



WHITE PAPER

EU ENVIRONMENTAL LIABILITY DIRECTIVE: PRACTICAL SUGGESTIONS TO ENSURE SOUND IMPLEMENTATION (FALL 2005)

This document highlights key considerations concerning implementation of the EU Environmental Liability Directive by individual Member States and suggests ways that the industrial community can work to facilitate regimes that reflect sound policy, law and methodology.

STATEMENT OF THE ISSUE

The European Union (EU) *Directive on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage* ("Directive") was adopted by the European Parliament and Council on 21 April 2004. The Directive makes Member States responsible for ensuring that damage to water, land, and biodiversity is either prevented, by taking appropriate measures in cases of imminent threats, or effectively remedied by restoring the previous condition if the damage has already been done. By April 2007, Member States must "bring into force the laws, regulations and administrative provisions necessary to comply with the Directive." The Directive's fundamental principle is prevention of environmental harm through potential liability, based around the theory that if operators are exposed to financial liabilities for damage, they will be induced to adopt measures and develop practices to minimize the risks of environmental damage. It is focused on action to prevent the imminent threat of damage and on restoration of injured resources in the event that damage does occur.

The Directive imposes liability for damage to natural habitats and species protected at Community and national levels, surface and ground waters covered by the Water Framework Directive and land. It subjects operators of activities covered by listed EU environmental directives to strict liability and operators of other occupational activities to fault or negligence liability. It incorporates provisions for determination of and restoration of environmental damages. A wide range of companies will be exposed to liability under the Directive, including *transporters or disposers of waste and hazardous waste, companies whose operations have resulted in a discharge of dangerous substances or genetically modified organisms, and other industries.*

The Directive lays out a framework under which Member States will need to develop their own regimes. In some areas, the Directive's requirements will be an overlay to the existing laws and regulations of a Member State, while in other cases, entirely new laws and regulations will be developed. In either situation, the Directive leaves many choices to individual countries. These decisions include: choosing whether to adopt certain defences to liability; interpretation of the

provisions of the Directive itself; development of national solutions in places where the Directive is silent; and creating new regimes consistent with existing environmental law requirements that go beyond the Directive's intended purpose – all of which has the potential to lead to the adoption of diverging regimes; and laws that may provide inefficient and/or unworkable solutions to deal with the issues raised by the Directive. Many Member States have started to draft legislation and/or initiated activities pursuant to the Directive's implementation.

The Directive is, in part, patterned after the natural resource damages (NRD) regime under United States (US) laws. Annex II of the directive very closely tracks the US Natural Resource Damage Assessment (NRDA) regulations under the Oil Pollution Act (OPA). For example, the Annex II definitions of the key concepts of primary and compensatory restoration are identical, as are the Directive's definition of "damage" and the OPA regulations' definition of "injury". Other terms, such as "baseline" and "recovery", have analogous definitions. The industrial community in the US has gained extensive experience with NRD, and there are many lessons to be learned from NRD law, policy and practice that can instruct the direction and substance of the Environmental Liability Directive's implementation in the EU. Although there are distinct differences between NRD and the regimes that will be developed to comply with the Environmental Liability Directive, there are a number of common issues, such as establishing causation, determining baseline, restoration options, injury determination, valuation methodologies, and ways to work with authorities, that are important to consider in order to learn from both the successes and failures of the US system, some of which are highlighted herein.

EFFECT ON INDUSTRY

The environmental liability that may be imposed on industrial companies operating within EU Member States is unprecedented on the continent, and may result in significant financial burdens. Member States that are enacting this type of legislation for the first time may be tempted to enact very stringent environmental liability legislation, as the Directive explicitly does not "prevent Member States from maintaining or enacting more stringent provisions in relation to the prevention and remedying of environmental damage." Governments and other stakeholders with little experience in environmental liability issues, may see "bigger" or "broader" (or more stringent) as better. However, legislation that reflects the need for solutions that work, settlements tied directly to the restoration of injured resources, and processes that reflect the need for certainty will benefit all parties involved through expeditious resolution of claims and restoration of resources that is both efficient and effective.

Experience with NRD regimes in the US has shown the importance of certainty and predictability in environmental liability. Over twenty years of NRD practice has yet to lead to a reasonably predictable system and numerous challenges remain for the industrial community. While flexibility is necessary, uncertainty can lead to delays and even failure to achieve restoration, as well as limiting financial predictability for companies. While the parties may share the common goal of restoration of an injured resource, mistrust in the face of uncertainty may prevent them from working together in a productive way toward that common goal.

There will be a certain degree of interchange between the US NRD and EU Environmental Liability Directive regimes on methodological and practical issues. The manner in which the respective regimes proceed can influence the policy and practice of the other, either positively or negatively. Accordingly, the industrial community will need to be mindful of these potential synergies.

Issues that the Directive leaves to Member State regimes, ambiguity within the Directive and issues of interpretation should all be of concern to the industrial community. Critical issues that will be faced by each Member State that may have significant impacts on industry include:

- To what extent and how Member States will elaborate the provisions of the Directive;
- Definition and interpretation of loosely defined or undefined terms within the Directive, including the definition of the key term “operator;”
- Decisions related to the scope of the implementing national law, including the range of activities covered by the liability regime and the persons exposed to liability;
- Decisions related to the extent of exceptions to the Directive and the defenses available to operators;
- Treatment of situations where damage has occurred both before and after the enactment of the Directive;
- The extent to which operators will be exposed to joint and several, as opposed to proportional, liability under member state law;
- Causation rules, including decisions regarding the use of presumptions and multi-party causation;
- Methodologies for assessing damage to protected habitats and species and valuation of resources;
- Methods for recovery of costs, including rules regarding security interests in favor of the authorities;
- Rules in respect of double recovery, and the coordination of administrative and civil actions in respect of the same instance of environmental damage;
- Treatment of damage resulting from activities in compliance with permits or recognized state-of-science standards;
- Determination of the “baseline” condition of natural resources and interpretation of “best available information;”
- Participation rights, rights to request action and rights to review decisions made;
- Relationship of the regimes implemented under the Directive to existing national law, policy and administrative structure; and
- Relationship to existing Directives and other sources of international and European law.

While the Directive does not prescribe that all Member States create identical regimes, general consistency in approach will be essential. Industry input will be critical as governments are developing their regimes to ensure that the proposed regimes are legally and technically sound and will result in a consistent and certain practice.

REQUIRED ACTION AND WAYS TO EFFECT THAT ACTION

The Directive creates a unique opportunity, as the majority of Member States will be developing their approach to adopting the Directive and meshing its requirements with their existing liability frameworks, on a similar timeframe. They will all be developing these systems within the same time frame, and a handful of States are likely to be seen as leads that other States will follow in development of their regimes. It will be important for the industrial community to work with lead Member States to find workable solutions, and above all, to strive for certainty and predictability. Industry should present Member States with options that will lead to the achievement of the common goal of a workable system, instead of appearing to present ways to minimize the scope of the environmental liability regime, and therefore their own liability. Position papers for industry on some of the key issues identified above (and otherwise) can assist individual companies, and the business and industry associations in which they participate, in these discussions.

As Member States set up advisory committees and other methods of consultation, companies will have the opportunity to input into the development of environmental liability regimes. It will be important to work with lead companies to focus on resolution of the issues that are key to industry. Companies can maximize the effect of their participation by:

- Learning about specific issues, including US experience that may be applicable;
- Following the development of the regimes in Member States;
- Participating in development through advisory committees, other consultation mechanisms, and other legislative and administrative participation; and
- Coordinating input with other industrial companies.

The opportunity to work to effect viable Environmental Liability Directive regimes in Member States exists between now and April 2007.

