



EUROPEAN COMMISSION
DIRECTORATE-GENERAL
ENVIRONMENT
Directorate A - Sustainable Development and Policy Support
ENV.A3 - Environmental Governance

Brussels, 11-09-2001
CPI/en D(2001) 230199

**NOTE FOR THE ATTENTION OF THE PERMANENT REPRESENTATIONS OF BELGIUM,
DENMARK, GERMANY, GREECE, SPAIN, FRANCE, IRELAND, ITALY, LUXEMBOURG,
AUSTRIA, THE NETHERLANDS, PORTUGAL, FINLAND, SWEDEN AND THE UNITED
KINGDOM**

**Subject: Public consultation on a working document on prevention and
restoration of significant environmental damage (environmental
liability)**

I refer to the letter from Mr Currie, A230154, dated 25 July, transmitting to your
authorities a working document on the above-mentioned item.

Please find hereafter, as supplementary information released by the Environment
Directorate-General in the context of the above-mentioned public consultation, a draft list
of activities to be covered by the planned regime on prevention and restoration of
significant environmental damage.

I apologise for the fact that only an English version is available at this stage.

The attached document will also be placed on the Environment Directorate-General
website.

SIGNED

L. Krämer

Encl.

ANNEX

ACTIVITIES SUBJECT TO STRICT LIABILITY

- The operation of installations subject to permit in pursuance of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control¹.
- The operation of installations subject to authorisation in pursuance of Council Directive 84/360/EEC of 28 June 1984 on the combating of air pollution from industrial plants² in relation to the release into air of any of the polluting substances covered by the aforementioned Directive.
- The operation of installations subject to permit in pursuance of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community³ in relation to the discharge of any of the dangerous substances covered by the aforementioned Directive.
- The operation of installations subject to permit for discharging any of the dangerous substances in pursuance of Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances⁴ in relation to the discharge of any of the dangerous substances covered by the aforementioned Directive.
- The operation of installations subject to permit in pursuance of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy⁵ in relation to the discharge of any of the dangerous substances covered by the aforementioned Directive.

Note: Directives 76/464/EEC and 80/68/EEC would be repealed on 22 December 2013 in pursuance of Article 22 of Directive 2000/60/EC; as of 23 December 2013, the relevant provisions of Directive 2000/60/EC would be entirely applicable. Consequently, Directive 2000/60/EC would only be taken into account for the purpose of the proposal as of that date.

¹ OJ L 257, 10.10.1996, p. 26.

² OJ L 188, 16.7.1984, p. 20.

³ OJ L 129, 18.5.1976, p. 23.

⁴ OJ L 20, 26.1.1980, p. 43.

⁵ OJ L 327, 22.12.2000, p. 1.

- Waste management operations, including the collection, transport, recovery and disposal of waste and hazardous waste, including the supervision of such operations and after-care of disposal sites, subject to permit or registration in pursuance of Council Directive 75/442/EEC of 15 July 1975 on waste⁶ and Council Directive 91/689/EEC of 12 December 1991 on hazardous waste⁷.
- Manufacture, use, storage, transport or release into the environment, of dangerous substances within the scope of Council Directive 67/548/EEC of 27 June 1967 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous substances⁸.
- Manufacture, use, storage, transport or release into the environment, of dangerous preparations within the scope of Directive 1999/45/EC of the European Parliament and of the Council of 31 May 1999 concerning the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations⁹.
- Manufacture, use, storage, transport or release into the environment, of plant protection products within the scope of Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market¹⁰.
- Manufacture, use, storage, transport or release into the environment, of biocidal products within the scope of Directive 98/8/EC of the European Parliament and of the Council of 16 February 1998 concerning the placing of biocidal products on the market¹¹.
- Any contained use of genetically modified micro-organisms within the scope of Council Directive 90/219/EEC of 23 April 1990 on the contained use of genetically modified micro-organisms¹².
- Any deliberate release into the environment of genetically modified organisms within the scope of Directive 2001/18/EC of the European Parliament and of the

⁶ OJ L 194, 25.7.1975, p. 39. Directive as last amended by Commission Decision 96/350/EC of 24 May 1996 adapting its Annexes IIA and IIB (OJ L 135, 6.6.1996, p. 32).

⁷ OJ L 377, 31.12.1991, p. 20. Directive as amended by Council Directive 94/31/EC of 27 June 1994 (OJ L 168, 2.7.1994, p. 28).

⁸ OJ 196, 16.8.1967, p. 1.

⁹ OJ L 200, 30.7.1999, p. 1.

¹⁰ OJ L 230, 19.8.1991, p. 1. Directive as last amended by Commission Directive 2001/21/EC of 5 March 2001 (OJ L 69, 10.3.2001, p. 17).

¹¹ OJ L 123, 24.4.1998, p. 1.

¹² OJ L 117, 8.5.1990, p. 1. Directive as amended by Council Directive 98/81/EC of 26 October 1998 (OJ L 330, 5.12.1998, p. 13).

Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC¹³.

- Transport of genetically modified organisms within the scope of Directive 2001/18/EC of the European Parliament and of the Council.
- Any practices covered by Council Directive 96/29/Euratom of 13 May 1996 laying down basic safety standards for the protection of the health of workers and the general public against the dangers arising from ionising radiation¹⁴.

¹³ OJ L 106, 17.4.2001, p. 1.

¹⁴ OJ L 159, 29.6.1996, p. 1.



EUROPEAN COMMISSION
DIRECTORATE-GENERAL
ENVIRONMENT

The Director-General

FÆLLESREPRÆSENTATIONEN BRUSSEL		
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25 JULI 2001		
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Brussels, 25-07-2001
ENV.A.3(01)D/230154

Your Excellency,

The European Commission adopted a White Paper on Environmental Liability on 9 February 2000. The White Paper explored how a Community regime on environmental liability could best be shaped. Having explored different options for Community action, the White Paper concluded that the most appropriate option would be a Community directive on environmental liability.

In the aftermath of the White Paper, the Commission received a considerable number of comments sent by several Member States and a wide range of stakeholders¹.

The Commission has also commissioned several studies concerning different topics relating to environmental liability, including on legal issues, competitiveness, prevention of environmental damage, and insurance schemes².

The Commission Work Programme for 2001 foresees the adoption of a proposal for a directive on environmental liability.

It is within that context that the Environment Directorate-General has prepared the attached working document which outlines the principles on which the forthcoming Commission legislative proposal could be based³.

In order to ensure as wide a consultation as possible, the Environment Directorate-General would like to have your comments on the ideas set out in the working document. To this end, I have the pleasure of inviting representatives from your country to an informal meeting which should take place on 7 September 2001 in Brussels. Further information relating to scheduling and the exact venue will be provided during the fourth

¹ Summaries of those comments can be found on the following website:
<http://europa.eu.int/comm/environment/liability/followup.htm>

² The final reports of those studies which are available can be found on the above-mentioned website.

³ The document can also be downloaded from the aforementioned website.

Hans Excellence Hr. ambassadør Poul SKYTTE CHRISTOFFERSEN
Danmarks Faste Repræsentant ved Den Europæiske Union
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week preceding the meeting. Other Member States and EEA States have been invited to attend this meeting.

The Commission can reimburse the travel expenses for one expert per Member State. Participants who intend to request reimbursement of expenses should have with them all of the information required in order to complete their reimbursement forms, which will be available at the meeting, and in particular the details needed for a bank transfer.

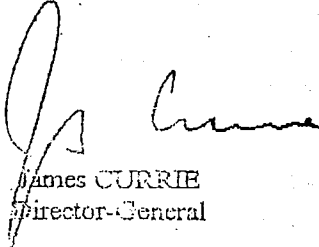
The working document has also been sent out to accession countries, European environmental, industrial and professional non-governmental organisations, European associations of local and regional authorities, and some international organisations (see list of contacted parties attached).

Similar meetings will be organised with accession countries, European associations of local and regional authorities, environmental non-governmental organisations and European industrial and professional federations and associations.

Written comments can be sent to the Commission by 15 September 2001 at the latest.

In order to make the consultation process as transparent as possible, it is foreseen to publish opinions and statements of interested parties on the Commission website. Consent to the publishing of submissions made by commenting parties will be assumed unless accompanied by a clear statement requesting confidentiality. Comments should be sent in electronic form⁴.

Yours faithfully,



James CURRIE
Director-General

Enclosures: 1. Working paper
2. List of contacted parties

⁴ Either in Word or PDF format. Electronic documents should be sent to the following address: Charles.Pirotte@cec.eu.int.

**ENVIRONMENT DIRECTORATE GENERAL WORKING PAPER ON
PREVENTION AND RESTORATION OF SIGNIFICANT ENVIRONMENTAL
DAMAGE**

(ENVIRONMENTAL LIABILITY)

This working paper has been prepared in the context of the preparation of a legislative proposal dealing with environmental liability for the purpose of consulting Member States and other interested persons and bodies with respect to the main features of the forthcoming proposal for a Directive on prevention and restoration of significant environmental damage.

The proposal would be based on the following elements:

1. The purpose would be to establish a Community framework in respect of **professional/commercial activities** causing Significant Environmental Damage ("SED"), addressing both its **prevention and restoration**.
2. Liable party would be the **operator**, who is the natural or legal person who **controls** the activity concerned. Where the activity is subject to authorisation, the **authorisation holder** would also be considered as the operator.
3. SED means:
 - **Damage that adversely affects the favourable conservation status¹ of biodiversity** (habitats and species protected under Community legislation – Habitats Directive and Annex I to Wild Birds Directive – and and natural sites protected national legislation). Damage authorised under Article 6(3) and (4) of the Habitats Directive would be excluded.
 - **Pollution of water** covered by the Community Water Framework Directive ("WFD") when this pollution causes water quality to deteriorate from one quality status to a worse one². Damage covered by Article 4(7) of the WFD would be excluded.
 - **Damage that creates serious harm to human health** as a result of either of the foregoing categories or land (soil and subsoil) contamination.
4. **Liability would not be retrospective**. In case of doubt, the operator would have to establish that the cause of the damage occurred before the entry into force of the regime. There is a **thirty year limitation period** on liability under the Directive.
5. The liability scheme would depend on the type of activity and of the type of damage in question:
 - (a) **Strict Liability** - for SED caused by activities defined in an Annex by reference to environmental legislation (see below).

¹ As defined in the Habitats Directive.

² Quality statuses are those defined in the Water Framework Directive.

(b) **Fault based liability** - for Biodiversity damage caused by activities other than those covered under (a).

6. The regime would create a **general duty on operators** to prevent an imminent threat of SED.
7. Where SED has occurred there would be a **duty on Member States to ensure that operators will comply with their obligations**:
 - In the case of **strict liability activities**, they would require the operator to take restorative measures, regardless of fault.
 - In the case of **fault based liability activities**, they would require the operator to take restorative measures, if he is at fault.

If the operator fails to respond to a request, the Member States would take the appropriate action themselves and recover the costs of so doing.

8. Where the SED has **not yet occurred** but there is an imminent threat, Member States would have to request action by the operator, or take the appropriate action themselves, and recover the costs of so doing. If the operator fails to respond to a request, Member States would have to take the appropriate action themselves and recover the costs of so doing.
9. **Defences to liability to the benefit of operators** would apply where the SED was wholly the result of armed conflict; acts of God; intentional acts by third parties to cause damage which succeeded in spite of appropriate safety measures; and in the case of compliance with a compulsory order from a public authority.
10. **Member States would have to ensure that restoration/prevention occurs**:
 - In circumstances when someone is liable but cannot be identified or doesn't have sufficient fund to do some/any of the work necessary.
 - In circumstances when no one is liable.

If the proposed regime would be setting the objective (i.e. that Member States take the necessary steps to ensure that environmental damage is rectified when the polluter cannot be found or is insolvent), Member States would be free to decide how best to achieve that objective (requiring operators to be covered by a kind of financial security, setting up of a fund system fed through contributions from the industry, imposing liability on other categories of persons, such as the owner of the polluted site, etc.).

11. **Criteria for carrying out restoration** would be set out in an Annex to the Directive. The duty to determine the appropriate measures to be taken in accordance with the Annex would rest solely with the competent authorities designated by Member States (see below).
12. **Multiple parties would be liable** where two or more operators caused SED. Each operator who is able to establish the extent to which the damage results from its activities, would only be liable for that part of the damage. Those operators who

could not so demonstrate would be jointly and severally liable for the remainder of the SED.

13. Natural persons who control a liable legal person under the Directive could be jointly and severally liable in certain circumstances (if they are at fault).
14. Legal persons controlling other legal persons could be jointly and severally liable in certain circumstances (if they have had knowledge or ought to have knowledge of the damaging factor).
15. Persons providing financial security to a liable person and insolvency practitioners would not be liable unless they could be deemed as controlling the liable party at the relevant time.
16. **Qualified entities in the field of environmental protection** would be entitled to submit observations on incidents of SED to national authorities responsible for the enforcement of the Directive, and would be entitled to request that action be taken. The competent authorities would be under a duty to consider such requests and observations. Within four months the competent authorities would be under a duty to inform the qualified entity of its decision in respect of the observations and requests for action.
17. **Qualified entities in the field of environmental protection** would be entitled to bring legal proceedings to review a competent authority's response to their observations and request for action. There would have been a failure by a competent authority to act only when it received a prior request to do so by the qualified entity that seeks judicial review.

A "qualified entity" would mean any body or organisation which, according to the criteria, if any, laid down in national law, has an interest in ensuring that significant environmental damage is restored. Bodies and organisations whose purpose, as is shown by the articles of incorporation thereof, is to protect the environment should be deemed to have such an interest.
18. The regime would not require any compulsory insurance but Member States retain the right to require it.
19. Court orders could be sought by competent authorities to secure funds for prevention/restoration where there is a serious danger that these would be dissipated by the liable party.
20. An Annex would list the activities subject to strict liability. Those activities would be defined by reference to Directives: activities subject to the "Integrated Pollution Prevention and Control"; discharge of dangerous substances into air and water/groundwater; waste management operations; contained use of genetically modified micro-organisms and deliberate use of genetically modified organisms; manufacture, use, storage, transport or release into the environment of biocidal products, plant protection products or dangerous chemicals and preparations; practices covered by Euratom Basic Safety Standards Directive 96/29.

The proposed regime would be without prejudice to the international arrangements concerning the compensation of damage caused by oil pollution.

21. Another Annex would set out: the objectives of restoration; how to identify restorative options; and how the final restorative option would be selected.

21.1. Objectives

For SED in terms of:

- (1) **biodiversity damage**; and (2) **water pollution**, restoration would be achieved by returning damaged habitats and polluted water to **baseline condition**. It would also require that **serious harm to human health be removed**;
- (3) **land (soil and subsoil) contamination**, restoration would be achieved by ensuring that **serious harm or potential harm to humans is removed**, this being assessed having regard to present and plausible future land uses as resulting from the land use regulations in force at the time of the damage.

Compensation for interim losses from the date of damage until restoration is completed would be required.

21.2. Identifying reasonable restorative options

The competent authority would have to consider:

- a **natural recovery option** i.e. where no direct human intervention is taken in order to restore damaged resources to baseline condition;
- **direct intervention** in order to restore damaged resources to baseline condition on an accelerated time frame; and
- **compensation for interim losses** of natural resources and their services.

The competent authority would ensure that compensation is assessed with regard to the **time dimension**, i.e. discounting the value attributable to natural resources and/or services concerned.

The competent authority would, in so far as is possible, favour the provision of natural resources and/or services of the same **type and quality and therefore of comparative value** as those actually damaged. In the rare circumstances where this is not possible, **monetary valuation** techniques based on observed behaviour would be used.

21.3. Choice of restorative options

After the competent authority had developed a reasonable range of restorative options, it would **evaluate these based upon**:

- cost;
- likelihood of success;
- avoidance of future damage and collateral damage;
- benefits to each component of the damaged resource/service;

- effects on public health and safety.

Where several options are likely to deliver the same value, the least costly would be preferred.

An invitation to the liable operator to co-operate would always be made to ensure effective implementation.

A restoration scheme that does not restore the damaged site fully to baseline condition would be chosen only where the competent authority ensures that additional restorative actions are taken. These additional restorative actions - taken at other sites - should provide comparable value to the natural resources and/or services lost because the damaged resource has not been fully restored to its baseline condition.

