Common Comments on the Commission Working Paper – BirdLife, WWF, FoE, EEB 13 September 2001*) were dropped completely or weakened by the time of the actual Commission proposal. The introduction of the “compliance with permit” and “state of the art” exemptions is just one example of many. According to an unofficial statement by one Commission official, 95% of lobbyists making representations to the Commission on the Directive were from trade and industry. This did not change once the Directive was debated in the European Parliament. Nevertheless, on a number of occasions, political leadership from some Member States and European Parliamentarians, and joint advocacy work by NGOs and local authorities, prevented an outcome that would have made the Directive completely ineffective.

#### **1. The Commission proposal: a sudden weakening of the Commission stance (See: *Press release 19 December 2001*)**

The Commission’s proposal for a Directive on Environmental liability with regard to the prevention and remedying of environmental damage (COM (2002) 17 final) was published on 23 January 2002. After numerous environmental disasters left unclear whether and how the relevant sites could be restored and who would pay for the restoration measures, the European Commission at last published a legislative proposal to try to make the “polluter-pays” and “prevention” principles a reality. However, the proposal was far weaker in a number of crucial aspects than previous Commission documents had indicated it would be.

##### **a) From the White Paper to the Working Document**

Following on from the consultation on the White Paper on Environmental Liability (COM (2000) 66 final), published on 9 February 2000, the Environment Directorate General of the Commission released on 25 July 2001 a working paper which set out the principles of the proposed future regime. The NGOs welcomed the decision of the Commission to go ahead with the long awaited Directive - proposed to be called at that time “on prevention and restoration of Significant Environmental Damage” - but listed a series of shortcomings that seriously undermined the whole regime. (See *Common Comments on the Commission Working Paper – BirdLife, WWF, FoE, EEB 13 September 2001*). These concerned:

- The fact that the Working document provided for two different liability regimes (one based on strict liability and one based on fault-based liability) depending on the type of activity involved and the type of damage caused ;
- the way different types of damage were defined and the way in which too many qualifying conditions (“thresholds”) were introduced before the regime would in fact apply;

- the temporal cut-off point for liability (limitation of liability) and ways in which historical damage (i.e. past damage) should be dealt with;
- the introduction of personal liability in relation to directors or other “legal” persons in control of the activity and the introduction of lender liability; the failure to include adequate provisions to alleviate the “burden of proof”, i.e. the burden of proving environmental liability on the part of the relevant polluter
- the fact that tiered access to justice was envisaged for affected persons and environmental NGOs;
- the way in which financial security was dealt with.

b) Final sacrifices for a draft legislative proposal

The legislative proposal published in January 2002 was weakened further. The most striking setback was the introduction of the “state of the art” and “compliance with permit” exemptions in the final stages of consideration within the Commission. Since in previous instances the Directorate General for Environment had made clear its support for a strict liability regime with a limited number of defences as a pre-condition for achieving the Directive’s objectives, the NGOs were astonished to read in the final published version that non-negligent operators who had complied with “a permit” or “applicable laws and regulations” or who had operated according to the “state of scientific knowledge” at the time were to be exempt from liability. In addition, the provisions on financial security had been further diluted by no longer making it possible for Member States’ to “require that insurance or other forms of financial security [should] cover operators who are potentially liable under the Directive”.

Environmental NGOs BirdLife International, EEB, Friends of the Earth, Greenpeace and WWF however still felt that it was important to be involved in the adoption process in the European Parliament and the Council to avoid further watering down of the text and where possible to redress key provisions. While some countries already had quite comprehensive environment liability systems in place, in particular in relation to soil and water pollution, e.g. Sweden, Germany and the UK, this new European framework directive would probably be regarded as the standard for legislation to be introduced in other countries, like Spain and Portugal. Also it would be the basis for new legislation in relation to damage to biodiversity in most, if not all, Member States. In addition, the debates on the text also served as an opportunity to raise awareness in the European Parliament and in the media on the need to create effective incentives to prevent environmental damage and to effectively remedy such damage. This was dramatically confirmed by the devastating Prestige oil spill off the Spanish and French coasts and the discovery of the serious soil and air contamination resulting from the activities of the Metaleurop plant in northern France.

Given their very limited resources the NGOs decided to focus on the following five priorities:

## Exceptions/defences (Article 9(1)(c) and (d) - now Article 8.4)

<b>Issue</b>	<p>The Environmental Liability Directive claims to be a “strict liability” regime intended to create a strong incentive to operate as safely as possible and to prevent environmental damage, as well as ensuring that damage is remedied by the person who causes it and not at the tax payer’s expense (i.e. making the polluter pay). The most serious of the Directive’s derogations from the principle of strict liability is the introduction of “compliance with permit” and “state of the art” considerations as a reason for enabling Member States to release operators from all clean-up costs. According to the relevant provisions operators who have complied with certain permits or who operated according to the state of scientific and technical knowledge at the time, can be exempted from paying for the remedial measures. The introduction of “compliance with permit” <b>and</b> “state of the art” considerations in this way directly opposes the “polluter pays” principle. As a consequence, there is a very real danger that environmental damage will be remedied at the taxpayer’s expense or not at all.</p> <p>The Commission proposal exempts from liability non-negligent operators who operated in compliance with permit or according to the “state of the art”.</p>
<b>NGO objective</b>	<p>To delete Article 9(1)(c) and (d) which exempts operators from liability - in order to avoid that polluters escaping from liability under such broad exemptions or defences.</p>

## Financial security (Article 16 - now Article 14)

<b>Issue</b>	<p>From an environmental point of view the crucial test as to the effectiveness of this Directive is twofold:</p> <ol style="list-style-type: none"> <li>1. Does the Directive create a strong incentive to prevent environmental damage in the first place?</li> <li>2. When environmental damage is caused, is it effectively remedied?</li> </ol> <p>Strong rules on financial security are necessary to answer both questions in the affirmative. An obligation to have some kind of financial security cover, be it through insurance, dedicated funds or another mechanism, would create a strong incentive to operate in an environmentally friendly fashion, thus preventing environmental damage. In the case of insurance, for example, premiums and operating requirements set by insurers, would achieve this. In addition, where an operator does cause environmental damage, financial security cover would guarantee that the damage is remedied. In the absence of proper rules making the state responsible for remedying environmental damage where the polluter does not or cannot do so (“subsidiary state responsibility”), this is especially important.</p> <p>The Commission proposal only contains a vague exhortation on Member States to encourage the development of financial security instruments and markets.</p>
<b>NGO objective</b>	<p>To make financial security compulsory under the Directive.</p>

## Definition of biodiversity (Article 2(1)(2) - now Article 2(1)(3))

<b>Issue</b>	<p>As seen above, the Directive covers damage to water, soil and biodiversity. The particular value of this Directive, in contrast to other liability regimes, is that it protects biodiversity. This is the one area where the Directive goes further than any national laws and could make a real difference to environmental protection. Therefore, it is very important that as much wildlife as possible is protected, or, more realistically, as much vulnerable wildlife as possible.</p> <p>The Commission proposal was restricted to species and habitats protected by certain restricted annexes of the Birds and Habitats Directives (basically only on Natura 2000 sites).</p>
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<b>NGO objective</b>	To cover all protected sites and species.
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**Restriction of scope (in terms of activities covered in order for strict liability to apply)  
(Article 3 and Annex I - now Article 3 and Annex III)**

<b>Issue</b>	In order to guarantee that the Directive is effective in meeting its twin aims, it is crucial that all entities that may cause environmental damage are caught. In addition, liability should be strict (see above). We have already seen that one of the crucial benefits of this Directive is the way in which it widens liability rules to extend to biodiversity damage. However, both the Commission proposal and the final text of the Directive restrict the application of strict liability principles to a, in the NGO's view, restricted list of dangerous activities. Fault-based liability is to apply to all occupational activities in relation to biodiversity damage. This is unfortunate as it weakens some of the positive impact this Directive might have had on biodiversity protection.
<b>NGO objective</b>	To introduce strict liability in relation to all occupational activities as regards all environmental damage (including biodiversity damage).

**Access to justice (Article 14 and 15 - now Article 12 and 13)**

<b>Issue</b>	<p>This Directive, rather like the contaminated land regime in the UK, is an administrative law system, i.e. it is the competent authority that enforces the regime. However, the competent authority will in many cases be the same as the permitting authority, and it is the body that may ultimately take any preventive or remedial measures. This may cause a conflict of interest and may over-burden the relevant authorities.</p> <p>Giving interested third parties rights in relation to enforcing the Directive could help remedy some of these problems. Traditionally, NGOs have limited rights of judicial review (or similar actions) and it can be hard to establish a sufficient interest/right of standing. Other ways in which NGOs could get more directly involved in making sure that the Directive is complied with and enforced were on the table in the</p>
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	<p>development of the final text and some were introduced, for example the right to request the authority to take action.</p> <p>The Commission proposal gives specialist NGOs the right to:</p> <ul style="list-style-type: none"> <li>• request the competent authority to take action</li> <li>• bring judicial review proceedings.</li> </ul>
<b>NGO objective</b>	Specialised NGOs to have right to bring action in court against operators in cases of imminent threat of environmental damage.

We however also addressed other issues that emerged in the Council debates:

**Subsidiary state responsibility (Article 6 - now Articles 5(3)(d) and (4) and 6(2)(d) and (3))**

<b>Issue</b>	Especially with weak financial security provisions, it is important, from an environmental point of view, that environmental liability laws should provide for a fall-back solution for environmental restoration if a polluter cannot be identified or cannot pay for clean-up costs (e.g. because of insolvency). In such cases, it should be the State that bears the responsibility for remedying the damage. This is called “subsidiary state responsibility”.  The Commission proposal provides for subsidiary state responsibility in certain cases.
<b>NGO objective</b>	To maintain Commission’s status quo.

**Relation with certain international Conventions (Article 3(3) and (4) - now Article 4(2), (3) and (4) and Article 18)**

<b>Issue</b>	<p>There are a number of international Conventions that deal with liability for oil pollution and nuclear damage, as well as the limitation of liability in relation to inland and maritime navigation accidents. The oil and nuclear conventions are much narrower than the Directive in the way in which the environment is protected through liability rules. For example, they do not cover biodiversity damage. The Conventions on Limitation of Liability set limits on the liability in relation to shipping accidents that, if applied to the Directive, could mean that great portions of environmental damage caused by a shipping accident would not be remedied.</p> <p>The Commission proposal completely excludes liability in any cases covered by the relevant international nuclear and oil pollution Conventions, but it does not mention the Conventions on Limitation of Liability (this was added in the Council's Common Position).</p>
<b>NGO objective</b>	Directive to apply in cases where the international Conventions do not bite (especially relevant to biodiversity damage and damage caused by nuclear and GMOs activities) and where Conventions are not ratified.

**Damage caused by GMOs (Annex I - now Article 18(3)(b) and Annex III)**

<b>Issue</b>	<p>Calls for the introduction of a liability regime in relation to concerns about the safety of GM technologies and GMOs lead to EU institutions promising to introduce such a regime. The Environmental Liability Directive applies to operators subject to the Contained Use and Deliberate Release Directives in relation to GMOs and is being treated by the EU institutions as satisfying the demands for a GM liability regime. However, it does not cover some major areas of concern in relation to GM safety and liability, such as cross-pollination etc.</p>
<b>NGO objective</b>	All GM activities to be covered by the Directive.

## 2. First Reading vote in the European Parliament

### a) Committee conflicts

The start of work on the Directive in the European Parliament was considerably delayed due to a conflict of competence between two Committees: the Environment, Public Health and Consumer Protection Committee (the “Environment Committee”) and the Legal Affairs and Internal Market Committee (the “Legal Affairs Committee”).

The Environment Committee was initially allocated the report, but this was subject to challenge by the Legal Affairs Committee. The Legal Affairs Committee, which had taken the lead on consideration of the White Paper, stated that it was within the Committee’s remit to consider issues of legal liability. The Environment Committee believed that it should lead on the Directive, as the Directive was an entirely new instrument to tackle environmental damage, based on Article 175 of the Treaty (the environmental protection article). The dispute was referred to three of the Parliament’s Vice-Presidents, who supported the Environment Committee’s claim to the Directive. However, the Conference of Group Presidents did not endorse this decision. As the two bodies could not agree, the question of Committee competence was referred to the Parliament as a whole in July 2002. For the first time in the Parliament’s history, Members of the European Parliament voted on an issue of Committee competence, and, by a very slim margin, they referred the dossier to the Legal Affairs Committee.

### **The Environment Committee**

The Environment Committee was however invited to prepare an “Opinion” to the Legal Affairs Committee, under the “reinforced Hughes procedure” (Rule 162 bis of the Rules of Procedure of the European Parliament), which allowed the Committee to prepare amendments to be voted in the Legal Affairs Committee or sent directly to the Parliament’s Plenary, depending on their content. Mr Mihail Papayannakis MEP (Greece, European United Left/Nordic Green Left) was nominated “Draftsman” for the Committee.

The Environment Committee voted Mr Papayannakis’ report and amendments from other Members in January 2003. More than two hundred amendments were tabled. Overall, the Environment Committee greatly improved the original Commission proposal, by adopting amendments to delete the “compliance with permit” and “state of the art” exemptions, introducing requirements for financial security and extending the definition of “biodiversity”.

### **The Legal Affairs Committee**

The Legal Affairs Committee nominated Mr Toine Manders MEP (The Netherlands, European Liberal Democrat Reformist) as their “Rapporteur”. Mr Manders produced 23 amendments. His proposal to include Article 95, the internal market article, as an additional legal basis for the Directive created significant concerns for the NGOs.

This would have required the harmonisation of all environmental liability laws in the Member States to the same minimum level required by the Directive, and would have constrained the ability of Member States to adopt laws going beyond the minimum requirements laid down by the Directive. Since the Directive was significantly less stringent than almost all national environmental clean-up laws already in force, particularly the “compliance with permit” and “state of the art” exemptions, the Directive would have led to a “dumbing down” of existing environmental liability rules in the Member States.

Other proposals included a “tree-fee” per passenger on intercontinental flights leaving from Europe to fund the compensation costs for diffuse pollution by planting vegetation, the request for the Commission to introduce a voluntary Environment Risk Management system (known as “ERM”) for SMEs as a tool to prevent environmental damage and a cap on liability in the form of a “flex-max” system. Mr Manders also brought forward a compromise proposal on the “compliance with permit” and “state of the art” exemptions, reducing them from full, automatic exemptions to “mitigating factors”.

In total, 303 amendments were tabled in the Legal Affairs Committee. Several of these amendments, notably those tabled by Mr Bill Miller MEP and Ms Evelyn Gebhardt MEP from the Party of European Socialists, and Ms Heidi Hautala MEP and Mr Neil MacCormick MEP from the Greens/EFA group, sought to improve the environmental effectiveness of the Directive, particularly as regards the “compliance with permit” and “state of the art” exceptions and financial security. However, many of the amendments tabled by Committee members sought to weaken the Directive even further, particularly those introducing an additional exemption from liability for “good agriculture and forestry practice”, restricting the definition of “biodiversity” and undermining important concepts such as “compensatory restoration”. What emerged from the Legal Affairs Committee vote on 29 April 2003 was an instrument that was not only ineffective from an environmental perspective, but also posed a significant threat to existing environmental laws.

b) First Reading vote

The considerable weakening of the Directive by the Legal Affairs Committee inspired a cross-party coalition of MEPs to prepare a package of compromise amendments on the key issues: the exemptions, financial security, the definition of “biodiversity” and the coverage of activities. These amendments, signed by Members from almost all the political groups, were presented to the plenary vote on 14 May 2003.

The lobbying activity in advance of the vote was intense, from industry, environmental NGOs, local authorities, Member States and farmers’ associations.

The outcome of the First Reading vote was, overall, a victory for the Environment Committee:

Issue	NGO preferred outcome	First Reading outcome	Analysis
<b>Exemptions Art 9(1)(c) and (d)</b>	Deletion of Article 9(1)(c) and (d)	Article 9(1)(c) and (d) deleted, but “compliance with permit” and “state of the art” considerations to be retained as mitigating factors when determining level of responsibility and financial compensation – with some complicating factors, one of which could allow “compliance with permit” to give rise to complete exemption in limited circumstances.	A qualified success.  This is better than Commission proposal, but does not go as far as NGOs original demands.
<b>Financial security Art 16</b>	Mandatory financial security	Mandatory financial security for Annex I activities phased-in over a number of years according to the type of activity. Member States to have discretion whether to introduce exemption for low-risk activities. Provision for Commission review as regards potential minimum thresholds.	A positive outcome.  From an NGO point of view a phase-in of financial security requirements is acceptable as long as there will be mandatory financial security at a defined future date. The restriction to Annex I activities and possible future restrictions due to Commission review are slightly disappointing.
<b>Biodiversity definition Article 2(1)(2)</b>	To cover all protected sites and species	All species and protected sites they live in and all habitats protected under EU law and all habitats and species not covered by EU law but by equivalent national legislation are	Best possible outcome.  In line with NGOs request.

Issue	NGO preferred outcome	First Reading outcome	Analysis
		covered by Directive.	
<b>Scope</b> <b>Article 3 and Annex I</b>	Strict liability in relation to all occupational activities as regards all environmental damage (including biodiversity damage)	Strict liability in relation to all environmental damage for Annex I activities.  Negligent liability for biodiversity damage for first five years, then negligent liability for all environmental damage.	Qualified success.  Because of the complexity of cross-references between Articles etc., the best possible outcome, which would have been strict liability in relation to all environmental damage for all activities, was prevented by the failure to remove Article 8, which introduces fault-based liability in relation to Article 3(2), which contains the 5 year wording.
<b>Access to justice</b> <b>Article 14 and 15</b>	Specialised NGOs to have right to bring action in court against operators in cases of imminent threat of environmental damage.	Qualified entities to have right to bring action in court against operators in cases of imminent threat of environmental damage	Best possible outcome.
<b>Subsidiary state responsibility</b> <b>Article 6</b>	Preservation of Commission position	Weakened provision in relation to subsidiary state responsibility – competent authority only has to take measures in the “exercise” of their “duty of assessment”	Not good, but not as bad as final outcome.
<b>International</b>	Directive to apply in cases where the international	Directive to apply in cases where	Good outcome.

Issue	NGO preferred outcome	First Reading outcome	Analysis
<b>Conventions</b> <b>Article 3(3) and 3(4)</b>	Conventions do not bite and where Conventions are not ratified/in force.	<p>Conventions not ratified/not in force.</p> <p>Commission, within 5 years, to conduct gap analysis and, if appropriate, make proposals for Directive to apply to Conventions where the Conventions do not apply.</p>	
<b>GMOs</b> <b>Annex I</b>	All GM activities to be covered by Directive.	<p>New Article 18a introduced which attempts to impose a duty on the Commission to propose additional legislation on liability for GM damage.</p>	<p>Good outcome.</p> <p>Even though NGOs realised this could not be a binding obligation, this clause would have the function of an official acknowledgment that the Directive does not cover GM damage in a satisfactory way and that additional legislation is necessary.</p>

### 3 Council negotiations and common position

Work in the Council on the proposed Directive started under the Spanish Presidency (Jan-June 2002). Achieving some progress in the negotiations towards the adoption of a political agreement was key for the Spanish representatives as legislation in this field at national level was also in preparation. Spain faced a major ecological disaster in 1998 with the Aznalcollar/Boliden toxic waste mining spill in the Doñana wetlands.

The Spanish Presidency took some constructive steps to improve the text proposed by the Commission. This concerned in particular:

- the scope of the Directive;
- the exemptions relating to “compliance with permit” and “state of the art”;
- the possibility of a mandatory financial security system.

Progress on the proposed Directive was less significant under the Danish Presidency, as other issues, such as the World Summit on Sustainable Development, were given priority. Momentum was regained in January 2003 under the leadership of the Greek Presidency. The Greek government had stated that it hoped that the Council would reach a political agreement by the end of its Presidency in June 2003. This timing was key to allow enough time for a Second Reading in the European Parliament and to complete a possible conciliation process between the Parliament and the Council before the end of the Parliament's legislative term in April 2004.

#### a) The last six months of negotiations to reach a Common Position: the Greek Presidency

The Greek Presidency suggested a number of compromise proposals as regards the “compliance with permit” and “state of the art” exemptions, as well as the financial security system. It was suggested that “compliance with permit” and “state of the art” should be treated as “mitigating factors” to be taken into account by national authorities when allocating clean-up costs. However, a number of Member States were unwilling to accept a compromise along these lines, and, indeed, in some cases, made the exemptions “red-line” issues for the negotiations.

*See – joint press release in view of Environment Council meeting 4 March 2003, letter to the Permanent representation and letter to national governments*

As regards the financial security system, the Greek Presidency proposed a phased-in system in acknowledgment of the arguments put forward by the insurance sector and some Member States that the market would not be ready to provide financial security products by the date of entry into force of the Directive. The proposal referred to two lists of activities for which “Member States shall ensure that operators shall use appropriate insurance or other forms of financial security to cover their responsibilities under the Directive” within respectively three and six years from the date of entry into force of the Directive.

Negotiations in the Council were difficult – all the more so as the vote in the Legal Affairs Committee of the Parliament continued to be postponed.

The Committee of Permanent Representatives to the Council could not reach common ground in relation to a number of issues and many key points were still left open for Ministers to find a solution to at the last Environment Council meeting of the Greek Presidency on 13 June 2003:

- financial security
- “state of the art” and “compliance with permit” exemptions
- subsidiary state responsibility.

Two other points were still on the agenda at the request of a minority of delegations:

- the scope of the proposal: while a small number of delegations would have liked to see the scope of the proposal extended to all types of activities without distinction, one delegation wanted to restrict its scope to include only those activities mentioned in Annex I of Directive 96/61/EC, and two delegations wanted to ensure that the proposal would effectively cover damage caused by nuclear activities and GMOs;
- the definition of protected species and habitats: some delegations insisted on limiting the scope of biodiversity damage to European protected habitats, excluding protected species when they are not within those areas.

Late on 13 June the Council spokesperson announced that the Environment Ministers had finally managed to reach a political agreement on key items of the Directive but had not adopted a complete Common Position yet. Detailed work was to be completed by COREPER (Committee of the Permanent Representatives to the EU). The Common Position was finally adopted at the Environment Council in September 2003 under the Irish Presidency.

The positions agreed were as follows:

- No mandatory financial security an issue on which the UK had struck an alliance with France, Italy and Ireland, leaving no chance of success for the Greek compromise solution.
- “Compliance with permit” and “state of the art” exemptions to be converted to so-called “mitigating factors” - This was an improvement compared to the Commission’s text because it shifted the burden of proof to the operator and allowed Member States discretion on how to implement it .
- Biodiversity scope: a range of EU protected species are covered, whether or not the damage occurs on Natura 2000 sites – the coverage of nationally protected areas and whetherliajetw too

is difficult to get amendments passed at Second Reading at the best of times, as an absolute majority - over 50% of the European Parliament, so at least 314 votes - is needed to carry through an amendment. This is not possible without cross-party support. Unfortunately, such cross-party support to improve the Directive from an environmental point of view was lacking in relation to most of the suggested amendments, due to a number of factors:

- the Legal Affairs Committee and not the Environment Committee was the lead committee (see above);
- the lack of agreement on a number of issues within the Legal Affairs Committee;
- sustained industry lobbying efforts against recommendations to make the Directive more robust;
- sustained pressure from certain national governments against recommendations to strengthen the Directive.

However, for similar reasons, this situation also meant that it would be impossible for most of the more “industry-friendly” amendments to be adopted.

Consequently, the European Parliament only adopted four amendments at the Second Reading vote on 17 December 2003. Of these, two were positive from an NGO point of view (although one of these was subsequently given up in the conciliation process) and the other two were not significant.

## **5. Conciliation and final adoption of the text**

By the time the conciliation procedures got underway, not much remained to be gained from an environmental point of view, without the potential loss of the whole Directive. Therefore, our lobbying efforts at this stage were fairly limited. In the end, the Council and the Parliament agreed on:

- a slightly improved paragraph on mandatory financial security;
- a marginal improvement in relation to the review of the application of the Conventions on Limitation of Liability;
- a marginal weakening of already weak provisions on subsidiary state responsibility;
- a relatively unimportant amendment in relation to the international oil pollution conventions.

**The Parliament’s Third Reading of the Directive, to adopt the conciliation text, took place on 31 March 2004. Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage was published in the Official Journal of the European Union at the end of April.**

**Member States are required to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 30 April 2007.**

## IV **Comments on final text**

The Directive in its present state does contain some improvements and will introduce liability for damage to biodiversity, which has not so far existed to the same extent in any Member State.

Issue	Positive Aspects	Negative Aspects
Exemptions - Article 8(4)	<ul style="list-style-type: none"> <li>Improvement on Commission proposal.</li> <li>Member States can decide not to introduce the clause at all - making operators strictly liable for all environmental damage they cause – the best solution from an environmental point of view.</li> <li>The wording is probably vague enough for Member States to interpret in such a way as to be able to introduce sensible laws on mitigation which allow a reduction of an appropriate part of the clean-up costs if the operator has complied with the relevant permits or operated according to the “state of the art” - the operator would not necessarily have to be absolved from the full costs in every case.</li> <li>The burden of proof is on the operator to “demonstrate” that he was not negligent/at fault. This means that where an operator has caused environmental damage, there should be a presumption of negligence/fault. Disproving this assumption could potentially be difficult, depending also on the standard of proof that Member States require (but see below).</li> <li>In relation to “state of the art”, the burden of proof is on the operator to “demonstrate” that the</li> </ul>	<ul style="list-style-type: none"> <li>The wording of this clause is still <i>very unsatisfactory</i>. All Member States who have been in favour of keeping the “state of the art” and “compliance with permit” exemptions as in the Commission proposal, as well as all other States who do not want to (unilaterally) introduce more stringent laws, are given the possibility of effectively re-introducing the exemptions. Although operators will still be legally liable for environmental damage they cause, this means nothing if they are automatically absolved from paying for any of the costs of the necessary remedial actions if they have complied with a permit or operated according to the “state of the art”. Under the agreed wording, that could happen.</li> <li>Especially in connection with the weakened provisions on subsidiary state responsibility, the result of this may be that neither the polluter, nor the state, pay for environmental damage, leaving the damage un-remedied.</li> <li>If implemented and interpreted restrictively, this provision could lead to a direct or indirect weakening of national laws in relation to environmental liability (which are generally based on strict liability rules and</li> </ul>

Issue	Positive Aspects	Negative Aspects
	<p>emission/activity was considered safe according to “state of the art” knowledge at the time. This may be quite hard to prove (again – subject to considerations in relation to burden of proof).</p> <ul style="list-style-type: none"> <li>• In relation to “compliance with permit”, the very wide provisions as regards compliance with applicable laws, which were included in the Commission proposal, have been removed.</li> <li>• “Compliance with permit” considerations only apply to Annex III activities (.</li> <li>• The costs of preventive measures are not subject to these provisions;</li> </ul>	<p>do not include “compliance with permit” or “state of the art” exemptions or mitigating factors).</p> <ul style="list-style-type: none"> <li>• The Directive uses the word “demonstrate” instead of “prove” in relation to the burden of proof to be imposed on the operator. This adds to the confusion surrounding this clause, as it could lead to a lesser than normal legal burden of proof being introduced.</li> </ul>
<b>Financial security – Article 14</b>	<ul style="list-style-type: none"> <li>• Had the wording of the Commission proposal survived, the Directive would have failed to satisfy the two fundamental effectiveness tests described in relation to financial security in the body of the text above.</li> <li>• Although the final text still encourages the development of the relevant markets (a very weak provision), it does go slightly further by requiring the Commission, within 6 years from entry into force of the Directive, to submit proposals for a “system of harmonised mandatory financial security”, but only if “appropriate” and having carried out an “extended” impact assessment, including a cost benefit analysis. Again, this is not the strongest of wording, but at least it shows that a mandatory financial security system is the ultimate aim of the Directive and, even though it is subject to caveats,</li> </ul>	<ul style="list-style-type: none"> <li>• In view of the Commission’s historic position on financial security, it is dubious whether it will be in favour of a mandatory system. The existence of all the caveats does not help, although the Commission’s declaration on the final wording adopted in conciliation proceedings between the Parliament and the Council is encouraging.</li> <li>• From an environmental point of view it would have been preferable not to include in the Commission’s review the possibility of a ceiling for the financial guarantee and the possibility of the exclusion of low risk activities.</li> <li>• The Commission review requirement in this Article is too weak. The Commission’s review is not made dependent on receiving national reports on type and results of measures taken by governments to encourage markets to develop. However, any</li> </ul>

Issue	Positive Aspects	Negative Aspects
	<p>the word “shall” is used.</p> <ul style="list-style-type: none"> <li>The provision relating to the introduction of a mandatory security system does not appear to be limited to Annex III activities.</li> </ul>	<p>Commission report that is not based on national information will have no sound practical basis. Article 18 and Annex VI do not impose an obligation on Member States to report on these issues either (although it is made optional). Therefore, there is not enough pressure on national governments to take the necessary measures.</p> <ul style="list-style-type: none"> <li>Some of the Commission review requirements in relation to financial security only refer to Annex III activities. However, even if the Commission’s recommendations should only extend to Annex III activities, the review should examine the wider issues, including all environmental damage (including biodiversity damage) and all occupational activities.</li> </ul>
<b>Biodiversity definition – Article 2(1)(3)</b>	<ul style="list-style-type: none"> <li>The final text of the Directive is a vast improvement on the Commission proposal and, although not quite as wide as our preferred outcome, it covers all important biodiversity which would usefully benefit from liability provisions under this Directive. Introducing a mandatory requirement to include equivalent national legislation would not necessarily add that much to the most “relevant” biodiversity. However, by giving Member States the option to include equivalent national legislation, a good balance is struck, as Member States wishing to go beyond the Habitats and Birds Directive can do so, but no disincentive for the further national designation of protected species/habitats is created.</li> <li>The final text undoes the discrepancies created by th</li> </ul>	<p><u>Caveat:</u></p> <ul style="list-style-type: none"> <li>The application of the Directive in relation to protected species and habitats is subject to Commission review, a fact that may lead to further improvement, but could also lead to a future weakening of the Directive.</li> </ul>

Issue	Positive Aspects	Negative Aspects
	Commission proposal's definition of "conservation status" with that of the Habitats Directive.	
<b>Scope – Article 3/ Annex III</b>	N/A	<ul style="list-style-type: none"> <li>Disappointing result, in particular from the point of view of biodiversity damage. Liability for biodiversity damage is the one area where this Directive goes further than any national laws and could therefore make a real difference to environmental protection. However, by restricting strict liability to a list of prescribed activities and by introducing fault-based liability for damage caused by other activities, the positive impact of this Directive on biodiversity protection is severely weakened.</li> </ul> <p><u>Caveat:</u></p> <ul style="list-style-type: none"> <li>Again, the contents of Annex III are subject to Commission review.</li> </ul>
<b>Subsidiary state responsibility – Art 5(3) and 5(4) and 6(2) and 6(3)</b>	N/A	<ul style="list-style-type: none"> <li>This is a substantial weakening of the Commission proposal, which provides for subsidiary state responsibility. Fundamentally, the Directive imposes no obligation at all on Member States to remedy environmental damage where the operator cannot/does not do so himself. The Directive merely says that the “competent authority” <i>may</i> itself take the relevant measures. However, as seen above, this creates a potential conflict.</li> </ul>

Issue	Positive Aspects	Negative Aspects
<b>Access to justice - Art 12 and 13</b>	<ul style="list-style-type: none"> <li>Some additional rights for NGOS</li> </ul>	<ul style="list-style-type: none"> <li>Member States have the discretion to take away these rights in the case of imminent threat of damage (Art 12(5)), which is when such rights would be most useful to NGOs and most beneficial to the protection of the environment.</li> </ul>
<b>International Conventions – Art 4(2), (3) and (4) and Art 18</b>	<ul style="list-style-type: none"> <li>Review of this provision is intended.</li> </ul>	<ul style="list-style-type: none"> <li>The inclusion of the two Conventions on Limitation of Liability is not good. Although many of the instances in which these Conventions apply, would not be caught by the Directive, there is a very general provision in both of the Conventions that could mean that environmental damage caused by a navigation accident (whether inland or maritime) could be effectively excluded from the operation of the Directive.</li> <li>The review provision is very vague, more concrete wording would have been preferable.</li> </ul>
<b>GMOs - Art 18(3)(b) and Annex III</b>	N/A	<ul style="list-style-type: none"> <li>This Directive is not a satisfactory liability scheme for GMOs.</li> </ul>
<b>Other</b>	N/A	<ul style="list-style-type: none"> <li>The Directive has the potential to weaken national laws on contaminated land and possibly water pollution</li> </ul>



## V. Conclusion

As has become clear in the preceding pages, the development of this Directive was fraught - from the start. Because of the sensitivity and the potential economic impacts of its subject matter, the political pressures which came to bear on law makers in relation to this Directive were and will continue to be intense, so intense that for the first time in the European Parliament's history, a vote was taken on which should be the lead Committee!

A number of Member States asserted very strong and sustained pressure from the start in order to weaken the Directive from an environmental point of view in relation to all the important issues, in particular the “compliance with permit” and “state of the art” exemptions, mandatory financial security and subsidiary state responsibility.

As a consequence, the Directive started with a much weaker Commission proposal than expected and pressure to weaken it further was maintained throughout the process.

The final provisions of the Environmental Liability Directive are weak and are by no means ideal from an environmental point of view. However, given the political pressures, NGO lobbying at EU level was successful in preventing a catastrophic piece of legislation being passed, one which would not only have been weak in itself, but which could have had a severe impact on national laws on environmental liability..

However, the prospect is not necessarily gloomy. Looking to the future, **everything** will depend on how the Member States implement the Directive into national laws and how the Commission carries out its reviews. If sensible, pro-environment options are chosen, then the Directive may yet prove to be a valuable instrument for environmental protection.

For example, Member States can choose:

- not to introduce “compliance with permit” and “state of the art” as mitigating factors to exempt companies from liability;
- to interpret the provisions on subsidiary state responsibility widely;
- not to dis-apply the additional rights given to NGOs under the Directive in relation to a threat of imminent environmental damage.

After all, Member States are always entitled to make (or keep) their environmental liability laws more stringent than the provisions of the Directive (see Article 16 of the Directive).

In addition, there is potential for the Commission to use its review obligations as opportunities to improve the Directive by:

- introducing proposals for mandatory financial security;
- dealing effectively with the problems in relation to the international Conventions on oil pollution, nuclear damage and limitation of liability;
- strengthening the provisions on scope and possibly on biodiversity.

However, there is a great danger in a number of Member States that these potentially positive opportunities will not be taken. It is up to NGOs to get to know this Directive well, so that they can:

- use the rights they are given by the Directive in relation to enforcement, especially in relation to damage to protected species and natural habitats;
- lobby their national governments in relation to the sensible implementation of the Directive into national law (as above);
- lobby their national governments to prevent a weakening of existing national laws on environmental liability through the direct or indirect effects of the Directive.

Sandy Luk, Victoria Phillips and Sandra Jen  
30 July 2004

## VI. Annexes

### Annex I

#### Guide to the Directive's provisions

##### 1. What is the Directive on Environmental Liability all about?

The Directive has two fundamental goals: the **prevention** and **remedying** of environmental damage. It aims to achieve this by applying the “polluter pays principle” and making businesses, which damage the environment, legally and financially accountable for that damage. Unlike existing laws in this area, which mainly depend on ownership and the monetary value of property, the Directive also covers biodiversity damage. The Directive does not give private parties a right of compensation as a consequence of environmental damage or of an imminent threat of environmental damage (Article 3(3)).

##### 2 How does the Directive work?

###### Q1: When does the Directive apply?

**A:** The Directive applies if an “operator” of an “occupational activity” causes or gives rise to an immediate threat of causing environmental damage. In such a case, the operator must prevent or remedy the environmental damage, as appropriate and/or bear the costs of the relevant preventive or remedial actions taken (Article 8) – subject to certain exceptions (see below).

###### Q2: What qualifies as environmental damage?

**A:** Environmental damage is damage to protected species and natural habitats, water damage and land damage (Article 2(1)):

- Damage to protected species and natural habitats is “any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species”. There are certain exceptions in relation to actions that were authorised by the relevant authorities under the Habitats and Wild Birds Directives or under equivalent national legislation, and there are additional rules for assessing the “significance of such [adverse] effects” (Article 2(1)(a) and Annex I).
- Water damage is “any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in the [Water Framework] Directive 2000/60/EC, of the waters concerned”. Adverse effects where Article 4(7) of the Water Framework Directive applies are excluded (Article 2(1)(b)).
- Land damage 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, or substances, preparations, organisms or micro-organisms (Article 2(1)(c)).

Damage is basically a direct or indirect measurable adverse change (Article 2(2)).

*Note:*

1. *The thresholds which apply before an environmental incident amounts to “environmental damage” under this Directive are set at a very high level – a measurable adverse change that has significant adverse effects - and will probably prove difficult to satisfy in practice.*
2. *The application of the Directive in relation to protected species and habitats is subject to Commission review under Article 18.*

### **Q3: What are the temporal restrictions on the application of the Directive?**

**A:** Member States must implement the Directive into their national laws within three years after the Directive has entered into force (Article 19(1), i.e. by 30 April 2007).

The Directive only applies to damage caused after the cut-off date by which Member State have to implement the Directive, i.e. after 30 April 2007, although the details of this rule are slightly more complex. There is also a “long-stop” period of 30 years after which operators are no longer liable for damage they have caused (both Article 17). There is no cap on liability, but there may be a cap on financial security requirements in future (see below).

In addition, there is a rule stating that competent authorities must recover the costs of any measures it has taken under the Directive from the operator within five years from the date on which those measures have been completed or the liable operator, or third party, has been identified, whichever is the later (Article 10).

### **Q4: To whom does the Directive apply?**

**A:** It applies to “operators” of “occupational activities”. An operator is any person (including legal persons) who operates or controls the “occupational activity” or to whom decisive economic power over the technical functioning of the activity has been delegated, including permit holders and similar persons. (Article 2(6)). Fundamentally this means businesses. However, the definition of “occupational activity” also refers to “economic activities” and “undertakings”, including non-profit making organisations, which means that NGOs can also be affected by the Directive, for example in relation to biodiversity damage.

### **Q5: When are operators liable for different types of environmental damage?**

**A:** The rules on when operators are liable for the specific types of damage are complex (Article 3(1)):

- Only operators of a specified list of dangerous activities (Annex III activities – see below) are caught in relation to the *entire* range of environmental damage.

- In those cases liability is “strict” which means operators are liable irrespective of whether or not they are at fault (subject to “mitigating factors” considerations below).
- All operators (i.e. not only restricted to the Annex III activities) can be liable for biodiversity damage, but only if they have been at fault.

Consequently, if an operator of an un-listed activity causes biodiversity damage without being at fault, or if he causes soil or water damage, he will not be caught by the Directive.

The list of dangerous activities is contained in Annex III of the Directive and consists of a list of EU Directives and Regulations on dangerous activities, e.g. in relation to IPPC, waste, water pollution, water abstraction, dangerous substances, air pollution, GMOs.

*Note:*

1. *Activities in relation to nuclear energy, activities referred to in the Seveso Directives and activities governed by the Environmental Impact Assessment Directive are not specifically covered by the Directive.*
2. *The application of the Directive to environmental damage caused by GMOs is subject to Commission review, as are the Community instruments that may be eligible for incorporation into Annex I.(Article 18).*

#### **Q6: What happens if several operators have contributed to the environmental damage?**

**A:** Where several parties have contributed to the environmental damage, costs are allocated in line with the relevant Member State’s rules on apportionment of liability (Article 9).

#### **Q7: Are there provisions relating to cases of cross-border damage?**

**A:** There is an obligation on Member States to co-operate and exchange information in such cases and Member States have a right to report the relevant damage to the Commission and the other Member State concerned, as well as to make recommendations for the adoption of the necessary preventive or remedial measures. Also, it may seek to recover the costs it has incurred in relation to any such measures (Article 15).

#### **Q8: Are there any exceptions from liability?**

A variety of standard defences/exceptions from liability are available to operators, e.g. war, act of God, national defence (Article 4(1)). 3<sup>rd</sup> party interference and compulsory orders can lead to an exemption from the costs of remedial actions (Article 8(3)). Also, the Directive does not apply to diffuse pollution (Article 4(5)).

In addition, the Directive does not apply to environmental damage:

- Arising from an incident covered by a number of international oil pollution conventions if they are in force in the Member State concerned (Article 4(2));

- Caused by activities covered by certain international treaties on nuclear damage (irrespective of whether the treaties are in force or not) (Article 4(4)).

Also, the Directive is without prejudice to operators' rights to limit their liability under international Conventions governing the limitation of liability for claims arising out of maritime and inland shipping accidents (Article 4(3)).

However, one of the most crucial new rules in this liability regime from an environmental point of view is the introduction of a potentially dangerous new hybrid clause in relation to “compliance with permit” and “state of the art”, which is all but nominally an exemption, but has been described as a “mitigating factors” clause (see below).

*Note: All the rules in relation to international Conventions are subject to future Commission review (Article 18).*

**Q9: What are the rules in relation to “compliance with permit” and “state of the art”?**

**A:** According to the relevant provisions, Member States can choose to absolve operators from bearing *any* of the costs of remedial actions, if:

- the environmental damage was caused by an emission or event subject to any permits given under the measures listed in Annex III; or
- the environmental damage was caused by an emission or activity which was not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time; and
- the operator demonstrates he was not at fault or negligent (all Article 8(4)).

**Q10: Why is the implementation of Article 8(4) so important?**

**A:** As already seen, the Environmental Liability Directive has the twin goals of preventing and remedying environmental damage through the application of the “polluter pays principle”. To achieve this, the Directive claims to create a “strict liability” regime. This should mean that operators who cause environmental damage are liable regardless of whether they are at fault, thereby creating a strong incentive to operate as safely as possible and to prevent environmental damage, but also ensuring that damage is remedied by the person who causes it and not at the tax payer’s expense (i.e. making the polluter pay). However, the Directive derogates from the principle of strict liability in several important aspects. The most serious of these is the introduction of “compliance with permit” and “state of the art” considerations as a reason for enabling Member States to release operators from all clean-up costs. The fact that operators who have complied with certain permits or who operated according to the state of scientific and technical knowledge at the time, can be exempted from paying for the remedial measures directly opposes the “polluter pays” principle. As a consequence, there is a very real danger that environmental damage will be remedied at the taxpayer’s expense or not at all. In addition, there is a real possibility that this clause will weaken national laws on liability, either directly or indirectly.

However, Member States can decide not to introduce the clause at all - making operators strictly liable for all environmental damage they cause – the best solution

from an environmental point of view. In addition, the wording is probably vague enough for Member States to interpret in such a way as to be able to introduce sensible laws on mitigation which allow a reduction of an appropriate part of the clean-up costs if the operator has complied with the relevant permits or operated according to the “state of the art” - the operator would not necessarily have to be absolved from the full costs in every case.

Therefore, the wording of the national implementing legislation will be absolutely crucial in relation to this Article.

**Q11: What is the “competent authority” and is it the competent authority that enforces the provisions of the Directive?**

**A:** The competent authority is an authority designated by each Member State to take action against polluters and enforce this Directive (Article 11). The rules governing the kind of action the authority can ask the operator to take are set out in Article 5 (preventive action) and Articles 6 and 7 (remedial action).

The Directive also gives directly affected individuals and NGOs promoting environmental protection the right to request the competent authority to take action in cases of environmental damage and to be informed about the authority's decision on such a request. However, Member States have the discretion not to give NGOs such rights in cases of imminent threat of damage (i.e. damage prevention) (Article 12).

NGOs also have a right of judicial review of decisions of the authority (Article 13).

**Q12: What happens if the responsible operator cannot be identified, does not carry out or is not required to bear the cost of preventive/remedial measures?**

**A:** The provisions here are confused, but appear to state that where the operator has not complied with the competent authority's requests for action, or he cannot be identified or is not required to bear the costs under the Directive:

- in cases of threatened damage, the authority may itself take preventive measures (Article 5(4));
- where the environmental damage has already taken place, the authority may itself take remedial measures *only as a last resort* (Article 6(3)).

However, in both cases the Directive also says (Article 5(3)(d) and 6(2)(e)) that the authority may take remedial/preventive measures *at any time*. This creates a potential conflict between the two provisions.

**Q13: How does the Directive aim to ensure that operators can pay for any required restoration measures?**

**A:** The Directive asks Member States to encourage the development of financial security instruments and markets (Article 14(1)).

In addition the Commission must present a report on:

- the effectiveness of the Directive in terms of actual remediation of environmental damage;
- the availability at reasonable costs and the conditions of insurance and other types of financial security for Annex III activities;
- the possibility of a gradual approach [to introducing a financial security system];
- the possibility of a ceiling for the financial guarantee;
- the possibility of the exclusion of low risk activities (all Article 14(2)).

#### **Q14: What is the importance of an effective system of financial security?**

**A:** From an environmental point of view the crucial test as to the effectiveness of this Directive is twofold:

- Does the Directive create a strong incentive to prevent environmental damage in the first place?
- When environmental damage is caused, is it effectively remedied?

Strong rules on financial security are necessary to answer both questions in the affirmative. An obligation to have some kind of financial security cover, be it through insurance, dedicated funds or another mechanism, would create a strong incentive to operate in an environmentally friendly fashion, thus preventing environmental damage. In the case of insurance, for example, premiums and operating requirements set by insurers, would achieve this. In addition, where an operator does cause environmental damage, financial security cover would guarantee that the damage is remedied. In the absence of proper rules making the state responsible for remedying environmental damage where the polluter does not or cannot do so (“subsidiary state responsibility”), this is especially important.

Given the current weakness of the financial security provisions, the Commission review process is especially important. This should be one of the main focuses of ongoing lobbying in this field.

#### **Q15: How does the restoration regime under the Directive work and does the Directive allow punitive damages?**

**A:** It is the **restoration** of environmental damage that is one of the main aims of the Directive. This means that the fundamental aim is to **return the damaged natural resource to or towards its baseline condition (“primary remediation”)** (Annex II, para 1(a) and 1.1.1).

If the damage cannot be fully restored, “**complementary remediation**” is to be undertaken which aims to provide a **similar level of natural resources 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 (Annex II, para 1(b) and 1.1.2).

However, the Directive also introduces the concept of “compensatory” remediation, which consists of the compensation of “interim losses”. This is to compensate for the interim loss of natural resources and services pending recovery and it will consist of additional improvements to protected natural habitats and species or water either at

the damaged site or at an alternative site. It will not consist of financial compensation to members of the public (Annex II, para 1(c) and 1.1.3).

### **3. “Open” issues**

As already noted, several issues, such as the application of the Directive in relation to biodiversity, GMOs, the relevant international Conventions and financial security have been left open for further determination at a later point through Commission review proceedings (Article 18(3)). Except in relation to financial security all review proceedings are governed by Article 18 which obliges the Commission to report on these issues ten years after entry into force of the Directive at the latest (Article 18(2)). There is also an obligation on Member States to report to the Commission on the experience gained in the application of this Directive nine years after entry into force (at the latest) (Article 18(1) and Annex VI).

## Annex 2

### Rough guide to national Government positions

This Annex is based on NGO notes taken at the public debate at the beginning and at the end of the Council meeting on 13 June. It reflects the NGOs' understanding of the short statements made by national Government representatives in that debate. It is not, and is not intended to be, a summary of the full relevant Government's official positions and it is not based on any other sources

Austria: Unwilling to support the compromise reached because the Directive would not cover damage caused by nuclear accidents (but also wanted to have clear “compliance with permit” and “state of the art” exemptions).

Belgium: Belgium supported the compromise solution.

Ireland: Similar approach to that of Austria with emphasis on the importance of avoiding negative impacts on business.

DK: Acknowledged the difficulties in finding a compromise that would also provide a robust regime but agreed to support the compromise.

France: In line with the UK, wanted to have clear “compliance with permit” and “state of the art” exemptions and no mandatory financial security. Also wanted to reduce the scope of the definition for biodiversity damage, but agreed to support the compromise.

Germany: Unwilling to support the compromise solution and argued that no Directive would be better than one that would undermine existing national standards.

NL: Referred to Dutch liability system for water and soil contamination and the existing financial security system that accompanies it - agreed to support compromise. Considered the agreement as a first step on a long path.

Spain: Spanish environment minister emphasised that Spain had been striving to include mandatory financial security, but nevertheless agreed to support the compromise.

Portugal: Agreed to support compromise but regretted that many concessions had to be made to reach it.

UK: Opposed to mandatory financial security, wanted clear “compliance with permit” and “state of the art” exemptions and supported French position regarding the definition of biodiversity damage, but agreed to support the compromise.

Poland (at that time candidate country which took part in the Council meeting and could take the floor for initial comments on each item): In line with Irish and UK position.

## Annex 3

### **Selection of NGOs position papers**

#### Contents:

Briefing for Hearing at the European Parliament - 21 May 2002

Letter to Permanent Representations - 5 June 2002

Press release WWF: Environmental Liability: “POLLUTER PAYS” Principle Must be Maintained -25 June 2002

Letter to Permanent Representations - 13 February 2003

Press release: “EU Environment Ministers must stand firm on liability Directive: Polluters have to accept their responsibilities” - 4 March 2003

Press release: “Polluters cannot be left off the hook any longer – Environment Ministers must agree on strong legislation” - 12 June 2003

Letter to Permanent Representatives - 27 May 2003

Programme of Seminar: “Polluter Pays: From Principle to Practice” – Seminar in advance of the Parliament’s Second Reading of the Environmental Liability Directive - 25 November 2003,

Media briefing on the Environmental Liability Directive “Paying for pollution” - 2 December 2003

Press release: “Stalemate on Polluter pays law” - 17 December 2003

## Briefing for Hearing at the European Parliament - 21 May 2002

### Proposal for a Directive on Environmental Liability with regard to the prevention and remedying of environmental damage COM (2002) 17 final

#### BirdLife International, EEB, Greenpeace, Friends of the Earth and WWF position

##### Introduction

Environmental Liability aims to make those who damage the environment legally accountable for that damage. In this way, operators are given a strong financial incentive to avoid environmental damage. As such, BirdLife, Greenpeace, Friends of the Earth, EEB and WWF welcome the Commission's proposed Environmental Liability Directive COM (2002) 17 as a step in the right direction.

However, the current text has a number of shortcomings that must be addressed by the European Parliament and the Council of Ministers at the next stages of the legislative process. NGOs believe significant amendments are required in order to create a robust and effective regime, based on the 'polluter pays' principle and 'strict liability'.

##### Key recommendations

BirdLife International, EEB, Greenpeace, Friends of the Earth, and WWF have the following key recommendations for improvements to the Commission text:

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(see Article 9.1(c)); or
  - because according to the state of scientific and technical knowledge at the time, an activity or emission was believed to be safe for the environment (see Article 9.1(d)).
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 individuals directly affected and all 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.

## **Reasoning**

The grounds for suggested amendments to the Commission’s proposal are as follows:

### **1. The principle of strict liability must be restored, in order to make the polluter pay.**

Strict liability means that operators are made liable for environmental damage they cause, regardless of whether or not 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, most significantly, by introducing exemptions to liability in relation to ‘compliance with a permit’ and the use of “state of the art” technology and knowledge under Article 9.1. c) and d).

Both these exemptions fundamentally undermine the ‘polluter pays’ principle, giving rise to a situation where operators may avoid liability for environmental damage they have caused, thus shifting the ultimate financial burden of restoring the environmental damage onto the taxpayer.

***Recommendation: Article 9.1(c) and (d) must be deleted so that operators do not escape liability for damage they cause to the environment because:***

- they have a permit or they have complied with applicable laws or;
- 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. Financial security – in the form of liability insurance or dedicated funds - must be made compulsory.**

Where no compulsory financial security, in the form of insurance or dedicated funds, is required, a situation may arise where an operator causing damage can evade liability if he becomes insolvent or simply has insufficient funds to pay for restoration. This was the case with the incident at Doñana. 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, undermining one of the key aims of the Directive.

Where the introduction of financial security is left up to individual Member States, the range of different schemes across the EU could lead to a distortion of competition with the application of different standards. Instead of the regime providing an incentive to develop more environmentally responsible methods of operation, operators could ‘forum shop’ in order to carry out their activities in the countries with the weakest insurance requirements or where no insurance requirements exist.

***Recommendation: Article 16 must require compulsory liability insurance or dedicated funds***

### **3. All species and habitats protected under international, EU and Member State legislation should be included within the scope of the Directive.**

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 certain parts of the Wild Birds and Habitats Directives and it omits species and areas protected under international legislation. On a generous estimation, only 20% of the biodiversity in the EU would be covered. Where damage occurs to sites or species outside these limits, it will either not be remedied, or will be cleaned up at public cost.

***Recommendation: The definition of “biodiversity” in Article 2 must be amended in order to include all species and habitats protected under international, EU and Member State legislation.***

#### **4. Interested individuals and groups should be allowed to take direct legal action against polluters.**

As a system based on the principles of public law, the proposed Directive gives third parties – individuals who are directly affected and all public interest groups whose objective it is to protect the environment – only weak and indirect rights of ensuring that the Directive is implemented. Third parties can request the competent authority to take action and bring judicial review proceedings in relation to the competent authority’s decision - a lengthy process - but they cannot take direct legal action against polluters. In some cases, public authorities may either be slow to act or simply be overburdened by the demands of the proposed regime. Allowing public interest groups and individuals to take action directly against polluters, by means of an injunction or similar legal process, in the case of imminent damage to the environment, could ensure that the aims of the Directive are more effectively achieved.

***Recommendation: Article 14 must allow individuals who are directly affected and groups whose objective is to protect the environment to take direct legal action against polluters in the case of imminent environmental damage.***

#### **5. The Directive 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.**

The proposed Directive introduces two types of liability: one for environmental damage caused by a closed list of ‘dangerous activities’; and another – weaker - one for non-listed activities. This distinction further undermines the principle of strict liability, by basing the need for restoration on the arbitrary nature of the activity causing environmental damage rather than the damage caused to the environment itself. In addition, the current list of occupational activities covered by the Directive must be widened. The list should include all activities covered by EU environmental instruments e.g. 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. In addition, provision must be made in the Directive to ensure that such a list is reviewed and updated at regular intervals, to take into account new legislation or occupational activities subsequently regarded as being dangerous.

***Recommendation: The scope of Annex I must be expanded to cover all activities that pose a danger to the environment***

**BirdLife International  
European Environmental Bureau  
Greenpeace International  
WWF – European Policy Office**

To: all Permanent Representations to the EU

Brussels, 5<sup>th</sup> June 2002

Dear Sir/Madam,

**Proposed Directive on Environmental Liability**

BirdLife, Greenpeace, EEB and WWF welcome the Commission's initiative in adopting a proposal for a Directive on Environmental Liability (COM (2002) 17) as a step in the right direction for the prevention and remediation of environmental damage. However, we believe that the proposed text must be significantly amended in order to create a robust and comprehensive regime, which effectively implements the 'polluter pays' principle, while aiming to ensure compliance with existing environmental legislation.

In light of this, we look to the work currently being undertaken in the Council to address the shortcomings in the Commission proposal. In particular BirdLife, Greenpeace, EEB and WWF wish to draw your attention to the points raised below:

1. Strict liability must apply for any environmental damage caused by activities listed under Annex I. Therefore, the "compliance with permit" and the "state of the art" exceptions currently included in the text of the proposed Directive must be to ensure that the costs of remediation are borne by those causing environmental damage. Similarly, no amended or weakened wording of these exceptions must be allowed under the regime, for example by restricting their scope or reintroducing them in the form of defences. This is fundamental to ensure the effective implementation of the "polluter pays" principle.
2. Provisions must be included in the Directive to guarantee that the competent authority can ensure the remediation of any 'orphan sites', for example where the operator who caused the damage either cannot be identified, no longer exists or has gone into liquidation. Dedicated funds, established under compulsory financial security schemes, should be put in place to ensure that the costs of remediation are not borne by taxpayers (see 6. below).
3. Liability must be imposed for damage caused to all species and habitats protected under international, EU and Member State law, covering both existing law, and any subsequent amendments, as well as relevant future legislation.
4. to ensure that all activities and products that pose a danger to the environment, in particular transport, mining, pesticides, GMO contamination, radiation, oil pollution and the use of dangerous substances and activities, are covered.
5. Liability must be imposed for any damage occurring after the date of the entry into force of the Directive, unless the operator can establish that the event causing the

damage took place prior to that date. In addition, where there is an imminent threat to the environment deriving from the operation of an activity that took place before the date of entry into force, provisions should be made to ensure that the operator undertakes appropriate measures in an attempt to avoid environmental damage occurring.

6. in the form of insurance and/or dedicated funds, must be made under the Directive to ensure that the financial means to carry out environmental remediation are available. This requirement should include the creation of a dedicated fund to ensure that the remediation cost of ‘orphan sites’ is not borne by public authorities alone.
7. The Directive must ensure that all “qualified entities” must be given the right to take direct legal action in the case of imminent damage to the environment. This direct action may take the form of an or other legal tool to  
or, failing that, at least limited.

We thank you in advance for the consideration you give to these issues. Our member/partner organisations at national level will also be in contact with your relevant ministries to discuss these issues in due course

# Press Release

25 June 2002

## Environmental Liability: 'POLLUTER PAYS' Principle Must be Maintained

Today, WWF, the conservation organization, strongly urges European Environmental Ministers, meeting for the last time under the Spanish Presidency, to learn from past environmental disasters such as the Erika oil spill in 1999 or the pollution of the Doñana basin in 1998 and to ensure that significant progress is made on the proposed Directive for the prevention or restoration of environmental damage. WWF welcomes the work of the Environment Council under the Spanish Presidency in addressing the serious shortcomings in the proposal for a Directive on environmental liability (COM (2002) 17) following its adoption by the Commission in January. However, WWF urges Denmark as forthcoming President of the European Council to build on this progress, to ensure that the proposal is significantly improved **in order to create a robust and comprehensive regime, which effectively implements the 'polluter pays' principle, as well as ensuring greater compliance with existing environmental legislation.**

In light of this, WWF looks to the Council to address the shortcomings in the Commission proposal. In particular for the regime to be effective in practice it must adhere to the 'polluter pays' principle by ensuring the following objectives are met:

- Operators causing any environmental damage as a result of those activities listed under the draft Directive must not be allowed to escape liability under broad exceptions. The "compliance with permit" and the "state of the art" exceptions currently included in the proposed Directive must be to ensure that the costs of remediation are borne by those causing environmental damage.
- Liability must be imposed for damage caused to all species and habitats protected under international, EU and Member State law, covering both existing law, and any subsequent amendments, as well as relevant future legislation.
  - in the form of insurance and/or dedicated funds, must be made under the Directive to ensure that the financial means to carry out environmental remediation are available. This requirement should include the creation of a dedicated fund to ensure that the remediation cost of 'orphan sites' (sites for which no owner can be found, or the owner is bankrupt) is not borne by public authorities alone.
- Local people and environmental groups must be given the right to take direct legal action in the case of damage or the imminent threat of damage to the environment to enable them take steps to prevent, or at least limit, it. This legal action may take the form of an injunction or other legal tool. This power is vital, given that in the case of serious damage to the environment, it is the local people and environmental groups who are first on the scene, carrying out the clean up.

**The draft Directive on environmental liability represents a unique opportunity to introduce a thorough regime for the prevention and restoration of damage to the environment throughout the EU. WWF urges the Council to respond to this challenge and work to improve the proposal to ensure that these aims can be fulfilled.**

**BirdLife International  
European Environmental Bureau  
Greenpeace European Unit  
Friends of the Earth Europe  
Seas at Risks  
WWF – European Policy Office**

To: all Permanent Representations to the EU

Brussels, 13 February 2003

Dear Sir/Madam,

**Proposed Directive on Environmental Liability (Environment Council, 4 March)**

BirdLife International, Greenpeace, EEB, Friend of the Earth Europe and WWF believe that the Directive on Environmental Liability is a vitally important piece of European legislation, which has been long awaited. We therefore welcome the priority given by the Environment Council to progress on the adoption of a political agreement on the proposed Directive on Environmental Liability (COM (2002) 17) by the end of June 2003.

In light of the work being undertaken by the Council, BirdLife, Greenpeace, EEB, FoE and WWF wish to draw your attention to the following points for some fundamental improvements to this Directive:

1. : Polluters must **not** escape liability under broad exceptions or defences:  
The ‘compliance with a permit’ and ‘state-of-the-art’ exceptions contained in the Commission proposal (Art. 9.1.c. & d) would allow many operators to escape liability for environmental damage they cause under this Directive automatically. These exceptions contradict the implementation of the ‘polluter pays’ principle, and severely weaken the regime.  
. This is fundamental to ensure that the costs of remediation are borne by those causing environmental damage and not by the taxpayers.
2. Financial security must be made under the Directive.  
Mandatory financial security is vital to ensure that the costs of environmental clean-up are not passed on to the taxpayer if the operator becomes insolvent. Financial security need not be limited to insurance; it could also include reserves, bonds, dedicated funds etc. or a combination of these. A phased implementation of these provisions could also be foreseen to allow for the progressive development of the market in financial security instruments.
3. Liability must be imposed for damage caused to all species and habitats protected under EU and Member State law, covering both existing law, and any subsequent amendments.
4. All occupational activities that may pose a danger to the environment, must be covered by the Directive. The deciding factor in determining liability for environmental damage should only be dependent on the caused to the environment, not the arbitrary nature of the activity causing the damage.

Strict liability for environmental damage (water, soil, biodiversity) should not be limited to Annex 1 activities. This type of distinction does not usually exist in national clean-up regimes. In the same way, there is no logical reason for introducing an arbitrary fault-based liability regime for biodiversity damage.

In addition, the EU environmental liability regime should apply to environmental damage caused by shipping and nuclear activities as far as such damage is not covered by international conventions.

The Directive must ensure that all “qualified entities” are given the right to take direct legal action in the case of imminent damage to the environment. Citizens’ access to justice should not be limited to judicial review. The Directive must

6. Provisions must also be included in the Directive to guarantee that the competent authority has real power to enforce the necessary preventive measures effectively and act where an operator cannot be identified, or is not required to bear the costs under the Directive. In addition, qualified entities that have lodged a request for action must be effectively kept informed of the actions taken along the process, and have the right to appeal against a competent authority's decision.

We thank you in advance for your consideration of these points. Our member/partner organisations at national level will also be in contact with your relevant ministries to discuss these issues in due course.

**BirdLife  
EEB  
Greenpeace  
Friends of the Earth  
WWF**

**Press release 4 March 2003**

## **EU Environment Ministers must stand firm on liability Directive: Polluters have to accept their responsibilities**

**Brussels, 4 March 2003**, Six leading European green organisations are calling on the EU environment ministers – meeting in Brussels today – to stand firm on the proposed Directive on environmental liability and to resist pressures from industry interests. The environmental organisations - BirdLife International, Greenpeace, the European Environmental Bureau, Friends of the Earth Europe, WWF and Seas at Risk – are concerned, that some EU Member States (1) will seek to substantially weaken the proposal under consideration. The environmentalists have appealed to Ministers to improve the weak Commission proposal, bringing forward a regime that requires polluters, rather than the general public, to pay for repairing environmental damage (2).

The key issues of concern for the environmental organisations are the exceptions envisaged for activities covered by a permit, or carried out according to ‘state-of-the-art’ technology and knowledge, provided that the damage they cause is not due to negligence or fault. According to the green groups, these exceptions should be completely deleted from the Directive, as they fundamentally undermine the liability regime by granting immunity to the vast majority of operators. None of the national environmental clean-up regimes already existing in the Member States contains such wide-ranging exceptions, and accidents such as the mine spill in 1998 would not have been covered by the regime. Furthermore, these exemptions would automatically exclude genetically modified organisms (GMOs) from the liability regime, as GMOs are expressly permitted under an EU authorisation system.

The groups are also calling on Ministers to adopt a mandatory financial security provision in the Directive, which would oblige all operators to be covered by some form of insurance or financial guarantee such as bonds, dedicated funds or reserves. They warn that this is vital to ensure that the costs of environmental repair are not passed on to the taxpayer if companies become insolvent. Sandra Jen, of WWF commented: “

The green organisations are also very concerned about a proposal made by the British and French delegations to exclude from the scope of the Directive areas and species protected under national legislation. Victoria Phillips of Birdlife international said:

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### **Notes to the Editor:**

- (1) The Greek Presidency has recently proposed a compromise text as regards the “compliance with permit” and ‘state-of-the-art’ exceptions, which would reduce these to ‘mitigating factors’ that the national competent authorities may take into account when allocating clean-up costs. However, France, UK, Austria, Portugal, and apparently also Germany, are unwilling to accept a compromise along these lines; instead, they wish to stick to ‘permit’ and ‘state-of-the-art’ exceptions based on the Commission’s original proposal..
- (2) The environmental organisations sent a letter to all member States’ Permanent Representations to the EU on 13 February, outlining six priority demands for improvements to the Directive:

: not \_\_\_\_\_ the  
‘compliance with a permit’ and ‘state-of-the-art’ exceptions contained in the Commission proposal  
(Art. 9.1.c. & d) must be completely removed.

Mandatory financial security is vital to ensure that the costs of environmental clean-up are not passed on to the taxpayer if the operator becomes insolvent.

3. Liability must be imposed for damage caused to all species and habitats protected under EU and Member State law, covering both existing law, and any subsequent amendments.

All occupational activities that may pose a danger to the environment must be covered by the Directive.

The Directive must ensure that all “qualified entities” are given the right to take direct legal action in the case of imminent damage to the environment.

Provisions must also be included in the Directive to guarantee that the competent authority has real power to enforce the necessary preventive measures effectively and act where an operator cannot be identified, or is not required to bear the costs under the Directive.

## Press Release 12 June 2003

### **POLLUTERS CANNOT BE LEFT OFF THE HOOK ANY LONGER ENVIRONMENT MINISTERS MUST AGREE ON STRONG LEGISLATION**

**Brussels, 12 June:** On the eve of a possible ‘political agreement’ on the Environmental Liability Directive at the Environment Council in Luxembourg, five leading green groups are calling on Environment Ministers to bring forward a robust new law which ensures that polluters, rather than taxpayers, pay the costs of environmental damage they cause.

BirdLife International, EEB, Friends of the Earth, Greenpeace and WWF believe that the proposed EU liability regime for environmental damage must provide a strong financial incentive for companies to avoid environmental disasters, such as the devastation of the Doñana wetlands in Spain in 1998, the pollution of the Tisza river in Hungary and Romania in 2000 and the 'Erika' and 'Prestige' oil spills.

“After years of planning for this Directive, the time has come to make the ‘polluter pays’ principle a reality. We call on Ministers to resist industry pressure and agree a regime which ensures that taxpayers no longer have to foot the bill for cleaning-up the environment”, said Victoria Phillips of BirdLife International.

“We can’t wait for another environmental disaster to have this legislation adopted. The European Parliament gave a clear signal with its vote to strengthen the Commission proposal in May. Environment Ministers must go ahead with this legislation now. European tax payers should no longer bear the costs and consequences of environmental damages caused by reckless operators.” said Sandra Jen of WWF European Policy Office.

NGOs are concerned about possible attempts to trade off on crucial elements in favour of a toothless regime and are urging support for many of the European Parliament’s First Reading amendments, in particular those seeking to delete wide-ranging exceptions for companies in ‘compliance with a permit’ or operating in accordance with ‘state-of-the-art’ technology and knowledge. These exceptions contained in the Commission’s proposed Directive would severely weaken the regime by granting immunity to the vast majority of operators. Furthermore, they would automatically exclude possible damage caused by genetically modified organisms (GMOs) from the scope of the regime, as GMOs are expressly permitted under an EU authorisation system.

The green groups also call on the Ministers to back the Parliament’s proposal to require high-risk operators to be covered by some form of financial guarantee. They believe that this is vital to ensure that if a company becomes insolvent the costs of environmental clean-up are not passed on to the public, as was the case with the Doñana mine spill which cost the taxpayer 250 million Euro to repair.

“The oil spill of the Prestige cost the European taxpayer an estimated 1 billion euros, while current regimes would only compensate these costs up to 170 million. This new legislation should make sure that companies pay the full costs of damage in the future and encourage a shift away from irresponsible and high risk practices”, said Frederic Thoma from Friends of the Earth Europe

In terms of scope, the NGOs are recommending that the Directive should cover all habitats and species protected under EU law and equivalent national legislation, in line with Parliamentary amendments.

“It is vitally important that EU Environment Ministers support a widening of the yet narrow scope of the regime in order to ensure that, in the future, environmental catastrophes such as the 1998 Aznalcóllar toxic mining spill could be prevented in the first place or properly and fully repaired” said Rosanna Micciche’ of Greenpeace.

**Notes to the Editor:**

(1) On 27 May, the five NGOs wrote to EU Permanent Representatives, urging support for the following priority recommendations with regard to the Commission's proposed Environmental Liability Directive:

**• Exceptions/defences: the broad exceptions for ‘compliance with a permit’ and operation according to ‘state-of-the-art’ technology/knowledge must be removed.**

These broad exceptions ‘compliance with a permit’ and operation according to ‘state-of-the-art’ technology/knowledge contradict the ‘polluter pays’ and ‘strict liability’ principles on which the regime is supposed to be based, as only in the worst cases of negligence would an operator be made liable for environmental damage he/she has caused.

**• Financial security: the Directive must require high-risk operators to be covered by some form of financial security (eg. insurance, bonds, letters of credit, reserves)**

The Directive must contain a provision requiring high-risk operators to be covered some form of financial guarantee, in order to ensure that environmental clean-up costs do not revert to the public purse in the case of insolvency.

**• Scope: ultimately, any occupational activity that causes environmental damage must be covered by the Directive**

We believe that the liability regime must ultimately focus on the actual environmental damage caused above the defined thresholds, not the arbitrary nature of the damaging activity. This would add equity and certainty to the operation of the Directive.

**• ‘Biodiversity’ definition: there must be the comprehensive definition of ‘biodiversity’**

We welcome Parliament's amendments to include all habitats and species protected under EU law and equivalent national legislation in the definition of ‘biodiversity’.

**• There must be adequate citizens' access to justice**

We welcome the Parliament's amendments allowing qualified NGOs and affected citizens direct access to justice in the case of an imminent threat of environmental damage.

(2) The European Parliament's First Reading vote took place on 14 May. At the First Reading, MEPs adopted amendments to improve the Directive in several key areas, eg. reduction of the ‘permit’ and ‘state-of-the-art’ exceptions to ‘mitigating factors’, a ‘phased-in’ mandatory security regime for high-risk operators, the extension of the definition of ‘biodiversity’ to all habitats and species protected under EU and national law and the automatic extension of the regime to environmental damage from ‘all occupational activities’ after five years.

(3) The Greek Presidency has proposed a compromise text as regards the “compliance with permit” and 'state-of-the-art' exceptions, which would reduce these to 'mitigating factors' that the national competent authorities may take into account when allocating clean-up costs. However, it is understood that France, UK, Austria, Portugal are unwilling to accept a compromise along these lines. Instead, they wish to stick to 'permit' and 'state-of-the-art' exceptions based on the Commission's original proposal.

Brussels, 27 May 2003

**Letter to: all Permanent Representatives to the EU**

Dear Sir/Madam

Re. Proposed Directive on Environmental Liability –  
Environment Council (13 June)

I write on behalf of BirdLife International, Greenpeace, EEB, Friends of the Earth Europe and WWF with regard to the proposed Directive on Environmental Liability (COM (2002) 17), on which a ‘political agreement’ is anticipated at the Environment Council on 13 June.

Environmental NGOs believe that this is a vitally important Directive, as it aims to implement the ‘polluter pays’ principle into EC law and create strong incentives for operators to avoid damage to protected wildlife and the wider environment (eg devastation of the wetlands, oil spill, soil contamination).

In the light of the European Parliament’s First Reading amendments, we would urge you to support the following **priority recommendations** for improvements to the proposed Directive:

- **Exceptions/defences: the broad exceptions for ‘compliance with a permit’ and ‘operation according to ‘state-of-the-art’ technology/knowledge must be removed.**

These broad exceptions ‘compliance with a permit’ and operation according to ‘state-of-the-art’ technology/knowledge contradict the ‘polluter pays’ and ‘strict liability’ principles on which the regime is supposed to be based, as only in the worst cases of negligence would an operator be made liable for environmental damage he/she has caused. Such exceptions or defences are not generally allowed in the existing regimes of EU Member States or OECD countries, and they could undermine existing national clean-up requirements if they remain.

*We welcome the European Parliament’s amendments which delete the ‘permit’ and ‘state-of-the-art’ exceptions from Article 9 and, instead, allow such issues to be taken into account as ‘mitigating factors’, on a case-by-case basis, when deciding the amount of compensation to be paid by operators, once liability has been established.*

- **Financial security: the Directive must require high-risk operators to be covered by some form of financial security (eg. insurance, bonds, letters of credit, reserves)**

The Directive must contain a provision requiring high-risk operators to be covered some form of financial guarantee, in order to ensure that environmental clean-up costs do not revert to the public purse in the case of insolvency.

*We believe that European Parliamentary amendments which seek to introduce a ‘phase-in’ approach to mandatory financial security over a period of three to six years, and exclude low risk operations from this requirement, offer a reasonable compromise solution.*

We also call on you to support the following key principles:

- **Scope: ultimately, any occupational activity that causes environmental damage must be covered by the Directive**

We believe that the liability regime must ultimately focus on the actual environmental damage caused above the defined thresholds, not the arbitrary nature of the damaging activity. This would add equity and certainty to the operation of the Directive.

We support Parliament's amendments proposing to apply the 'strict liability' regime to all occupational activities after a period of five years. Parliamentary amendments seeking to include pollution from ships and nuclear pollution in the Directive, to the extent that no liability is imposed by international conventions in relation to such damage, should also be supported.

- **'Biodiversity' definition: there must be the comprehensive definition of 'biodiversity'**

We welcome Parliament's amendments to include all habitats and species protected under EU law and equivalent national legislation in the definition of 'biodiversity'.

- **There must be adequate citizens' access to justice**

We welcome the Parliament's amendments allowing qualified NGOs and affected citizens direct access to justice in the case of an imminent threat of environmental damage.

Thank you for your attention to our views on this vital Directive. We look forward to legislation which effectively implements the principle that the 'polluter pays'.



GREENPEACE



## “POLLUTER PAYS: FROM PRINCIPLE TO PRACTICE”

### Preparatory seminar for the Parliament's Second Reading of the Environmental Liability Directive

- Hosted by Astrid Thors MEP-

Tuesday, 25 November, 14.00-17.00  
The European Parliament, A8F388

- Welcome by Astrid Thors MEP
- Introduction by Martin Rocholl, Director, Friends of the Earth Europe
- **Why a robust ‘polluter pays’ law is needed:**  
*The view of local authorities:* Margaret Wells (Chair, Birmingham City Council’s Public Protection Committee)  
*The victim’s perspective:* Mr G. Viaud (Oysterfarmers’ organisation of Marennes Oléron) (*in French, with powerpoint in English*)
- **Financial security – how it could work:**  
*The Spanish experience:* José Luis de Heras (PERM)  
*The ‘Marsh/Nera/Garrigues’ report commissioned by the Spanish government:* Julio Garcia Cobos (Senior Consultant, NERA)
- **How the current Directive compares to existing clean-up laws in the Member States:**  
*The view of an independent expert:* Chris Clarke (*independent consultant on environmental liability*)
- General exchange of views
- Closing remarks by Martin Rocholl and Astrid Thors MEP

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For further information and RSVP, please contact

# Paying for pollution

## Media briefing on the Environmental Liability Directive

**Brussels, 2 December 2003:** It is better that EU taxpayers foot the bill for environmental pollution rather than making those responsible pay, was the message sent by MEPs in the Legal Affairs Committee today when they amended the Common Position adopted by EU governments on the Environmental Liability Directive.

Two weeks before the whole Parliament is due to vote on the Directive at its **Second Reading** during the week beginning 15 December, MEPs in the Committee made timid improvements regarding mandatory financial security and state liability, but severely undermined the spirit of the Directive by reintroducing a number of exemptions for polluters.

The Directive is designed to lessen the likelihood of environmental damage by introducing a system that makes polluters liable for harm caused to water, land and certain protected wildlife. At present, industrial operators can seldom be held responsible for “unowned” nature such as birds and wild animals. Any cleaning up operation is therefore paid out of public funds, if it is undertaken at all.

### Loopholes

Proposed by the EU Commission in January 2002, the Directive had been substantially strengthened by the European Parliament at its First Reading vote in May. Many of the Parliament’s amendments were already weakened or rejected by the Council of EU Environment Ministers in June. Today’s vote in the Legal Affairs Committee amounts to a further shift away from the Directive’s aim and renders the proposed regime almost meaningless. It would allow polluters to escape liability:

- if their action respects the terms of a permit they hold for carrying out that operation;
- where their activities were believed to be safe for the environment according to scientific and technical knowledge at the time of the damage;
- wherever they are acting in accordance with so-called ‘good practice’ in forestry and agriculture.

### Who stands where?

The Environmental Liability Directive has been over 10 years in the making, with industry, governments and NGOs fiercely debating a system that would implement the ‘polluter pays’ principle.

There is currently no clear consensus emerging in the **European Parliament** in advance of the Second Reading, with positions split between the political groups. The substance of certain amendments adopted today by the conservative Legal Affairs Committee had already been opposed by the Parliament at its First Reading.

The **Council** was similarly divided in advance of agreement of its Common Position: France, the UK and Italy were pushing for a relatively weak liability regime, while Spain, Greece, Belgium, Denmark and the Netherlands wanted tougher legislation.

As there is codecision on the Directive, any amendments adopted by Parliament at the Second Reading would lead to stiff negotiations with the Council to reach a final ‘conciliation’ deal.

Many **industry and business groups** are lobbying against amendments which would create a robust ‘polluter pays’ regime, particularly the imposition of compulsory financial security for environmental damage.

Those who usually foot the bill for damage and live with its consequences, **local authorities**, have called on MEPs to ensure costs are met by polluters rather than the public purse.

**Environmental NGOs** call on MEPs to ensure that:

1. Polluters - rather than taxpayers - pay for the restoration of environmental damage. Companies should not be allowed to escape all environmental clean-up costs if they are in ‘compliance with a permit’, operating according to ‘state-of-the-art’ technology and knowledge, or acting in accordance with ‘good practice’ in forestry and agriculture.
2. The Directive includes a provision to ‘phase in’ mandatory financial security (in the form of insurance, bonds, dedicated funds, reserves, etc) for risky operations, to shift the costs of environmental damage from society onto those who actually cause the problem. This would ensure that insolvency is not an easy way out.
3. Where the operator cannot be found or be made liable, the state (in the form of the relevant competent authorities) is required to ensure that the environment is restored. This is vital to ensure that decisive action is taken to repair environmental damage in all circumstances.

### **Why a ‘polluter pays’ regime is necessary - real-life examples**

The past catastrophes listed below demonstrate the most severe cases that would have fallen outside the regime proposed by the Common Position on the Directive. NGOs believe that it is essential that MEPs address the three recommendations above at the Second Reading if the ‘polluter pays’ principle is to be effective.

In January 2000 in North-western Romania, a burst dam caused about 100,000 cubic metres of cyanide-laced water from the **Baia Mare Aurul goldmine** to spill into tributaries of the river Tisza, into the Szamos river and ultimately into the Danube. Hungary, which alleged damage worth 84 million euros, says it alone lost more than 1,000 tonnes of fish, while the water supplies of more than 2.5 million people were threatened. Yet Australian mining company Esmeralda, which has a 50% stake in the mining operation behind the pollution, was in liquidation and therefore could not contribute to the clean-up operation.

The **Prestige tanker oil spill** off the Spanish coast released an estimated 64,000 tonnes of fuel oil into the sea in November 2002, poisoning fish, killing seabirds, fouling beaches and destroying livelihoods. The International Oil Pollution Compensation Fund has agreed to fund compensation claims up to a total 171 million euros, while recognising that this will cover just 15% of the accident’s likely costs. Yet again, it will be taxpayers footing the bill.

Also in Spain, a burst lagoon at the **Aznalcollar zinc mine** in April 1998 led to five million cubic metres of acidic water flooding into the internationally important conservation area of the Doñana wetlands. More than 20 tonnes of dead fish were collected. The EU has contributed around 72 million euros to the clean-up operation, whose total is estimated at 180 million to 250 million euros.

**Press release 17 December 2003**  
**BirdLife International, EEB, Greenpeace, Friends of the Earth and WWF**

## **Stalemate on 'polluter pays' law**

*Environmental groups' disappointment as the European Parliament fails to reach agreement to improve new Environmental Liability Directive*

**Strasbourg, 17 December 2003:** After years of wrangling at EU level on a new law aiming to make polluting companies responsible for cleaning up environmental damage, the European Parliament has today failed to strengthen a weak Directive on Environmental Liability.

This Directive seeks to ensure that polluters, rather than public authorities and broader society, pay for environmental repair after catastrophes such as chemical leaks, mine spills and wildlife damage caused by GMOs.

The European Parliament adopted a strong First Reading position on the Directive in May. However, tough Parliamentary amendments removing wide exceptions from liability for companies operating in 'compliance with a permit' or according to 'state-of-the-art' knowledge were watered down by the Council of EU Environment Ministers when negotiating their 'Common Position' in June. The Ministerial agreement allows Member States to exempt polluters from all environmental clean-up costs in these circumstances, and consequently fails to shift the financial burden of environmental repair from the public purse to the companies responsible.

Disagreement between the political groups on the 'permit' and 'state-of-the-art' exceptions, and other issues such as a proposal for an additional exception for 'good agriculture and forestry practice' and provisions on compensation for wildlife damage, meant that MEPs were unable to adopt amendments to improve the Council's weak Common Position at today's vote and bring forward a more robust 'polluter pays' regime.

"

" said Rosanna Micciché of Greenpeace.

" commented Victoria Phillips from  
BirdLife International.

said Sandra Jen of WWF.

This report was co-written and prepared by the Royal Society for the Protection of Birds, the BirdLife Partner in the United Kingdom, and by WWF.

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The RSPB is a UK charity working to secure a healthy environment for birds and wildlife, helping to create a better world for us all. We belong to BirdLife International, the global partnership of bird conservation organisations.



The BirdLife International Partnership strives to conserve birds, their habitats and global biodiversity, working with people towards sustainability in the use of natural resources.

WWF's mission is to stop the degradation of the planet's natural environment and to build a future in which humans live in harmony with nature, by:

- conserving the world's biological diversity
- ensuring that the use of renewable natural resources is sustainable
- promoting the reduction of pollution and wasteful consumption

