Implementation of changes to the Paris and Brussels Conventions on nuclear third party liability - a public consultation

Response form

You may respond to this consultation by email or by post.

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Name	
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Tick this box if you are requesting non-disclosure of your response. ☐

Please return by 28 April 2011 to:

Consultation on Paris and Brussels Conventions on nuclear 3rd party liability
Department of Energy and Climate Change
Area 3C
3 Whitehall Place
London
SW1A 2AW

You can also submit this form by email:
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	Consultation Question	SL Response
1 Chapter 4 Categories of Damage Page 35	We would welcome your views on our proposed implementation of the new categories of damage as described in this chapter and as set out in the draft Order. Particular questions you may wish to consider include:	Before responding to the detailed issues in this Chapter, by way of general comment, we believe that the proposed Order could usefully clarify that the liability regime's exclusivity means that no other action arises if damage is not proved under the revised regime i.e. the NIA65 should make it clear that it is an exhaustive regime preventing parties making additional and separate claims for damage outside the NIA65.
	a) should particular types of claim be prioritised, and if so, how (see paragraph 4.14)	We do not believe it will be practicable to prioritise particular types of claim in this way.
	b) should we make provision to deal with the case where a claim is made by a public authority for the cost of reinstating property in respect of which compensation has already been paid to the owner (see paragraph 4.29)	We support the general principle of no double recovery. Following a nuclear incident our view is that a nuclear site operator should not be liable for environmental reinstatement costs to a regulator where costs have already been paid to a landowner under a property damage claim. Perhaps an appropriate method of ensuring these two heads do not result in double recovery may be provide that any payment made to an owner for property damage which includes damages for loss of environment should be off-set against any subsequent regulatory claims for environmental reinstatement. It is our understanding from the consultation document and the draft Order that environmental reinstatement will only be regulatory driven, however, it appears to us there would additionally need to be mechanisms in place to understand how the liabilities of various parties will be assessed by the regulators and account taken of costs already paid by an Operator consistent with other environmental liability regimes in the UK. In addition our view is that the Operator should not be required to cover any additional costs incurred to the extent that the passage of time and inflation has caused the reinstatement costs to increase e.g. where the Operator has paid appropriate damages to a third party but where the third party has chosen not to apply the money towards environmental reinstatement.
	c) should "compensatory remediation" be expressly included or excluded from the measures of reinstatement that can be claimed for (see paragraph 4.39)	In line with our comments on double recovery above, it should be made clear that the landowner and regulator should co-ordinate any reinstatement action so that it is not permissible for both the landowner and a regulator to claim in respect of the same land/premises (and furthermore, any claim settled under the property damage head, should

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		also be off-set against any separate reinstatement claim). Our view is that compensatory remediation should be expressly excluded from the new Order as an Operator which is additionally required to pay ongoing compensation for time taken for the impaired environment to be reinstated will not necessarily be in control of that remediation process. It is a regulatory decision on the timing of remediation. In addition, the Operator will have already paid costs towards property damage and/or environmental reinstatement. By way of general observation, it may be thought that widening the potential claims to include 'compensatory remediation' could well reduce the funds that may be available for personal injury, property damage and environmental reinstatement.
	d) should we define what constitutes a "grave and imminent threat" and, if so, how (see paragraph 4.65)?	It would be difficult to provide a definition within the Order of what constitutes a "grave and imminent threat of nuclear damage" sufficient to cover all potential occurrences. It may therefore be preferable to have Guidance setting out the decision criteria that would apply to defining whether a "grave and imminent threat" has materialised. Referring to the emergency plans required under the Radiation (Emergency Preparedness and Public Information) Regulations 2001 does not seem to cover all the criteria that might apply. The definitions of 'radiation accident' and 'radiation emergency' in those 2001 Regulations are relatively vague in any event but more importantly these 2001 Regulations are very much focused on human health and safety rather than a broader emergency scenario dealing with human and environmental impacts. Response in any Guidance might, though, helpfully refer to CFILS and Emergency Orders made to prevent the movement and consumption of foodstuffs.
2 **Chapter 5** **Geographical Scope** **Page 41**	We would welcome your views on our proposed implementation of the revised geographical scope of the Paris Convention and the Brussels Supplementary Convention as described in this chapter and as set out in the draft Order. Particular questions you may wish to	

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	consider include:	
	a) should we align our legislation with the Paris Convention by deleting current section 13 (2) of the 1965 Act. Would any important protections be lost (see paragraph 5.13)?	Removal of section 13(2) of the NIA65 would remove current certainty for persons who are on board UK ships carrying nuclear materials that they can take a claim to the UK courts if they should wish to. We do not believe that the potential benefits of aligning the NIA65 with the Convention in this aspect outweighs the disbenefits to those individuals.
	b) how should we define who should be treated as a UK "national" for the purposes of section 16A (see paragraph 5.21)?	
3 Chapter 6 Limitation Periods Page 43	We would welcome your views on our proposed implementation of the revised provisions on limitation periods in the Paris Convention as described in this chapter and as set out in the draft Order. A particular question you may wish to consider is whether we should apply the 30 year limitation period to claims in respect of injury caused by preventive measures (see paragraph 6.6).	***Please refer to Appendices 1 to 3 on Personal Injury, Preventative measures and Retrospective Effect.***
4 Chapter 7 Liability during Transport Page 48	We would welcome your views on our proposed implementation of the change to the Paris Convention regarding liability for transport of nuclear substances and the other related matters as discussed in this chapter and as set out in the draft Order. In particular we would welcome your views on the options set out in paragraphs 7.11 and 7.12. Is it common for nuclear substances to transit a licensed site while *en route* from one nuclear installation to another?	***Please refer to Appendix 4 on transport issues***.
5	We would welcome views on our proposed	The availability of suitable financial cover is essential for nuclear site licensees to be able to

	Consultation Question	SL Response
Chapter 8 Financial Liability Levels Page 58	implementation of the revised financial liability levels as described in this chapter and set out in the draft Order. In particular, we would welcome your views on:	operate existing installations. NDA estate SLCs are currently insured via NDA, therefore suitable arrangements will be required for the implementation of the revised NIA65 regime.
	a) the likely impact of increasing the standard liability level to €1200 million as compared to €700 million	Operators will need time to ensure they are compliant. It will be necessary therefore to have a transitional phase in the Order i.e. the requirement for the enhanced cover should be delayed to allow existing Operators the opportunity to obtain the additional cover in a reasonable time.
	b) the proposal to set a reduced level specifically for low-risk transport and to use the criteria in the Carriage of Dangerous Goods and Use of Transportable Pressure Equipment Regulations 2009. Is this a practical solution? Would it add significant administrative burdens? Are there alternative criteria that could be used to identify low-risk transport?	It may be possible to use CDG / ADR criteria to good effect but further detail on the specifics and mechanics of how this would work is needed to fully assess whether this is a practical solution and what the administrative burdens may be. We do consider however that the legislation would need to be explicit that not all Class 7 Material would be "nuclear matter" for the purposes of NIA65.
6 Chapter 9 Availability of Insurance/ Financial security Page 64	We would welcome views on the availability of insurance or other financial security. In particular, we would welcome your views on:	
	a) what forms of alternative financial security should be acceptable and over what classes of liability might alternative forms of financial security be appropriate?	Consideration should be given to the funding structures of SLCs within the NDA estate. Should, for example, a distinction be made between (a) decommissioning work and clean-up of the UK's nuclear legacy waste and (b) generating nuclear energy?
	b) how Government should assess operators' proposals for alternative financial security arrangements?	We have no views on the means of assessing Operator's proposals for alternative financial security but it is important that there is transparency and clarity on how any alternative financial security assessments will be made and how the Operator's financial standing will be reviewed.
	c) in addition, we would welcome your views	

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	on the Government stepping in as a last resort to fill any insurance gap. How should Government calculate the charge for this?	
7 Chapter 10 Jurisdiction Page 70	We would welcome views on our proposed implementation of the Paris Convention changes regarding allocation of jurisdiction, both between Paris countries and within a Paris country, as described in this chapter and set out in the draft Order. In particular, we appreciate your views on:	
	a) whether basing our tie-breaker provisions on the impact of an occurrence, event or breach of duty would be a workable solution – how practicable would it be to measure impact (see paragraph 10.16)?	Due to the potential for occurrences to have latent effects, we do not believe it would be practicable to assess with a sufficient degree of accuracy where the greatest impact may be felt.
	b) whether we need a fall back provision giving jurisdiction to the High Court of Justice (see paragraph 10.17).	Yes, for the reasons given above and for certainty we believe it is necessary to have a fall back provision to the High Court of Justice in place.
	In addition, we would welcome your views on our proposed clarification of "occurrence" in new section 26(2A) of the 1965 Act.	Please see previous comments made above in respect of the proposed limitation periods (Chapter 6) and Appendix 2 which also answer this question.
8 Chapter 11 Nuclear Waste disposal facilities Page 74	We would welcome your views on our proposals for implementing the Paris Convention requirements in respect of nuclear waste disposal facilities. In particular, we would welcome views on the number of commercial waste disposal facilities who may be affected by the proposed changes and how they may be	It occurs to us that further clarification will be required on the potential impact of the proposed changes on nuclear site operators who use offsite nuclear waste disposal facilities and in particular whether the outcome of this proposal is an extension of liability for the nuclear site operators. If the intention is that certain nuclear waste disposal facilities do not require a nuclear site licence where they do not store or manage certain low risk materials does that mean that the nuclear site licence holder who has transferred the material to that facility will never transfer or release its own liability under NIA 65 – will the nuclear site licence holder be

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	affected.	liable indefinitely despite the fact that it is not in control of the material? At what point does liability transfer, if at all? If the intention is still to transfer liability to the low level waste repository, how far down the chain of origin should this be applied? This also has the potential to affect transport issues covered in Chapter 7 of the consultation document.
9 Chapter 12 Representative Actions Page 77	We would welcome your views on our proposals for implementing the Paris Convention requirements in respect of representative actions.	Given the widened scope of the proposed new NIA65 regime it does not seem necessary to extend the NIA65 regime in this way.
	Impact Assessment Questions	
1A 1.	Can you provide information on current actual costs of insurance or other financial security and the impact of the proposed changes?	Please refer to details provided by NDA.
1A 2.	If you cannot provide actual costs, are you able to provide information on the scale of change for the costs of insurance or other financial security through higher insurance premiums or alternatives?	As above.
1A 3.	Are these estimates for a standard installation or a low risk installation or for transport activities?	As above.
1A 4.	Can you provide information on ongoing legal and administrative costs as a result of the changes and the likely scale and nature of transition costs?	As a general observation it is very likely that Operators will see an increased number of claims as a result of the proposed changes to the regime. The proposal within Appendix 3 on retrospective effect may go some way to give Operators comfort that parties who have previously tried unsuccessfully to make property damage claims will not be given a second opportunity in light of the proposed changes.
	Other issues not raised in Consultation Questions	
	Creating of two pots of funds – Chapter 8 of the consultation document.	As a general observation we wonder whether the proposal to empty the first Paris Convention pot first before drawing funds from the second Brussels Convention pot is

	Consultation Question	SL Response
		equitable? E.g. is it the intention that all the parties who signed both the Paris and Brussels Conventions would therefore get first priority claim to the pot.

Appendix 1
Personal Injury

Conventional PI should be outside the scope of the NIA65.

It is important that claims in respect of personal injury caused by preventative measures should only be a head of claim if the damage arises from a 'nuclear occurrence'.

Referring back to the Convention wording, we do not believe it is inconsistent with the Convention to exclude conventional PI from the NIA65 i.e. it is not necessary to include such conventional injury in "loss or damage" arising from preventative measures.

Our preference is to make it expressly clear in the Order that conventional injuries are outside the scope of the nuclear liability regime. There are some good public policy reasons for this:

- the effect of including such claims could be to allow conventional PI claims to reduce the funds available under theNIA65 regime for nuclear loss or damage;
- new section 11H in the Order goes beyond what is required by the Convention: conventional PI has never previously been part of the NIA65 regime;
- further the removal from liability under the NIA65 for acts/ omissions of negligence or maliciousness would in our view run counter to the aim of the strict liability regime in respect of nuclear occurrences e.g. negligence would potentially provide a defence to liability under the NIA65;
- we believe that the NIA65 regime is and should continue to be an exclusive regime. Bringing in conventional PI plus the conventional negligence test to the regime could devalue this important principle; and
- there is potential for confusion under the NIA65 as to who is liable in respect of conventional injury and further confusion around who must insure and under what regime.

For this reason we believe that it is preferable for conventional PI to be dealt with via the normal PI claims process and thus it would not be necessary for conventional injuries arising from preventative measures to fall within a 30 year limitation period (as the usual 3 year limitation period for standard PI claims should apply in such circumstances).

Accordingly, we believe that section 11H(3), (4), (6), (8)(a), 12(1) , 12(1C), 12(1E), 12(1G)(b), 12(2), 12(3) and 15(3) should be amended to remove reference to "injury".

Appendix 2
Meaning of 'occurrence' and effect of new section 26(2A)

We welcome the commentary at Paragraph 10.22 and 10.23 of the Consultation document and agree with what we understand to be the proposal, namely that the "*presence of nuclear matter in a place*" is not an occurrence in its own right in circumstances where such material has been released to the environment some time previously. This is because it would widen the scope of the legislation too far if 'an occurrence' could be interpreted to include the mere presence of nuclear matter in a place reappearing some time after its original release. The limitation period under the NIA65 should correctly commence as at the first event or emission of ionising radiations.

Section 26(2A) and its relationship with section 7:
The new proposed drafting in the Order at section 26(2A) states, '*if the presence of nuclear matter in a place is the consequence of an occurrence such as is mentioned in section 7, 10 or 11, that presence is not to be treated as constituting a separate occurrence…*'. We do not believe that this quite achieves the aims of the Consultation proposal document at Paragraph 10.22 and 10.23 as we understand them for the reasons outlined below.

The duties established by section 7 (not all breaches of duty in section 7 refer to "an occurrence"):
Section 7 NIA65 requires the Licensee:
(a) not to cause injury, damage, or significant environmental impairment arising from an occurrence (section 7(1A)),
(b) not to cause injury damage or significant environmental impairment arising from a source on the nuclear licensed site or discharged from that site (section 7(1B)), and
(c) to secure that no event happens that creates a grave and imminent threat of these two breaches.
Only the first duty refers to an occurrence; the release of ionising radiations emissions is not, it seems, "an occurrence". "Occurrence" is not defined in NIA65.

Potential ambiguities as to what section 26(2A) will cover:
Firstly, and as noted above, because section 26(2A) refers to the presence of nuclear matter in a place as "*the consequence of an occurrence*", it may be possible for a court to find that the presence of nuclear matter in a place is in fact the first occurrence. This might occur where for instance the original discharge from the nuclear licensed site is not interpreted as "*an occurrence such as is mentioned in section 7…*" because section 7(1B) makes no reference to such discharge being an "occurrence".

Secondly, because section 26(2A) as currently drafted links to sections 7, 10 and 11 of the NIA65 ("*an occurrence such as is mentioned in section 7, 10 or 11*"), it may be possible for a court to find that section 26(2A) would require damage to have been caused by the initial event or release for it to be defined as "an occurrence" for the purposes of section 26(2A).

It therefore seems that the meaning of "occurrence" within section 26(2A) is critical to the operation of this provision, as it is this section only which provides that the presence of nuclear matter in a place is not to be treated as a separate occurrence if it is there as the consequence of an original occurrence. The consequences of this section and the possible interpretation ambiguities outlined above are potentially significant in that:

- it is not clear when the time limitation period would start – from the first event or from the second event on the basis that it is only the second event which has given rise to the harm? It would seem logical that the imitation period should start from the date of the original event, thus providing operators with the intended limitation period for loss or damage, but if the original event or release is not deemed to be an occurrence and the second event is deemed to be the occurrence, then the limitation clock would effectively be re-set; and

- as section 26(2A) stands currently, this section would result in operators of nuclear licensed sites having to address claims arising at any time from a permitted discharge or a discharge made before the proposed Order comes into force. Two issues arise from this – (1) the operator may not have insurance in place for damage arising from legal / authorised discharges (which are normally excluded from insurance policies); and (2) there is a risk that the Operator's insurers may not provide cover for discharges which took place prior to the date of the Order giving rise to a claim for damage under one of the new heads of claim after the date of the Order.

It is therefore proposed that the wording of section 26(2A) of the Order be reconsidered to make it clear that the presence of nuclear matter in a place must always be considered to be a continuation of the original event or release from the site. For the purposes of retrospection it should also be made clear that the new heads of damage are only ever available to claims relating to such events arising after the date of implementation.

Please see also our separate point raised on retrospective effect at Appendix 3 below.

Appendix 3
Retrospective Effect

The new legislation must not have retrospective effect and only future occurrences arising from future events or releases should be caught.

To be clear, we consider that historic discharges should not give rise to liability in the new extended regime principally on the basis that the Operator's insurance did not and will not cover this liability. In addition we consider that it would be inequitable for Operators to be made retrospectively liable for the actions of their predecessors at a time when attitudes towards risk may have been different. For the avoidance of any doubt we consider that this needs to be made clear in the Order.

Appendix 4
Transport

General

As a general point new section 7A is a complex piece of drafting.

Section 7A deals with a number of different potential scenarios including nuclear matter during the course of carriage (a) from or to non-convention territories, (b) from a nuclear reactor comprised in a means of transport, (c) otherwise carried on behalf of the licensee and where the licensee has a Direct Economic Interest in the nuclear matter.

Under the current regime, the licensee is always liable for nuclear matter on its site. It is noted that the Direct Economic Interest test is intended only to apply to carriage between Convention territory operators and to matter in transit e.g. transiting an installation. However, the reference to section 7(2)(A) in 7A(12) [and thus impliedly in 7A(6)(a)] seems potentially to indicate that a UK licensee which has no direct economic interest in the matter on its site will not be liable for an occurrence involving such matter and in fact will be precluded from accepting such liability unless it can demonstrate a Direct Economic Interest. We do not believe this is what is intended but clarification would be helpful.

It is of course necessary for all Convention operators to work to the same legislative framework and the comments above are therefore subject to development of implementation by Convention member states.

Linked to this is the meaning of what might constitute a Direct Economic Interest. Currently, section 7A(14) explains that merely receiving a financial or other benefit in connection with the carriage of nuclear material would not by itself give rise to a Direct Economic Interest. This would preclude an NDA estate SLC from taking liability in the example above (arguably even where that SLC treats, processes, repacks etc the nuclear matter). If, therefore, it is agreed to simplify the proposals and retain the current licensee responsibility for all matter on its site, it will also be necessary to augment this definition of Direct Economic Interest.

In fact, a presumption stated in the Order that the contractual relationship between NDA and its estate SLCs does not preclude/is deemed to amount to a Direct Economic Interest may be helpful.

We appreciate that the introduction of the new concept of Direct Economic Interest has been introduced in order to implement the requirements of the Convention which deal with the prevention of forum shopping. The contractual arrangement of the NDA Estate does however mean that the NDA's site licence companies could potentially be prevented from taking liability unless there is some clarification that the site licence companies in the NDA Estate do have a direct economic interest – i.e. a deemed interest.

Definitions

As an aside and related to the discussion above on the meaning of Direct Economic Interest it would be helpful for the Order to clarify what is meant by the terms '*take charge*', '*transhipment*' and '*in transit*'.

Transit issues

If it is intended that site licence companies in the NDA Estate are to be given the option to take liability whilst material is on their site (or at least be deemed to have an economic interest whilst the material is on their site) it would seem logical that liability for the material should then snap back to the consignor once the material leaves the nuclear licensed site where it has been resting in transit.

If this is the intention of the new drafting at section 7A we think further clarification in the Order is needed to be certain on this.

Other comments

In answer to the specific question in this Chapter of the Consultation document we can confirm that it is relatively common at nuclear licensed sites operated by Sellafield Limited for nuclear substances to transit a licensed site while en route from one nuclear installation to another.