

**Proposal for a Directive of the European Parliament and of the Council on environmental liability
with regard to the prevention and remedying of environmental damage**

(2002/C 151 E/06)

(Text with EEA relevance)

COM(2002) 17 final — 2002/0021(COD)

(Submitted by the Commission on 21 February 2002)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE
EUROPEAN UNION,

Having regard to the Treaty establishing the European
Community, and in particular Article 175(1) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the Economic and Social
Committee,

Having regard to the opinion of the Committee of the Regions,

Acting in accordance with the procedure laid down in Article
251 of the Treaty,

Whereas:

(1) There are currently many contaminated sites in the
Community posing significant health risks and the loss
of biodiversity has dramatically accelerated over the last
decades. Failure to act could result in increased site
contamination and greater loss of biodiversity in the
future. Preventing and remedying, in so far as is
possible, environmental damage contributes to
implementing the objectives and principles of the
Community's environment policy as set out in Article
174 of the Treaty.

(2) The prevention and remedying of environmental damage
should be implemented through the furtherance of the
principle according to which the polluter should pay, as
indicated in Article 174(2) of the Treaty. One of the
fundamental principles of this Directive should therefore
be that an operator whose activity has caused the environ-
mental damage or the imminent threat of such damage
will be held financially liable in order to induce operators
to adopt measures and develop practices to minimise the
risks of environmental damage so that their exposure to
financial liabilities is reduced.

(3) Since the objective of the proposed action, namely to
establish a common framework for the prevention and
remedying of environmental damage at a low cost to
society, cannot be sufficiently achieved by the Member
States and can therefore be better achieved at
Community level by reason of the scale of the proposed
action and the implications in respect of other
Community legislation, namely Council Directive
79/409/EEC of 2 April 1979 on the conservation of
wild birds ⁽¹⁾, Council Directive 92/43/EEC of 21 May
1992 on the conservation of natural habitats and of
wild fauna and flora ⁽²⁾, and 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 policy ⁽³⁾, the
Community may adopt measures in accordance with the
principle of subsidiarity as set out in Article 5 of the
Treaty. In accordance with the principle of propor-
tionality, as set out in that Article, this Directive does
not go beyond what is necessary in order to achieve
those objectives.

(4) Notions instrumental to the correct interpretation and
application of the scheme provided for by this Directive
should be defined. When the notion in question derives
from other relevant Community legislation, the same defi-
nition should be used so that common criteria can be
used and uniform application promoted.

(5) Biodiversity should also be defined by reference to areas
of protection or conservation that have been designated in
pursuance of national legislation on nature conservation.
Account should nevertheless be taken of specific
situations where Community directives or equivalent
national provisions allow for certain derogations from
the level of protection afforded to the environment.

(6) This Directive should apply, as far as environmental
damage is concerned, to occupational activities which
present a risk for human health and the environment.
Those activities should be identified, in principle, by
reference to the relevant Community legislation which
provides for regulatory requirements in relation to
certain activities or practices considered as posing a
potential or actual risk for man or the environment.

⁽¹⁾ OJ L 103, 25.4.1979, p. 1. Directive as last amended by
Commission Directive 97/49/EC (OJ L 223, 13.8.1997, p. 9).

⁽²⁾ OJ L 206, 22.7.1992, p. 7. Directive amended by Directive
97/62/EC (OJ L 305, 8.11.1997, p. 42).

⁽³⁾ OJ L 327, 22.12.2000, p. 1.

- (7) This Directive should also apply, in relation to biodiversity damage, to any occupational activities other than those already directly or indirectly identified by reference to Community legislation as posing an actual or potential risk for man or the environment.
- (8) Express account should be taken of the Euratom Treaty and relevant international conventions and of Community legislation regulating more comprehensively and more stringently the operation of any of the activities falling under the scope of this Directive. This Directive, which does not provide for additional rules of conflict of laws when it specifies the powers of the competent authorities, is without prejudice to the rules on international jurisdiction of courts as provided, *inter alia*, in Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ⁽¹⁾. This Directive should not apply to activities carried out in the interest of national defence.
- (9) Not all forms of environmental damage can be remedied by means of the liability mechanism. For the latter to be effective, there need to be one (or more) identifiable actors (polluters), the damage needs to be concrete and quantifiable, and a causal link needs to be established between the damage and the identified polluter(s). Liability is therefore not a suitable instrument for dealing with pollution of a widespread, diffuse character, where it is impossible to link the negative environmental effects with the activities of certain individual actors.
- (10) Since the prevention and remedying of environmental damage is a task directly contributing to the pursuit of the Community's environment policy, public authorities should be entrusted with special responsibilities to ensure the proper implementation and enforcement of the scheme provided for by this Directive.
- (11) In order for the system to be effective, the competent authority should take action itself in cases where the operators responsible do not or are not able to take the necessary measures either to prevent environmental damage or to remedy such damage.
- (12) Restoration of the environment should take place in an effective manner ensuring that the relevant restoration objectives are achieved. Appropriate guidelines should be defined to that end, the proper application of which should be supervised by the competent authority.
- (13) Appropriate provision should be made for those situations where several instances of environmental damage have occurred in such a manner that the competent authority cannot ensure that all the necessary restorative measures are taken at the same time. In such a case, the competent authority should be entitled to decide which instance of environmental damage is to be remedied first.
- (14) According to the 'polluter pays' principle, an operator causing environmental damage or creating an imminent threat of such damage should, in principle, bear the cost of the necessary preventive or restorative measures. In cases where a competent authority has to act itself or through a third party in the place of an operator, that authority should ensure that the cost incurred by it is recovered from the operator. It is also appropriate that the operators should ultimately bear the cost of assessing environmental damage and, as the case may be, assessing an imminent threat of such damage occurring.
- (15) Member States should ensure that the necessary preventive or restorative measures are taken when the polluter pays principle cannot be implemented. In such cases, Member States should adopt whatever provisions they deem fit in conformity with their legal systems provided that they ensure effectively that the necessary preventive or restorative measures are financed.
- (16) Where biodiversity damage has been caused by an operator in the course of an occupational activity other than one of those identified by this Directive as posing an actual or potential risk for man or the environment, that operator should not be obliged to bear the cost of preventive or restorative measures taken in pursuance of this Directive where it is not established that the operator was at fault or negligent.
- (17) Appropriate account should be taken of situations where the damage in question or imminent threat thereof is the result of certain events beyond the operator's control or of emissions or events explicitly authorised or where the potential for damage could not have been known when the event or emission took place, or where persons act in their capacity as insolvency practitioners and are not otherwise at fault or negligent, or where operators merely comply with the regulatory requirements imposed on their activity. In that context, there may be situations in which it is justifiable that, although the operator should not bear the cost of preventive or restorative measures, Member States should nevertheless be required to take action.
- (18) Operators should bear the costs relating to preventive measures when those measures should have been taken as a matter of course in order to comply with the legislative, regulatory and administrative provisions regulating their activities or the terms of any permit or authorisation.

⁽¹⁾ OJ L 12, 16.1.2001, p. 1.

- (19) Appropriate provision should be made to take account of cases where several operators have caused the damage including the possibility for Member States to either provide for joint and several liability or for apportionment on a fair and reasonable basis of the financial responsibility.
- (20) Competent authorities should be entitled to recover the cost of preventive or restorative measures from an operator for a reasonable period of time from the date on which those measures were effected.
- (21) It is necessary to ensure that effective means of implementation and enforcement are available, while ensuring that the legitimate interests of the relevant operators and other interested parties are adequately safeguarded. Competent authorities should carry out appropriate investigations and remain in charge of specific tasks entailing expert knowledge and appropriate administrative discretion, namely the duty to assess the significance of the damage and to determine which restorative measures should be taken.
- (22) Persons adversely affected or likely to be adversely affected by environmental damage should be entitled to ask the competent authority to take action. Environmental protection is, however, a diffuse interest on behalf of which individuals will not always act or will not be in a position to act. Qualified entities should therefore be given a special status so that they can properly contribute to the effective implementation of this Directive.
- (23) In order to facilitate requests for action, appropriate procedures should be provided for, and the competent authority should be under an obligation to inform the interested party when it is not possible to take a decision within a reasonable period or time.
- (24) The relevant persons and qualified entities should have access to procedures for the review of the competent authority's decisions, acts or failure to act.
- (25) Where environmental damage affects or is likely to affect several Member States, those Member States should co-operate with a view to ensuring proper and effective preventive or, as the case may be, restorative action in respect of any environmental damage.
- (26) Member States should encourage the use by operators of any appropriate insurance or other forms of financial security in order to provide effective cover for financial obligations under this Directive.
- (27) This Directive should not prevent Member States from maintaining or enacting more stringent provisions in relation to the prevention and remedying of environmental damage; nor should it prevent the adoption by Member States of appropriate measures in relation to situations where double recovery could occur as a result

of concurrent action by a competent authority under this Directive and by a person whose property is affected by damage.

- (28) Damage caused before the expiry of the deadline for implementation of this Directive should not be covered by its provisions and appropriate provision should be made for cases where it is not clear whether or not the cause of the damage occurred after that date.
- (29) Member States should report to the Commission on the experience gained in the application of this Directive so as to enable the Commission to consider, taking into account the impact on sustainable development, whether any review of the Directive is appropriate.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Subject matter

The purpose of this Directive is to establish a framework, based on environmental liability, for the prevention and remedying of environmental damage.

Article 2

Definitions

1. For the purpose of this Directive the following definitions shall apply:
 1. 'baseline condition' means the condition of the natural resources and services that would have existed had the damage not occurred, estimated on the basis of historical data, reference data, control data, or data on incremental changes (such as the number of dead animals), alone or in combination, as appropriate;
 2. 'biodiversity' means natural habitats and species listed in Annex I to Directive 79/409/EEC, or in Annexes I, II and IV to Directive 92/43/EEC, or habitats and species, not covered by those Directives, for which areas of protection or conservation have been designated pursuant to the relevant national legislation on nature conservation;
 3. 'conservation status' means:
 - (a) in respect of a natural habitat, the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species within, as the case may be, the European territory of the Member States to which the Treaty applies or the territory of a Member State or the natural range of that habitat;

- (b) in respect of a species, the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within, as the case may be, the European territory of the Member States to which the Treaty applies or the territory of a Member State or the natural range of that species;
4. 'costs' means costs which are justified by the need to ensure the proper and effective implementation of this Directive including administrative, legal, and enforcement costs, the costs of data collection and other general costs and monitoring and supervision costs;
 5. 'damage' means a measurable adverse change in a natural resource and/or measurable impairment of a natural resource service which may occur directly or indirectly and which is caused by any of the activities covered by this Directive;
 6. 'imminent threat' means a sufficient likelihood that environmental damage will occur in the near future;
 7. 'insolvency practitioner' means a person appointed in accordance with the relevant national law for the purposes of insolvency, liquidation, winding up or analogous proceedings;
 8. 'natural resource' means biodiversity, water and soil, including subsoil;
 9. 'operator' means any person who directs the operation of an activity covered by this Directive including the holder of a permit or authorisation for such an activity and/or the person registering or notifying such an activity;
 10. 'person' means any natural or legal person;
 11. 'land contamination' or 'soil and subsoil contamination' means the direct or indirect introduction, as a result of human activity, of substances, preparations, organisms or micro-organisms harmful to human health or natural resources into soil and subsoil;
 12. 'preventive measures' means any measures taken in response to an event, act or omission that has created an imminent threat of environmental damage, with a view to preventing or minimising that damage;
 13. 'occupational activity' includes non-profit-making activity and the rendering of services to the public;
 14. 'qualified entity' means any person who, according to criteria laid down in national law, has an interest in ensuring that environmental damage is remedied, including bodies and organisations whose purpose, as indicated by the articles of incorporation thereof, is to protect the environment and which meet any requirements specified by national law;
 15. 'recovery' means the return of damaged natural resources and/or services to baseline condition;
 16. 'restoration' means any action, or combination of actions, to restore, rehabilitate or replace damaged natural resources and/or impaired services, or to provide an equivalent alternative to those resources or services, including:
 - (a) primary restoration, which is any action, including natural recovery, that returns damaged natural resources and/or impaired services to baseline condition;
 - (b) compensatory restoration, which is any restorative action taken in relation to natural resources and/or services in a different location from that in which the relevant natural resources and/or services have been damaged and any action taken to compensate for interim losses of natural resources and/or services that occur from the date of damage occurring until the return of damaged natural resources and/or impaired services to baseline condition;
 17. 'services' (or 'natural resources services') means the functions performed by a natural resource for the benefit of another natural resource and/or the public;
 18. 'environmental damage' means:
 - (a) biodiversity damage, which is any damage that has serious adverse effects on the conservation status of biodiversity;
 - (b) water damage, which is any damage that adversely affects the ecological status, ecological potential and/or chemical status of the waters concerned to such an extent that this status will or is likely to deteriorate from one of the categories defined in Directive 2000/60/EC with the exception of adverse effects where Article 4(7) of Directive 2000/60/EC applies;
 - (c) land damage, which is any damage that creates serious potential or actual harm to public health as a result of soil and subsoil contamination;

19. 'value' means the maximum amount of goods, services, or money that an individual is willing to give up to obtain a specific good or service, or the minimum amount of goods, services, or money that an individual is willing to accept to forgo a specific good or service. The total value of a habitat or species includes the value derived by individuals from their direct use of the natural resource, for example, swimming, boating, or birdwatching, as well as the value attributed by individuals to the habitats and species irrespective of direct uses. This excludes loss of financial income to individuals;
20. 'waters' mean all waters covered by Directive 2000/60/EC;
21. 'emission' means the release in the environment of substances, preparations, organisms or micro-organisms.
2. Biodiversity damage within the meaning of paragraph 1(18)(a) does not include adverse effects which result from an act by the operator which was expressly authorised by the relevant authorities in accordance with provisions implementing Article 6(3) and (4) of Directive 92/43/EEC or in accordance with any other provisions of national law which have equivalent effect in relation to habitats and species protected under national legislation on nature conservation but not covered by Directives 79/409/EEC or 92/43/EEC, provided that those national provisions offer at least equivalent guarantees, including in terms of the compensatory measures required.
- Biodiversity damage does not include adverse effects which result from an act by the operator which was expressly authorised by the relevant authorities in accordance with provisions implementing Article 9 of Directive 79/409/EEC or Article 16 of Directive 92/43/EEC.
- Article 3*
- Scope**
1. This Directive shall apply to environmental damage caused by the operation of any of the occupational activities listed in Annex I, and to any imminent threat of such damage occurring by reason of any of those activities.
2. This Directive shall apply to biodiversity damage caused by the operation of any occupational activities other than those listed in Annex I, and to any imminent threat of such damage occurring by reason of any of those activities.
3. This Directive shall not apply to environmental damage or to any imminent threat of such damage arising from an incident in respect of which liability or compensation is regulated by any of the following agreements:
- (a) the International Convention of 27 November 1992 on Civil Liability for Oil Pollution Damage;
- (b) the International Convention of 27 November 1992 on the Establishment of an International Fund for Compensation for Oil Pollution Damage;
- (c) the International Convention of 23 March 2001 on Civil Liability for Bunker Oil Pollution Damage;
- (d) the International Convention of 3 May 1996 on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea;
- (e) the Convention of 10 October 1989 on Civil Liability for Damage Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels.
4. This Directive shall not apply to such nuclear risks or environmental damage or imminent threat of such damage as may be caused by the operation of the activities covered by the Treaty establishing the Atomic Energy European Community or caused by an incident or activity in respect of which liability or compensation is regulated by any of the following agreements:
- (a) the Paris Convention of 29 July 1960 on Third Party Liability in the Field of Nuclear Energy and the Brussels Supplementary Convention of 31 January 1963;
- (b) the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage, and the Vienna Convention of 12 September 1997 on Supplementary Compensation for Nuclear Damage;
- (c) the Joint Protocol of 21 September 1988 Relating to the Application of the Vienna Convention and the Paris Convention;
- (d) the Brussels Convention of 17 December 1971 relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material.
5. This Directive shall apply without prejudice to more stringent provisions of Community legislation regulating the operation of any of the activities falling within the scope of this Directive and without prejudice to Community legislation containing rules on conflicts of jurisdiction.
6. This Directive shall not apply to environmental damage or to an imminent threat of such damage caused by pollution of a widespread, diffuse character, where it is impossible to establish a causal link between the damage and the activities of certain individual operators.

7. This Directive shall not apply to activities the sole purpose of which is to serve national defence.

8. Subject to Article 11(3), this Directive shall not give private parties a right of compensation for any economic loss sustained in consequence of environmental damage or of an imminent threat of such damage.

Article 4

Prevention

1. Where environmental damage has not yet occurred but there is an imminent threat of such damage occurring, the competent authority shall either require the operator to take the necessary preventive measures or shall itself take such measures.

2. Without prejudice to any further action which could be required by the competent authority under paragraph 1, Member States shall provide that, when operators are aware of an imminent threat or ought to be aware of such an imminent threat, those operators are required to take the necessary measures to prevent environmental damage from occurring, without waiting for a request to do so by the competent authority.

3. Member States shall provide that where appropriate, and in any case whenever an imminent threat of environmental damage is not dispelled despite the preventive measures taken by the relevant operator, operators are to inform the competent authority of the situation.

4. If the operator fails to comply with the obligations laid down in paragraph 1 or 2, the competent authority shall take the necessary preventive measures.

Article 5

Restoration

1. Where environmental damage has occurred the competent authority shall either require the operator to take the necessary restorative measures or shall itself take such measures.

2. If the operator fails to comply with a request issued under paragraph 1, the competent authority shall take the necessary restorative measures.

3. The necessary restorative measures shall be determined in accordance with Annex II.

4. Where several instances of environmental damage have occurred in such a manner that the competent authority cannot ensure that the necessary restorative measures are taken at the same time, the competent authority shall be entitled to decide which instance of environmental damage must be remedied first.

In making that decision, the competent authority shall have regard, *inter alia*, to the nature, extent and gravity of the various instances of environmental damage concerned, and to the possibility of natural recovery.

Article 6

Additional provisions in relation to prevention and restoration

1. Subject to Article 9(1), Member States shall ensure that the necessary preventive or restorative measures are taken:

- (a) where it is not possible to identify the operator who caused the damage or the imminent threat of damage;
- (b) where the operator can be identified but has insufficient financial means to take any of the necessary preventive or restorative measures;
- (c) where the operator can be identified but has insufficient financial means to take all of the necessary preventive or restorative measures; or
- (d) where the operator is not required under this Directive to bear the cost of the necessary preventive or restorative measures.

2. Measures taken in pursuance of paragraph 1(a), (b) and (c) shall be without prejudice to the liability of the relevant operator under this Directive and without prejudice to Articles 87 and 88 of the EC Treaty.

Article 7

Recovery of costs

1. Subject to Articles 8, 9 and 10 the competent authority shall recover from the operator who has caused the damage or the imminent threat of damage the costs it has incurred in relation to the taking of preventive or restorative measures under this Directive.

2. The competent authority shall also recover from the operator who has caused the damage or the imminent threat of damage the costs of assessing environmental damage and, as the case may be, the costs of assessing an imminent threat of such damage.

Article 8

Cost allocation in relation to certain biodiversity damage

Subject to Article 10, in the cases referred to in Article 3(2), where it is not established that the operator who has caused the damage or the imminent threat of damage is at fault or has been negligent, that operator shall not be required to bear the cost of preventive or restorative measures taken pursuant to this Directive.

*Article 9***Exceptions**

1. Subject to Article 10, this Directive shall not cover environmental damage or an imminent threat of such damage caused by:
 - (a) an act of armed conflict, hostilities, civil war or insurrection;
 - (b) a natural phenomenon of exceptional, inevitable and irresistible character;
 - (c) an emission or event allowed in applicable laws and regulations, or in the permit or authorisation issued to the operator;
 - (d) emissions or activities which were not considered harmful according to the state of scientific and technical knowledge at the time when the emission was released or the activity took place.
2. Paragraph 1(c) and (d) shall not apply if the operator has been negligent.
3. Subject to Article 10, an operator shall not be required to bear the cost of preventive or restorative measures taken pursuant to this Directive when the environmental damage or imminent threat of such damage occurring is the result of:
 - (a) an act done by a third party with intent to cause damage, and the damage or imminent threat in question resulted despite the fact that appropriate safety measures were in place;
 - (b) compliance with a compulsory order, instruction or other legally binding or compulsory measure emanating from a public authority.
4. Where the operator is a person acting in his capacity as an insolvency practitioner, that person shall not be personally obliged to bear the costs relating to prevention or restoration under this Directive insofar as that person acts in accordance with the relevant national provisions governing insolvency, liquidation, winding up or analogous proceedings, and is not otherwise at fault or negligent.

*Article 10***Cost allocation in relation to certain preventive measures**

1. Member States shall ensure that in all circumstances operators bear any costs relating to preventive measures which they were required to take as a matter of course in order to comply with the legislative, regulatory and administrative provisions regulating their activities, including the terms of any permit or authorisation.
2. Article 4 shall not be taken into consideration for the purpose of defining the legislative, regulatory and administrative provisions referred to in paragraph 1.

*Article 11***Cost allocation in cases of multiple party causation**

1. Subject to paragraph 2, where the competent authority is able to establish with a sufficient degree of plausibility and probability that one and the same instance of damage has been caused by the actions or omissions of several operators, Member States may provide either that the relevant operators are to be held jointly and severally liable for that damage or that the competent authority is to apportion the share of the costs to be borne by each operator on a fair and reasonable basis.
2. Operators who are able to establish the extent to which the damage results from their activities shall be required to bear only such costs as relate to that part of the damage.
3. This Directive is without prejudice to any provisions of national law concerning the rights of contribution or recourse.

*Article 12***Limitation period for recovery**

The competent authority shall be entitled to initiate cost recovery proceedings against the operator who has caused the damage or the imminent threat of damage in relation to any measures taken in pursuance of this Directive during a period of five years from the date on which the measures in question were effected.

*Article 13***Competent authority**

1. Member States shall designate a competent authority or competent authorities responsible for fulfilling the duties provided for in this Directive.

Where a Member State decides not to give the competent authority the power to issue binding decisions or the power to enforce any such decisions, that Member State shall ensure that a court or other independent and impartial public body is competent to issue and enforce such decisions.

2. Regardless of whether a decision referred to in the second subparagraph of paragraph 1 is issued by the competent authority, a court or some other independent and impartial public body, the duty to establish which operator has caused the damage or the imminent threat of damage, to assess the significance of the damage and to determine which restorative measures should be taken in accordance with Annex II shall rest with the competent authority.

3. Member States shall ensure that the competent authority carries out appropriate investigations so as to fulfil its duties under this Directive, independently of any prior request for action lodged pursuant to Article 14.

To that effect, the competent authority shall be entitled to require the relevant operator to supply any information and data necessary for the purpose of the investigation.

Member States shall specify the detailed arrangements in accordance with which the competent authority may require such information and data.

4. Member States shall ensure that the competent authority may empower or require third parties to carry out the necessary preventive or restorative measures.

5. Any decision taken pursuant to this Directive which imposes preventive or restorative measures shall state the exact grounds on which it is based. Such decision shall be notified forthwith to the operator concerned, who shall at the same time be informed of the legal remedies available to him under the laws in force in the Member State concerned and of the time-limits to which such remedies are subject.

Article 14

Request for action

1. Without prejudice to any investigation initiated by the competent authority of its own motion, persons adversely affected or likely to be adversely affected by environmental damage and qualified entities shall be entitled to submit to the competent authority any observations relating to instances of environmental damage of which they are aware and shall be entitled to request the competent authority to take action under this Directive.

2. The competent authority shall be entitled to require that the request for action be accompanied by all relevant information and data supporting the observations submitted in relation to the environmental damage in question.

3. Where the request for action and the accompanying observations show in a sufficiently plausible manner that an instance of environmental damage exists, the competent authority shall consider any such observations and requests for action.

4. The competent authority shall give the relevant operator an opportunity to make his views known with respect to the request for action and the accompanying observations.

5. The competent authority shall, as soon as possible or in any case within a reasonable time-frame having regard to the nature, extent and gravity of the environmental damage concerned, inform the relevant person or qualified entity of its decision to accede to or refuse the request for action and shall provide the reasons for that decision.

6. Where the competent authority is unable, despite due diligence, to take a decision on a request for action within the period referred to in paragraph 5, the competent authority shall, at the latest within four months of being called upon to act, inform the relevant person or qualified entity of the steps and measures which it has taken and which it proposes to take in order to ensure the application

of this Directive within a time-frame which is consistent with the proper achievement of the purpose thereof.

Article 15

Review procedures

1. Any person who has lodged a request for action under this Directive, or any qualified entity which has lodged such a request, shall have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority.

2. This Directive shall be without prejudice to any provisions of national law which require that administrative review procedures be exhausted prior to recourse to judicial proceedings.

Article 16

Financial security

Member States shall encourage the use by operators of any appropriate insurance or other forms of financial security. Member States shall also encourage the development of appropriate insurance or other financial security instruments and markets by the appropriate economic and financial operators, including the financial services industry.

Article 17

Co-operation between Member States

Where environmental damage affects or is likely to affect several Member States, those Member States shall co-operate with a view to ensuring that proper and effective preventive action and, where necessary, restorative action is taken in respect of any such environmental damage

Article 18

Relationship with national law

1. This Directive shall not prevent Member States from maintaining or adopting more stringent provisions in relation to the prevention and remedying of environmental damage, including the identification of additional activities to be subject to the prevention and restoration requirements of this Directive, the identification of additional responsible parties and allocation of financial responsibility to or among responsible parties.

2. This Directive shall not prevent Member States from adopting appropriate measures, such as the prohibition of double recovery, in relation to situations where double recovery could occur as a result of concurrent action by a competent authority under this Directive and by a person whose property is affected by damage.

*Article 19***Temporal application**

1. This Directive shall not apply to damage caused by activities that have been carried out before the date referred to in Article 21(1). In particular, this Directive shall not apply to damage caused by waste the disposal of which took place lawfully in authorised disposal facilities before the date referred to in Article 21(1) or by substances released into the environment before the date referred to in Article 21(1).

2. Where the competent authority is able to establish with a sufficient degree of plausibility and probability that the environmental damage has been caused by an activity which has taken place after the date referred to in Article 21(1), this Directive shall apply unless the operator can establish that the activity that caused the damage in question took place before that date.

3. Paragraph 2 shall not apply to operators who, within one year of the date referred to in Article 21(1), have lodged with the competent authority a statement identifying any environmental damage that may have been caused by their activities before the date referred to in Article 21(1).

Member States shall take the necessary measures to ensure that the statement submitted by the operators may be relied on with respect to its quality and veracity.

*Article 20***Reports**

Member States shall report to the Commission on the experience gained in the application of this Directive by [date (five years after the date referred to in Article 22(1))] at the latest. The national reports shall include the information and data set out in Annex III.

On that basis the Commission shall submit a report to the European Parliament and the Council together with any proposal which it may consider appropriate.

*Article 21***Implementation**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 30 June 2005 at the latest. They shall forthwith inform the Commission thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the texts of the main provisions of national law which they adopt in the field governed by this Directive and a correlation table between this Directive and the national provisions adopted.

*Article 22***Entry into force**

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Communities*.

*Article 23***Addressees**

This Directive is addressed to the Member States.

ANNEX I

ACTIVITIES REFERRED TO IN ARTICLE 3(1)

- The operation of installations subject to permit in pursuance of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control ⁽¹⁾.
- 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 plants ⁽²⁾ 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 Community ⁽³⁾ 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 substances ⁽⁴⁾ in relation to the discharge of any of the dangerous substances covered by the aforementioned Directive.
- The operation of installations subject to permit, authorisation or registration 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 policy ⁽⁵⁾ 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 shall 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 shall be entirely applicable. Consequently, Directive 2000/60/EC shall only be taken into account for the purpose of this Directive as of that date.

- Water abstraction and impoundment of water subject to prior authorisation in pursuance of Directive 2000/60/EC of the European Parliament and of the Council.
- 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 waste ⁽⁶⁾ and Council Directive 91/689/EEC of 12 December 1991 on hazardous waste ⁽⁷⁾.

Those operations include, *inter alia*, the operation of landfill sites under Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste ⁽⁸⁾ and the operation of incineration plants under Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste ⁽⁹⁾.

- Manufacture, use, storage, transport within the perimeter of the same undertaking or release into the environment of dangerous substances as defined and 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 substances ⁽¹⁰⁾.

⁽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.

⁽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 L 182, 16.7.1999, p. 1.

⁽⁹⁾ OJ L 332, 28.12.2000, p. 91.

⁽¹⁰⁾ OJ 196, 16.8.1967, p. 1. Directive as last amended by Commission Directive 2001/59/EC of 6 August 2001 adapting to technical progress for the 28th time Council Directive 67/548/EEC on the approximation of the laws, regulations and administrative provisions relating to the classification, packaging and labelling of dangerous substances (OJ L 225, 21.8.2001, p. 1).

- Manufacture, use, storage, transport within the perimeter of the same undertaking or release into the environment of dangerous preparations as defined and 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 preparations ⁽¹⁾.
- Manufacture, use, storage, transport or release into the environment of plant protection products or active substances used in plant protection products as defined and within the scope of Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market ⁽²⁾.
- Manufacture, use, storage, transport or release into the environment of biocidal products or active substances used in biocidal products as defined and 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 market ⁽³⁾.
- Transport by road, rail, inland waterways, sea or air of dangerous goods or polluting goods as defined either in Annex A to Council Directive 94/55/EC of 21 November 1994 on the approximation of the laws of the Member States with regard to the transport of dangerous goods by road ⁽⁴⁾ or in the Annex to Council Directive 96/49/EC of 23 July 1996 on the approximation of the laws of the Member States with regard to the transport of dangerous goods by rail ⁽⁵⁾ or as defined in Council Directive 93/75/EEC of 13 September 1993 concerning minimum requirements for vessels bound for or leaving Community ports and carrying dangerous or polluting goods ⁽⁶⁾.
- Any contained use, including transport, of genetically modified micro-organisms as defined and within the scope of Council Directive 90/219/EEC of 23 April 1990 on the contained use of genetically modified micro-organisms ⁽⁷⁾.
- Any deliberate release into the environment or transport of genetically modified organisms as defined and within the scope of Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC ⁽⁸⁾.

⁽¹⁾ OJ L 200, 30.7.1999, p. 1. Commission Directive 2001/60/EC of 7 August 2001 adapting to technical progress Directive 1999/45/EC of the European Parliament and of the Council concerning the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations (OJ L 226, 22.8.2001, p. 5).

⁽²⁾ OJ L 230, 19.8.1991, p. 1. Directive as last amended by Commission Directive 2001/103/EC of 28 November 2001 (OJ L 313, 30.11.2001, p. 37).

⁽³⁾ OJ L 123, 24.4.1998, p. 1. Directive as last amended by Commission Directive 2001/87/EC of 12 October 2001 (OJ L 276, 19.10.2001, p. 17).

⁽⁴⁾ OJ L 319, 12.12.1994, p. 7. Directive as last amended by Commission Directive 2001/7/EC of 29 January 2001 (OJ L 30, 1.2.2001, p. 43).

⁽⁵⁾ OJ L 235, 17.9.1996, p. 25. Directive as last amended by Commission Directive 2001/6/EC of 29 January 2001 (OJ L 30, 1.2.2001, p. 42).

⁽⁶⁾ OJ L 247, 5.10.1993, p. 19. Directive as last amended by Commission Directive 98/74/EC of 1 October 1998 (OJ L 276, 13.10.1998, p. 7).

⁽⁷⁾ 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).

⁽⁸⁾ OJ L 106, 17.4.2001, p. 1.

ANNEX II

REMEDYING OF ENVIRONMENTAL DAMAGE**1. Introduction**

This Annex sets out the rules to be followed by the competent authority in order to ensure the remedying of environmental damage.

2. Restoration objectives

- 2.1. Remedying of environmental damage, in terms of biodiversity damage and water pollution, is achieved through the restoration of the environment as a whole to its baseline condition. Subject to point 3.2.3 below, this objective is achieved in principle through the return of damaged habitats, species and associated natural resources services or waters concerned to baseline condition and compensation for any interim losses incurred. Restoration is done through rehabilitating, replacing or acquiring the equivalent of damaged natural resources and/or services at the site originally damaged or at a different location.
- 2.2. Remedying of environmental damage, in terms of water pollution and in terms of biodiversity damage, also implies that any serious harm or serious potential harm to human health be removed should such a harm be present.
- 2.3. Where polluted soil or subsoil gives rise to a serious harm to human health or could pose such a risk, the necessary measures shall be taken to ensure that the relevant contaminants are controlled, contained, diminished or removed so that the polluted soil does not pose any serious harm or serious potential harm to human health which would be incompatible with the current or plausible future use of the land concerned. Plausible future use shall be ascertained on the basis of the land use regulations in force when the damage occurred.
- 2.4. Achieving the goal of this Directive also requires restoration to be undertaken to compensate for interim losses from the date of the damage until the baseline is restored.

3. Restoration**3.1. Identification of reasonable restorative options**

Identification of primary restorative actions

- 3.1.1. The competent authority shall consider a natural recovery option, that is an option in which no human intervention would be taken to directly restore the damaged natural resources and/or services to, or towards, baseline condition.
- 3.1.2. The competent authority shall also consider options comprised of actions to directly restore the natural resources and services towards baseline condition on an accelerated time frame.

Identification of compensatory restorative actions

- 3.1.3. For each option, the competent authority shall consider compensatory restorative actions to compensate for the interim loss of natural resources and services pending recovery.
- 3.1.4. The competent authority shall ensure that compensatory restoration takes account of the time dimension by discounting the value attributable to natural resources and/or services.
- 3.1.5. To the extent practicable, when evaluating compensatory restorative actions, the competent authority shall first consider actions that provide natural resources and/or services of the same type and quality, and of comparable value as those damaged.
- 3.1.6. When determining the scale of restorative actions that provide natural resources and/or services of the same type and quality, and of comparable value as those lost, the competent authority shall consider the use of a resource-to-resource or service-to-service scaling approach. Under this approach, the competent authority determines the scale of restorative actions that will provide natural resources and/or services equal in quantity to those lost.

- 3.1.7. If it is not possible to use the first choice resource-to-resource or service-to-service scaling approaches, monetary valuation techniques towards the damaged site may be used to choose compensatory restoration actions.
- 3.1.8. If, in the judgment of the competent authority, valuation of the lost resources and/or services is practicable, but valuation of the replacement natural resources and/or services cannot be performed within a reasonable time-frame or at a reasonable cost, the competent authority may estimate the monetary value of the lost resources and/or services and select the scale of the restoration action that has a cost equivalent to the lost value.
- 3.2. *Choice of the restorative options*
- 3.2.1. Once the competent authority has developed a reasonable range of restorative options, it shall evaluate the proposed options based on, at a minimum:
1. The effect of each option on public health and safety;
 2. The cost to carry out the option;
 3. The likelihood of success of each option;
 4. The extent to which each option will prevent future damage, and avoid collateral damage as a result of implementing the option; and
 5. The extent to which each option benefits to each component of the natural resource and/or service.
- 3.2.2. If several options are likely to deliver the same value, the least costly one shall be preferred.
- 3.2.3. When assessing the different identified restoration options, the competent authority is entitled to choose primary restoration actions that do not fully restore the damaged bio-diversity, water or soil to baseline. The competent authority is entitled to take this decision only if it compensates for the services, resources or value foregone at the primary site as a result of its decision by increasing compensatory actions to provide a similar level of services, resources or value as were foregone. These additional compensatory actions shall be determined in accordance with the rules set out in section 3.1. and the present section of this Annex.
- 3.2.4. The competent authority shall invite the operator to co-operate in the implementation of the procedures set out in this Annex so that those procedures can be properly and effectively carried out. The operator's participation may take the form, *inter alia*, of supplying appropriate information and data.
- 3.2.5. The competent authority shall also invite take the persons on whose land restorative measures should be carried out to submit their observations and shall take them into account.
- 3.2.6. On the basis of the above assessment, the competent authority shall decide which restorative measures shall be implemented.
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ANNEX III

INFORMATION AND DATA REFERRED TO IN ARTICLE 20(1)

The national reports referred to Article 20(1) shall include a list of instances of environmental damage and instances of liability under this Directive with the following information and data for each instance:

1. Date of occurrence of environmental damage and date on which proceedings were initiated under this Directive.
2. Industry classification code of the liable legal person(s).
3. Type of environmental damage.
4. Costs incurred with restoration and prevention measures, as defined in this Directive:
 - paid for directly by liable parties;
 - recovered *ex post facto* from liable parties;
 - unrecovered from liable parties. (Reasons for non-recovery shall be specified.)
5. Amount of additional administrative costs incurred annually by the public administration in setting up and operating the administrative structures needed to implement and enforce this Directive.
6. Whether there has been resort to judicial review proceedings either by liable parties or qualified entities. (The identity of the claimants and the outcome of proceedings shall be specified).
7. Outcome of the restoration process.
8. Date of closure of proceedings.

Member States may include in their reports any other information and data they deem useful on issues such as the desirability for introducing limited liability in certain cases, so as to allow a proper assessment of the functioning of this Directive. An evaluation of the possibility of introducing a cap should be undertaken within three years after the entry into force of this Directive.
