



Ad-Hoc INDUSTRY

NATURAL RESOURCE
MANAGEMENT GROUP

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WHITE PAPER

THE EUROPEAN UNION ENVIRONMENTAL LIABILITY DIRECTIVE -- PRACTICAL SUGGESTIONS TO ENSURE SOUND IMPLEMENTATION

This document highlights key considerations concerning implementation of the European Union (EU) Environmental Liability Directive (ELD) throughout Europe and suggests ways that government, operators and others can work to facilitate regimes that reflect sound policy, law and methodology¹.

STATEMENT OF THE ISSUE

The European Union *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 were to “bring into force the laws, regulations and administrative provisions necessary to comply with the Directive.” Although some Member States were late, all have now transposed the ELD. 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 (i) natural habitats and species protected at Community and national levels, (ii) surface and ground waters covered by the Water Framework Directive and (iii) 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 companies operating business activities involving hazardous substances, transporters or disposers of waste and hazardous waste,*

¹ This White Paper, originally released in 2005, has been reissued in order to incorporate the European Commission’s ongoing review of the EU Environmental Liability Directive pursuant to Article 18. The White Paper should not be construed as an endorsement by the member companies of the Ad-Hoc Industry Natural Resource Management Group, collectively or individually.

companies whose operations have resulted in a discharge of any dangerous substance or genetically modified organisms, and other industries.

The Directive lays out a framework under which Member States have developed their own regimes. In some areas, the Directive's requirements are an overlay to the existing national 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 add additional resources protected by national law to the scope of the regime, and whether to adopt certain defences to liability, joint and several liability or proportional liability for jointly caused damage, and financial security; 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 minimum scope. Some of the national regimes adopted by the Member States are expected to create some challenges, and may provide inefficient and/or impractical solutions to deal with the issues raised by the Directive. Some Member States have prepared guidance and/or initiated other activities pursuant to the ELD'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 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 ELD's implementation in the EU. Although there are distinct differences between NRD and the regimes developed to comply with the Environmental Liability Directive, there are a number of common issues, such as establishing causation, determining baseline, identifying and selecting 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 and in other documents produced by the Ad-Hoc Industry Natural Resource Management Group.

EFFECTS OF THE DIRECTIVE

The environmental liability that may be imposed on entities operating within EU Member States is unprecedented on the continent, and may result in significant financial burdens. Member States that enacted this type of legislation for the first time may have been 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 "broader" or "more stringent" as better. However, these regimes may be ineffective or inefficient, and draw resources away from restoration. On the other hand, 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. Much can be learned from the US experience and, moving forward, there will be a certain degree of interchange between the US NRD and EU ELD 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, all parties, including regulators and 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 Member State authorities and the industrial community alike. Critical issues that will be faced by each Member State that may have significant impacts on the ELD's implementation in actual practice include:

- Which Member States have adopted national regimes or guidance elaborating or going beyond the provisions of the Directive, and what do these elaborations or extensions involve;
- 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 is critical as governments are further developing and implementing their regimes to ensure that the proposed regimes are legally and technically sound and will result in a consistent and certain practice.

OPPORTUNITIES TO PROMOTE A REASONABLE, BALANCED AND PREDICTABLE REGIME

The Directive creates a unique opportunity, as the majority of Member States are still developing their approaches to implementing the Directive and meshing its requirements with their existing liability frameworks. A handful of Member States are likely to be seen as leads that other Member States will

follow in implementation 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. In site-specific situations, operators should present Member State authorities with options that will lead to the achievement of the common goal of a workable system.

In order to take proactive and responsible steps to promote a robust and efficient liability regime across Europe, numerous activities have and can continue to be undertaken by the operator community (see for example www.NRDonline.org and www.EUELDPracticeExchange.com). These activities include development of White Papers, position papers on key legal, technical, economic and other aspects of the Directive and Best Practices documentation, as well as other activities such as training, lessons learned and other specialty seminars.

By 30 April 2014, the European Commission, under Article 18 of the ELD, is required to submit a report to Parliament and Council on “appropriate proposals for amendments to the ELD”. Some of issues under consideration include financial security requirements, scope of the ELD, definitions of environmental damage and significance, optional defences, the relationship of the ELD to international conventions and more. To help inform the Commission’s review, Member States were required to submit individual reports “on the experience gained in the application” of the ELD by April 2013. Operators and other parties have the opportunity to provide input to this process as well².

In addition to proactive steps that individual companies can take to prevent and minimize potential liability under the ELD, parties can maximize the effect of their participation by:

- Learning about specific issues, including US experience that may be applicable;
- Following the implementation of regimes in Member States, including applications in specific cases;
- Working – and promoting dialogue and practice exchange – with other companies that are closely monitoring these issues;
- Participating in Member State consultation mechanisms and other legislative and administrative participation; and
- Coordinating input with other operators and interested parties via meetings, communications, surveys and the like.

There are many opportunities for the broad industrial community to work to effect the viable implementation of the Environmental Liability Directive. It is in everyone’s interest to promote regimes across Europe and in individual Member States that are reasonable, balanced and predictable.

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 industry sectors. The Group is focused on policies and practices concerning the interface between industrial operations and natural resources. Since the EU Environmental Liability Directive (ELD) was enacted in 2004, the Group has worked extensively to foster its reasonable, balanced and predictable implementation. In this role, the Group has served as a

² See for example, “Comments on Key Issues being Examined by the European Commission Relative to the EU Environmental Liability Directive” (January 2014), available at http://www.nrdonline.org/eu/liability_directive.php4.

resource to the broad industrial community and has facilitated communication exchange with government authorities and other practitioners. The Group has prepared numerous documents on the ELD, including guidelines for best practices and has convened numerous multi-stakeholder meetings, workshops and seminars on the ELD and related matters in Brussels, 2004 through the present.