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Response to Defra's Second Consultation on Implementation of the Environmental Liability Directive

The City of London Law Society (**CLLS**) represents approximately 12,000 City solicitors through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to Government consultations on issues of importance to its members through its 17 specialist committees. These comments have been prepared by the CLLS Planning and Environmental Law Committee, which is made up of solicitors who are experts in their field. The comments respond to the invitation by Defra and the Welsh Assembly Government pursuant to the above Second Consultation on transposition of the Environmental Liability Directive.

GENERAL COMMENTS

The CLLS adopts the comments made by the United Kingdom Environmental Law Association (**UKELA**) (attached) with the additional comments set out below.

APPORTIONMENT OF LIABILITY IN MULTIPARTY CASES (REGULATIONS 14 AND 20)

The CLLS suggests that Defra may wish to consider specifying in the Regulations or Guidance that the environmental damage which an operator must prove is divisible in order to avoid joint and several liability for remedial costs in situations involving chemical contamination is the presence of a substance which has caused environmental damage to water, a protected species or natural habitat or a site of special scientific interest (**SSSI**) together with the consequences of the presence of that substance.

In addition to the factors set out in UKELA's comments, the CLLS suggests that Defra may wish to consider setting out the following factors if it decides to produce Regulations or Guidance on the equitable apportionment of liability. That is, the following are suggested equitable factors to be considered in severally (but not jointly and severally) apportioning liability between operators

who are jointly and severally liable for remediating indivisible environmental damage. The factors are drawn from the enforcement of the Comprehensive Environmental Responsibility, Compensation and Liability Act (Superfund) in the United States:

- the amount of substances which each operator's activity has caused to be present in the damaged water or to the damaged protected species, natural habitat or SSSI;
- the degree of toxicity or hazard of each contributed substance;
- the migratory potential and degree of migration of each contributed substance;
- the degree of care exercised by each operator with respect to each contributed substance;
- the culpability of each operator; and
- the degree to which each operator co-operates with the relevant competent authority(ies) to remediate the environmental damage and to prevent any further damage.

Defra may also wish to consider the *Howe* factors in the equitable apportionment of liability for jointly and severally liable operators (see *R v F. Howe & Son (Engineers) Ltd* [1999] 2 All ER 249 (CA)).

Finally, if Defra allows individual operators to make individual contribution settlements to discharge their liability to the UK Government, as noted in UKELA's comments, Defra may wish to establish a mechanism to protect such operators from contribution actions by other operators who caused the indivisible environmental damage.