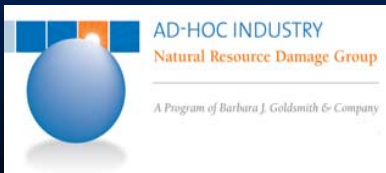


# **REVIEW OF AD HOC INDUSTRY NATURAL RESOURCE DAMAGE GROUP'S 17-18 OCTOBER 2007 BRIEFING/WORKSHOP AND RELATED ISSUES**

**BY  
BARBARA J. GOLDSMITH  
PRESIDENT, BARBARA J. GOLDSMITH & COMPANY  
DIRECTOR, AD-HOC INDUSTRY NATURAL RESOURCE DAMAGE GROUP**

**NICOLE NETWORK MEETING  
14-16 NOVEMBER 2007  
BRUSSELS, BELGIUM**



# PRESENTATION FOCUS

- **REPORT ON GROUP'S BRIEFING AND WORKSHOP: "THE EU ENVIRONMENTAL LIABILITY DIRECTIVE TRANSPOSED AND IMPLEMENTED: WHAT TO EXPECT"**
- **NICOLE INTERFACE OPPORTUNITIES**
- **MEMBER STATE IMPLEMENTATION STATUS**
- **GROUP'S INDUSTRY CASE STUDIES**
- **OTHER ELD-RELATED DOCUMENTS PREPARED BY GROUP**

# GROUP ELD BACKGROUND

- ACTIVITIES PRE VS. POST ENACTMENT
- RESOURCE/PARTNER TO EU INDUSTRY
- IDENTIFICATION OF KEY ISSUES
- EXTENSIVE DOCUMENT DEVELOPMENT
- MEETINGS WITH DG ENVIRONMENT
- DEVELOPMENT OF CASE STUDIES
- BRIEFINGS FOR INDUSTRY
- PARTICIPATION IN KEY MEETINGS

# CRITICAL ISSUES

- OPERATOR DEFINITION
- GEOGRAPHICAL SCOPE
- TEMPORAL SCOPE
- BASELINE CONDITION
- SIGNIFICANT RISK
- EXCEPTIONS AND DEFENCES
- PREVENTION ORDERS
- LEGAL RIGHTS

# CRITICAL ISSUES (CONTINUED)

- PARALLEL ACTIONS
- MULTIPARTY CASES
- CAUSATION REQUIREMENTS
- FINANCIAL SECURITY
- ASSESSMENT AND RESTORATION OF LAND DAMAGE
- ASSESSMENT OF DAMAGE TO PROTECTED HABITATS AND SPECIES
- ADMINISTRATIVE PROCEDURES
- SANCTIONS

# ANNEX II CONSIDERATIONS

- ASSESSMENT SHOULD CONSIDER BASELINE TO BE THE LEVEL OF SERVICES “BUT FOR” THE INJURY
- COMPLEMENTARY RESTORATION SHOULD NOT BE CONFUSED WITH COMPENSATORY RESTORATION
- WHEN USING SERVICE-TO-SERVICE SCALING, RESOURCE SERVICES SHOULD BE THE FOCUS
- THE COMPLETE PICTURE OF HABITAT EQUIVALENCY ANALYSIS MUST BE CONSIDERED WHEN USED AS A SCALING TECHNIQUE
- VALUATION SCALING MAY BE USED WHEN SERVICE-TO-SERVICE SCALING IS INAPPROPRIATE

# BRIEFING

- **OVERALL STATUS UPDATE FROM THE COMMISSION**
- **DETAILED UPDATES ON SOME MEMBER STATES (HUNGARY; BELGIUM; UK; FRANCE)**
- **TWO PANELS:**
  - **CRITICAL LEGAL ISSUES AND THE RELATIONSHIP OF ELD TO OTHER DIRECTIVES, NATIONAL REGIMES AND PAN-EUROPEAN ISSUES**
  - **CRITICAL TECHNICAL AND FINANCIAL SECURITY ISSUES RELATED TO THE IMPLEMENTATION OF THE ELD**

# WORKSHOP

- OVERVIEW OF ELD-RELATED METHODOLOGICAL ISSUES
- IN DEPTH DISCUSSION: BASELINE
- IN DEPTH DISCUSSION: SCALING
- IDENTIFICATION OF NEEDS AND ASSOCIATED ACTIONS

# TAKE AWAY MESSAGES

- GREAT VARIATION AMONG MEMBER STATES REGIMES
- WIDE RANGING PREDICTIONS OF ELD IMPACTS
- LINKAGES BETWEEN DIRECTIVES IN PRACTICE UNCLEAR
- ELD GUIDANCE NEEDED TO EFFECT PRACTICE GOALS
- BASELINE AND SERVICE LOSS ASSUMPTIONS IMPACT DAMAGE ASSESSMENTS
- APPROPRIATE BASELINES CRITICAL FOR REASONABLE AND RELIABLE ANALYSIS
- SCALING METHODS AS GOOD AS THE INFORMATION THAT GOES INTO THEM
- ELD SHOULD BE VIEWED AS INTEGRATING FRAMEWORK

# TAKE AWAY ACTIONS

- **BEST PRACTICES**
- **INDUSTRY/MS TECHNICAL WORKSHOPS**
- **CONTINUED CASE STUDY DEVELOPMENT**
- **LEVERAGING EXISTING EXPERTISE TO HARMONIZE ELD AND RELATED DIRECTIVES AND NATIONAL REGIMES**

# CURRENT ELD STATUS

- **FINAL LAWS IMPLEMENTED:**  
*ITALY, LITHUANIA, LATVIA, HUNGARY,  
GERMANY, ROMANIA, SLOVAKIA, SPAIN,  
SWEDEN*
- **TRANSPOSITION PARTIALLY  
COMPLETED:**  
*AUSTRIA, BELGIUM, CZECH REPUBLIC,  
POLAND*
- **ALL BUT ONE OR TWO MS HAVE ACTIVITY  
UNDERWAY**

# CASE STUDIES - OVERVIEW

- INITIAL PRESENTATION JANUARY 2007 IN BRUSSELS
- EXPLORATION OF PRACTICAL IMPLEMENTATION ISSUES
- STRUCTURE: BACKGROUND FACTS, CASES, VARIATIONS, ISSUES AND DISCUSSION (QUESTIONS)
- “...STUDY IS INTENDED TO INFORM DIALOGUE WITH MEMBER STATES ON HOW TO IMPLEMENT THE DIRECTIVE. IT ARGUES THAT NATIONAL LAWS SHOULD KEPT AS SIMPLE AS POSSIBLE, LEAVING MANY DETAILS TO LATER GUIDANCE...”
  - FRANCOIS LEGOFF “ENVIRONMENTAL LIABILITY: A JOURNEY INTO THE UNKNOWN”, ENDS EUROPE MONTHLY APRIL 2007

# ENVIRONMENTAL LIABILITY CASE STUDY DESIGN

## LEGAL ISSUES

- Applicability of the ELD
- Causation
- Burden of proof
- Operator definition
- Multiparty considerations
- Liability of previous owners
- Liability of professional inspectors
- Permit compliance defence
- Compliance with orders and instructions
- Preventive action required by authorities
- Differences between Annex III and non-Annex III parties
- Remedy cost-benefit
- Scope of damage covered by ELD
- Diffuse sources and causation
- State-of-the-Art defence
- International oil pollution conventions exception
- Liability limitations under LLMC and CLNI
- Interim losses

## TECHNICAL ISSUES

- Causation
- Primary remediation
- Compensatory remediation
- Service-to-service versus resource-to-resource scaling
- Sublethal effects
- Remediation with out-of-kind natural resources
- Uncertainty
- Dynamic baseline
- Remedy cost-benefit
- Remediation versus natural recovery
- Interim losses

**4 CASE STUDIES**

***Including 12 variations***

# FOUR CASE EXAMPLES

- **CASE 1: EXPLOSION AND FIRE**
- **CASE 2: TANK FAILURE**
- **CASE 3: RAIL CAR**
- **CASE 4: OIL SPILL**

# TECHNICAL APPENDIX

- **BASELINE**
- **DEFINITION OF DAMAGE**
- **FOCUS ON SERVICES**
- **SCALING ISSUES**
- **RESOURCE OR SERVICE SCALING FACTORS**
- **VALUATION SCALING REFERNCES**

# WHAT CASE STUDIES TELL US

- COMPLEXITY IS INEVITABLE
- AMBIGUITY IS PRESENT AND CAN BE ILLUMINATED
- THERE ARE WAYS TO MINIMIZE POTENTIAL PROBLEMS
- BENEFITS OF SIMPLE CLEAR LEGISLATION AND GUIDELINES
- THE NEED TO MINIMIZE, NOT MAXIMIZE ALLEGED LIABILITIES
- NOT TO LEAN TOO HEAVILY ON US CASES/PRACTICE: JUST ENOUGH TO INFORM AND NOT REPEAT MISTAKES

# PRINCIPLES AND RECOMMENDATIONS

- 25 YEAR RETROSPECTIVE TO GUIDE IMPLEMENTATION
- FOCUS ON PREVENTING THE INCIDENTS
- FOCUS ON RESTORING THE ENVIRONMENT RATHER THAN DISPUTING LIABILITY

# NICOLE INTERFACES

- POSSIBLE ROLE IN EXPERT MEETINGS
- POSSIBLE ROLE IN BEST PRACTICE DOCUMENTS
- CASE PRACTICE EXCHANGE
- CASE STUDY DOCUMENTATION
- LITERATURE IDENTIFICATION AND DEVELOPMENT
- OTHER (TO BE CONTINUED...)

# CONTACT INFORMATION

BARBARA J. GOLDSMITH

EMAIL: [bjg@bjgco.com](mailto:bjg@bjgco.com) or [bjg@NRDonline.com](mailto:bjg@NRDonline.com)

WEBSITE: [www.bjgco.com](http://www.bjgco.com)

AD-HOC INDUSTRY NATURAL RESOURCE  
DAMAGE GROUP

c/o Barbara J. Goldsmith & Company  
Rond Point Schuman, 6 - Box 5 1040  
Brussels, Belgium

Tel +32(0)2 234 6390

Fax +32(0)2 234 7911

EMAIL: [info@NRDonline.com](mailto:info@NRDonline.com)

WEBSITE: [www.NRDonline.com](http://www.NRDonline.com)

