

EUROPEAN UNION ENVIRONMENTAL LIABILITY DIRECTIVE:

An Update and Summary of Emerging Best Practices

AD-HOC INDUSTRY NATURAL RESOURCE MANAGEMENT GROUP

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

info@nrdonline.org
www.nrdonline.org



ABOUT THE AD-HOC INDUSTRY NATURAL RESOURCE MANAGEMENT GROUP



The Ad-Hoc Industry Natural Resource Management Group (Group), established in 1988, is comprised of multinational industrial companies representing all major sectors which is focused exclusively on policies and practices concerning environmental damage liability and related issues. Since the EU Environmental Liability Directive (ELD) was enacted in 2004, the Group has served as a resource to industry on the ELD and related issues, and it has assumed a key role in facilitating communication and practice

exchange within the industrial community, and between industry and government authorities and other practitioners. Also since 2004, the Group has convened, in Brussels, numerous ELD-related meetings, seminars and workshops, involving industry, government and other experts. The Group has and continues to prepare various documents, including White Papers, Issue Papers, Case Study Analyses, and more in an effort to foster the reasonable, balanced and predictable implementation of the Environmental Liability Directive throughout the European Union.

The Group invites the active participation of interested industrial companies. The Group also works closely with consultants, attorneys and other experts via its EU Affiliates program. Additionally, the Group has established liaison with numerous Practice Partners, including government bodies, business and professional associations, and research and conservation organizations. Further information may be found at www.nrdonline.org or you may email us at info@nrdonline.org.

Re-issued: January 2013

Following is a partial listing of the documents prepared by the Ad-Hoc Industry Natural Resource Management Group to date.

- White Paper: Environmental Liability Funds in the Context of the European Union Environmental Liability Directive (December 2012)
- Report: Survey of Industrial Companies – Insurance and Other Financial Security Instruments and Remediation of Environmental Damages Under the EU Environmental Liability Directive (February 2010)
- Implementation of the EU Environmental Liability Directive: Summary of Guiding Principles and Recommended Best Practices (February 2009 and updated July 2009)
- Industry Case Studies: An Examination of Potential Effects of the EU Environmental Liability Directive (ELD) in Practice and Options Available to Member States (February 2007 and expanded in July 2009)
- White Paper: Financial Security and Insurance Aspects of the European Union Environmental Liability Directive (October 2007 and updated February 2009)
- Model Clauses for Use in Transposition of the EU Environmental Liability Directive (March 2007)
- Implementation of the EU Environmental Liability Directive in EU Member States – Issue Paper: The Operator Definition and Multi-Party Causation (March 2007)
- Implementation of the EU Environmental Liability Directive in EU Member States – Issue Paper: Defences and Exceptions (March 2007)
- Implementation of the EU Environmental Liability Directive in EU Member States – Issue Paper: National Environmental Liability Systems of EU Member States and Implementation Issue Arising under the European Union’s Environmental Liability Directive (July 2006)
- Implementation of the EU Environmental Liability Directive in EU Member States – Issue Paper: Assessment and Remediation of Damage to Habitats and Species, Water, and Land (June 2006)
- White Paper: EU Environmental Liability Directive: Practical Suggestions to Ensure Sound Implementation (2005)

FURTHER INFORMATION

Additional information about the EU ELD and related legal, administrative, scientific and economic practices can be found at the EU ELD Practice Exchange Website (www.EUELDPracticeExchange.com). The website has been developed to provide a



focal point for government and non-government as a means to facilitate communication and information exchange on various practice issues, activities and meetings related to the ELD and its continued application. The website includes links to other resources pertaining to the ELD. The Group is working to develop an ELD database, containing information on actual cases arising in Member States. Contributions to the EU ELD Practice Exchange website are welcome. Materials may be sent to info@nrdonline.org.

BACKGROUND AND STATUS UPDATE ON THE EU ENVIRONMENTAL LIABILITY DIRECTIVE (ELD)

The European Union (EU) Directive on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage (ELD or Directive) was adopted by the European Parliament and Council on 21 April 2004 (Directive 2004/EC/35). 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 were to “bring into force the laws, regulations and administrative provisions necessary to comply with the Directive.” All 27 Member States have transposed the ELD into national laws. Although national laws are already in place, Member States still face many issues in respect of application of the ELD’s provisions.

The ELD’s fundamental principle is prevention of environmental harm through the incentives generated by 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. The Directive imposes liability for significant damage to natural habitats and species protected at Community and national levels, surface and ground waters covered by the Water Framework Directive and land. However, the ELD does not cover insignificant damage, oil spills, nuclear risks, pollution of diffuse character, and several other exceptions.

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. Operators of activities listed under Annex III of the ELD will be subjected to strict liability and operators of other occupational activities to fault or negligence liability.

Although prevention is an important (and primary) objective, much of the ELD is focused on restoration of injured resources in the event that environmental damage occurs. The ELD lays out a framework under which Member States have been required to develop their own regimes. In some areas, the ELD’s requirements overlay existing laws and regulations of a Member State, while in other cases, entirely new laws and

regulations have been developed. In either situation, the ELD left many choices to individual countries. These decisions included: choosing whether to adopt certain defences to liability; interpretation of the provisions of the ELD itself; development of national solutions in places where the ELD is silent; selecting methodologies for assessing damage to protected habitats and species and valuation of resources and recovery of costs, including rules regarding security interests in favor of the authorities; creating new regimes consistent with existing environmental law requirements that go beyond the ELD's intended purpose; and more. All of this possible variance has had the potential to lead to the adoption of diverging regimes. While the ELD does not prescribe that all Member States create identical regimes, general consistency in approach is desirable to ensure that the proposed regimes are legally and technically sound and will result in consistent and certain practice. Though some level of flexibility is necessary, uncertainty can lead to delays and even failure to achieve restoration. Greater certainty and predictability can allow parties to work together in a productive way toward the common goal of restoration of environmental damage.

As the ELD, the national laws implementing the ELD, and the pre-existing framework of national laws are applied to actual cases of environmental damage, wide-ranging issues will inevitably arise for which the laws will not provide simple, obvious and undisputed answers. Given that the ELD itself provides minimal guidance as to how certain methods, issues and ambiguities are to be treated, the development of guidance documents and suggested practice principles becomes all the more important to achieve a reasonable, balanced and predictable implementation of the ELD throughout the EU. A greater level of certainty will benefit all parties involved and help promote and realize expeditious resolution of claims and efficient and effective remediation of resources.

- To quantify compensatory remediation gains, (1) clearly specify the relevant time periods for the service gains of the project including the start date, growth path, and functional time span; (2) use an interdisciplinary team to estimate service gains to cover the relevant ecological services; (3) estimate service gains as a range not a single point; (4) incorporate information on primary and/or complementary remediation where appropriate; and (5) conduct a sensitivity analysis for key assumptions or where data uncertainties exist.
- To measure restoration costs, (1) develop potential remediation projects onsite and offsite; (2) use site specific data on costs for both onsite and offsite projects; (3) develop a range of costs assuming both best case and worst case that might arise at a specific site; (4) develop remediation projects that are likely to produce equivalent types and levels of ecological services; (5) evaluate cost effectiveness of various alternatives; and (6) conduct a sensitivity analysis for key assumptions or where data uncertainties exist.
- When using economic survey methods as an alternative for scaling ecological losses, (1) use a survey only when no other alternative scaling approach is feasible; (2) develop alternatives that are equal in terms of remediation costs so that the survey is providing information on relative importance of alternatives vs. absolute value; (3) develop alternatives in close consultation with ecologists to ensure that equivalent ecological options are being presented or that if they differ, those differences are ones that the public can understand and express a preference about; (4) pretest survey questionnaires thoroughly; (5) use cost-effective data collection methods such as internet based surveys when possible; and (6) include reliability tests within the survey design.
- To perform cost-effectiveness analyses, (1) ensure that all projects being compared provide similar benefits; (2) consider the full range of remediation alternatives including actions such as conservation easements; (3) array the potential projects in terms of costs; (4) include all relevant costs for each alternative including any operating and maintenance or monitoring costs that may be relevant; and (5) choose the alternative that is the most cost-effective.

- Standardize approaches for rapidly assessing the potential for SED following an environmental incident.
- To properly determine damage to biodiversity, identify methods that measure changes to the favourable conservation status of protected species and habitats and are also practical for use in damage assessments.
- To properly determine damage to water, identify metrics that reliably measure ecological or chemical status and that are good indicators of actual damage as defined in the ELD.
- To properly determine damage to land, develop reliable methods for translating human health risk results into damage estimates.
- Develop a standard assessment framework that the CA and Operators can follow when performing damage quantifications.
- To develop data required to properly evaluate damage, (1) clearly specify the research objectives; (2) use an interdisciplinary team to cover the relevant ecological services; (3) review and evaluate existing data, including web-based data portals, to determine that they meet data quality standards; (4) determine whether new data are needed, and if so collect only the relevant data needed to answer key questions.
- In using Resource or Habitat Equivalency Analysis to scale complementary and compensatory remedial measures, select a metric that is the most ecologically relevant to the particular service flow being evaluated. If more than one service flow is impacted, then multiple metrics may be appropriate.
- To quantify service losses, (1) clearly specify the baseline conditions, including spatial and temporal trends; (2) use an interdisciplinary team to estimate service losses to cover the relevant ecological services; (3) estimate service losses as a range not a single point; (4) incorporate information on primary and/or complementary remediation where appropriate; and (5) conduct a sensitivity analysis for key assumptions or where data uncertainties exist.

GENERAL GUIDING PRINCIPLES FOR ELD IMPLEMENTATION

Under the ELD, the goal of all parties should be first to prevent incidents of environmental damage from occurring. Should incidents occur, the focus should be on restoring the environment, rather than on disputes involving liability. The following principles and recommendations, developed in consultation with diverse parties over the last several years, can help guide implementation to achieve this goal.

- 1) A reasonable, balanced and predictable liability regime is the overarching goal in applying the ELD and national transposing laws.
- 2) A clear and reasonable definition of liability will permit parties to focus on prevention and remediation by creating the appropriate incentives to responsibly manage the risk. Provisions in the Directive that limit its application to significant, quantifiable harm at the species and habitat levels provide an important means to focus remediation efforts on the most significant ecological damage.
- 3) Experience implementing the ELD will illuminate a great variety of factual, legal, economic and technical issues, including those for which the answer is not clear under the Directive or its implementing legislation. It is inevitable that issues will arise for which the answer is not clear under the Directive or its implementing legislation. (The Ad-Hoc Industry Natural Resource Management Group (Group) has prepared case studies to illustrate a subset of the potential issues.)
- 4) Harmonization across Europe on fundamental principles is desirable to achieve reasonable consistency on application issues. Ongoing mechanisms for consensus-building amongst Member States and affected parties will aid this process.
- 5) The permit and state of the art defences are reasonable and balanced provisions that promote predictability, and should be recognized, either through national transposing laws or indirectly through application in actual cases. They also provide the appropriate incentive for responsible parties to focus on prevention.
- 6) In multiparty cases, proportional liability is preferable to joint and several. Joint and several liability should be used only if there is no other legal, scientific or economic basis for allocating the liability among the parties.

7) Consistent with the Directive's focus on the polluter pays principle and on prevention, the operator definition and the third party defence should be interpreted to promote prevention by placing liability on the party that caused the damage.

a. Parties should avoid the temptation to expand the operator definition to include deep pocket entities which did not cause the damage.

b. The third party defence should likewise be broadly interpreted to put liability on the party that causes the damage.

8) Appropriate insurance will develop through market forces if a reasonable, balanced and predictable liability regime is implemented.

9) Insurance issues should be viewed in the context of broader mechanisms for insuring financial responsibility (including self-insurance, parental guarantees, letters of credit, performance bonds, etc.).



BEST TECHNICAL AND ECONOMIC PRACTICES

The ELD includes several provisions for the determination and remediation of significant environmental damage. In particular, Annex II of the ELD "...sets out a common framework to be followed in order to choose the most appropriate measures to ensure the remedying of environmental damage". The recommended best practices below are intended to provide guidance relative to technical and economic issues that are likely to arise under the ELD relative to the "remedying of environmental damages". Key issues include determining significant environmental damage, primary remediation, complementary remediation, and compensatory remediation, as well as quantifying service losses, restoration gains and remediation costs.

The recommended best technical and economic practices identified below are intended to help address some of the major issues which will likely occur in ELD practice.

- While comprehensive identification of potentially affected resources and services should be performed during initial evaluations, it is important to emphasize those services that can be more readily and reliably measured to ensure that the magnitude of damage is correctly characterized. Therefore, select only the most relevant and affected resources or services and restrain from trying to evaluate all possible services.
- In determining environmental damage, do not equate risk to species and habitats with damage; rather, focus on accurate measurement of quantifiable changes in relevant service flows as an indicator of the potential for significant environmental damage (SED). Identify metrics of actual adverse effects that are quantitative indicators of SED.
- In determining the proper level of baseline, use reliable data to characterize baseline as completely as possible for all resources or services being assessed. Develop methods for establishing baseline in the absence of complete and reliable information.
- Causation analysis is a key step in the damage determination process that must be thoroughly performed. Only when the causal link is proven, and the criteria for damage have been met, is this SED.

- Review carefully whether any administrative review or appeal by a third party is admissible. If the requested review or appeal is found to be admissible and sufficiently substantiated, the operator concerned is notified and invited to participate.
- If a concurrent civil action is filed with respect to an instance of environmental damage, review to what extent there is potential of double recovery or overlapping actions. Consider staying the ELD procedures if there is significant potential for double recovery or conflicting opinions.
- Build a case file that includes only sound, relevant and reliable data meeting high data quality standards, so that sound decisions supported by the facts can be made.
- When obtaining external advice, define the issues on which external advice is needed, the scope of assignment and procedure for the expert's examination of issues and developing report ("terms of reference"), consider whether terms of reference should be made available for public comment, carefully select a well qualified expert, manage the expert, and make expert report available for comments from stakeholders.
- Define rules for stakeholder access to information held by the CA, and define exceptions to access.
- Define rules and modes for public participation, define groups of persons that have a right to participate, define responsibilities of participants, and define where in the procedure public participation takes place.
- Ensure that investigation of facts is careful and sound. Consider interests involved with the decision. State sound and persuasive reasons for decisions that are supported by the facts and the applicable law, and justify why key arguments made by stakeholders are rejected. Notify the decision to the persons concerned, and indicate any available review or appeal procedures.

GUIDANCE DEVELOPED TO DATE

To help facilitate implementation of the ELD into national laws, some Member State governments, including the Walloon Region of Belgium, the Netherlands and the United Kingdom, have released guidance documents. Generally, the guidance documents set out requirements and application of the national laws implementing the ELD in the respective Member State, focused on both legal and technical issues in most cases. In addition, some Member State guidance is embedded in legislative documents. A number of Member States are in the process developing guidance, including France, Ireland and others. Examples of some specific issues included in emerging guidance include how to determine scope and applicability of legislation, how to determine significant environmental damage, and how to select and implement remedial measures.

The Ad-Hoc Industry Natural Resource Management Group, on behalf of industry, has been working to encourage development of guidance and best practices needed to promote sound ELD implementation. The Group has convened, since 2008, a series of seminars focused on the discussion and development of ELD guiding principles and best practices, attended by European Commission, Member State and industrial company representatives, as well as legal and technical experts.

SUMMARY OF RECOMMENDED LEGAL, ADMINISTRATIVE, TECHNICAL AND ECONOMIC BEST PRACTICES

The material in this section is largely drawn from the discussions and consensus views resulting from the Group's best practices seminars, as well as the document, "EU Environmental Liability Directive: Summary of Guiding Principles and Best Practices" (July 2009). In particular, this section highlights some of the legal, administrative, technical and economic principles that will be fundamental for the successful and cost-effective remediation of environmental damage pursuant to the ELD and Member State implementation laws. The recommended best practices identified herein can provide guidance where national authorities and other stakeholders are able to shape ELD and Member State procedures -- as well as to serve as a basis for constructive and continued discussion of certain issues likely to emerge as important in actual practice. As new ELD-related information and experiences are gained in various Member States, the material herein will be revised and expanded accordingly.

The ELD requires that the Member States (1) bestow national authorities with certain powers in connection with administering the national regimes transposing the ELD and (2) establish procedures for administering key aspects of the ELD's regimes and for managing cases of environmental damage. It also imposes broad prevention, remediation, and reporting obligations on operators. There is not much detail in the ELD on these procedures and obligations; thus, much is left to Member States' discretion. This, in turn, implies that each Member State will have to analyze the issues and make decisions in respect of the details of administrative procedures and practices under the ELD. The same applies to industry, which has to determine how it will meet its prevention, remediation, and reporting obligations and how it will interact with the authorities.

The recommended best legal and administrative practices identified below are relevant to the national administrative procedures under national ELD legislation.

- Design and implement environmental management and response systems that ensure compliance with the obligations imposed on operators under ELD legislation.
- Respect the operator's primary responsibility for taking preventive and remedial measure, if operators, in fact, meet their obligations.
- Secure access to specialized legal, ecological, and economical expertise.
- Establish lines of communication with other authorities such as permitting authorities for Annex III activities, and nature protection authorities.
- Determine whether a case falls under the ELD-transposing legislation before initiating further procedures under such legislation.
- Determine whether any exception to the ELD's scope applies or the operator can invoke a defence before initiating further proceedings under the ELD.
- Document properly the decision in respect of whether a case falls under the ELD-transposing legislation.

- Assess whether the environmental damage at issue, (i) falls under the ELD's definitions of environmental damage; (ii) constitutes damages to protected species and habitats, or land damage; (iii) is caused by a covered emission, incident, or event after ELD's effective date; (iv) is significant, as defined in Annex I of the ELD; and (v) is caused by an activity falling under the scope of the EU environmental directives listed in Annex III, or by a non-listed activity but only if there is negligence (and then only as far as damage to protected habitats and species is involved).
- Consistent with the operator's primary responsibility and its ownership/possessory interest, follow a step-by-step approach in ensuring that the necessary preventive measures are taken, with the authority taking preventive measures only as a last resort.
- Consistent with the operator's primary responsibility and its ownership/possessory interest, follow a step-by-step approach in ensuring that the necessary remedial measures are taken, with the authority taking measures itself only as a last resort.
- If the Competent Authority (CA) intends to proceed with measures, the operator is invited to comment on the measures that the CA proposes to execute. The CA always pursues the least cost option that achieves effective remediation. The CA takes a security interest in the operator's property, only if there is a serious risk that the operator will otherwise not reimburse the CA's reasonable cost. The operator has access to cost recovery under the same conditions as those applying to the CA.
- In cases of multiple instances of environmental damage, the operators involved provide relevant information to the CA, and the CA determines whether all such instances of damage are covered by the ELD, ranks the various cases in terms of remediation priority, and considers with respect to environmental damage that does not have remediation priority, whether it is appropriate not to require compensatory remediation for interim losses.
- Review carefully any request from third parties to ensure that they meet the applicable legal requirements, give the operator an opportunity to review and comment on the request, and consider all information, data, and comments submitted before making a decision.