The Bar is Rising in Europe for Environmental Protection. Are You Prepared?

An update on the implications of the EU Environmental Liability Directive

June 25, 2010
Agenda

- Introduction
  Mike Balmer, Willis

- Overview of the EU Environmental Liability Directive
  Valerie Fogleman, Stevens & Bolton LLP

- New Risks, New Obligations, New Solutions
  Neil Cameron, Willis

- Practical Considerations – an Insurer’s Perspective
  Stephen Andrews, Chartis

- Q&A
Introduction

Michael Balmer - Environmental Practice Leader
Willis North America
Global Environmental Risk

- Tightening legislation, tougher enforcement
  - Criminalizing environmental obligations
  - Expanded clean-up liability and emerging clean-up standards
- Heightened awareness and increased expectations
  - Public opinion and social activism
  - Greater disclosure of environmental liabilities
- Global environmental management challenges – e.g. Climate Change
- New Challenges for multinational organizations
  - “beyond compliance”
Review of New Environmental Legislative Trends & Developments

Valerie Fogleman - Consultant, Stevens & Bolton LLP
Guildford, England

- Basic overview of Environmental Liability Directive (ELD) and implementation schedule
- Compulsory financial security implications
- Similarities and differences between EU and US regimes
- ELD cases
EU Member States
Sets Minimum Requirements Across European Union
- Must be transposed into individual Member State (MS) law

Implementation Schedule
- Deadline for implementation into MS national law: 30 April 2007
- Transposition largely complete – except Austria

Implications
- Establishes liability for remediating damage to land, water, and protected species and natural habitats
- Primary, complementary, and compensatory remediation
- Strict liability for EU-regulated activities

Financial Assurance Requirements
- No EU-wide Requirements, but...
- Certain MS imposing requirements
ELD Overview – Who does it impact?

Two Categories of “Operators”

- Annex III operators: strict liability for preventing or remediating imminent threat of, and actual, environmental damage to protected species and natural habitats, water and land

- Non-Annex III operators: fault-based liability for preventing or remediating imminent threat of, and actual, environmental damage to protected species and natural habitats
Compulsory Financial Security

- Bulgaria
- Czech Republic
- Greece
- Hungary
- Portugal
- Romania
- Slovakia
- Spain
Financial Assurance - Spain

- Applies only to
  - Annex III operators
  - Pollution
  - Primary remediation and small percentage of emergency remedial action costs

- Operator must carry out independently verified risk assessment
  - Competent authority determines minimum amount of financial security according to risk assessment report
  - Maximum amount of compulsory financial security: €20m

- Exemptions
  - Potential estimated primary remediation costs less than €300,000
  - Potential estimated primary remediation costs between €300,000 and €2m and operator’s activities certified by ISO 14001:1996 or EU Eco-management and audit system

- Financial security instruments not limited to insurance
Changes in MS National Law from ELD

- First EU “polluter pays” legislation
- Supplements MS national law; does not replace it
- Establishes minimum requirements
- Limited or no liability for natural resource damage in many MS prior to ELD
- Specific rights to non-governmental authorities (NGOs) - new in many MS
- Duty to notify enforcing authority of environmental damage - new in many MS for non-licensed activities
- European Court of Justice (ECJ) is final decision-maker
Similarities between EU & US Regimes

ELD / Superfund

- Liability for damage to natural resources
- NGOs and others affected by environmental damage granted rights (although rights differ between ELD and US)
- No cause of action for bodily injury and property damage claims

MS national civil and common law compared to US common law

- Liability for bodily injury and property damage from exposure to pollutants tends to be based on negligence
Differences between EU & US Regimes

**ELD / Superfund**
- ELD is not retroactive (applies from 30 April 2007)
- EU is not a federal system; implementation of ELD (and other Directives) may be more stringent in individual MS
- Competent authorities in each MS enforce ELD (and other EU environmental law) - no EU equivalent of EPA
- Operator is only potentially responsible party
Differences between EU & US Regimes

ELD / Superfund (cont’d)

- Establishes two liability systems (some MS have extended strict liability to both systems)
- Self-executing provisions for preventive and emergency remedial actions
- Not necessarily joint and several liability
- No clear separation between liability for clean-up costs and natural resource damage
- Establishes liability for “environmental damage,” not limited to pollution
ELD Cases

ELD cases include

- Spain: wells drained water from protected area
- Hungary: car racing across protected areas
- Germany: damage to protected area by mud from industrial facility
- France: oil spill from underground pipe into protected area
- England: large spill of sewage into river; small spills
Raffinerie Mediterranee (ERG) SpA v Ministero dello Sviluppo economico (C-378/08), (C-379/08 and C-380/08) (March 9, 2010)

- MS may establish rebuttable presumption of causal link between contamination and operator’s activities if plausible evidence of link exists.
- Evidence to establish link may include location of operator’s facility near contaminated site and correlation between substances used by operator and those identified at contaminated site.
- Operator may rebut presumption by showing its activities did not cause the contamination.
New Risks, New Obligations, New Solutions

Neil Cameron – Project Director
Willis Environmental Practice, London

- What are the new liabilities facing your operations?
- What are your risk management options?
- Insurance market response
Insurance/Risk Management Implications

Moving Goalposts

- More stringent environmental liability regime across EU
- Raft of new liabilities and new obligations
- No limit on financial liability
- Increased scope for claims (e.g. NGO activity)
- Compulsory financial assurance requirements

Conclusions/Questions

- What worked before will no longer be enough now!
- Is my organization compliant?
- How should you respond?
- How has the EU General Liability market responded?
- How has the specialist EU Environmental market responded?
# Advice Regarding Environmental Risk

<table>
<thead>
<tr>
<th>General Coverage Available</th>
<th>Gradual Release</th>
<th>1&lt;sup&gt;st&lt;/sup&gt; party cleanup</th>
<th>1&lt;sup&gt;st&lt;/sup&gt; party business interruption</th>
<th>Biodiversity</th>
<th>The Unowned Environment</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>General Liability</strong></td>
<td>NO</td>
<td>NO</td>
<td>NO</td>
<td>NO</td>
<td>NO</td>
</tr>
<tr>
<td>GL policies only respond to Sudden and Accidental Events</td>
<td>GL policies only respond to 3&lt;sup&gt;rd&lt;/sup&gt; party claims for damages. Does not cover 1&lt;sup&gt;st&lt;/sup&gt; party, therefore any land which is owned by the Insured is not covered</td>
<td></td>
<td></td>
<td>Seeing a growing number of specific exclusions for fauna and flora</td>
<td>GL policies are linked to property damage which by virtue means someone had to have suffered loss to property they owned</td>
</tr>
<tr>
<td><strong>Environmental</strong></td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
</tr>
</tbody>
</table>

The table above outlines the coverage details provided by General Liability and Environmental policies. General Liability policies only respond to sudden and accidental events, while Environmental policies are linked to property damage which by virtue means someone had to have suffered loss to property they owned.
What are the Main Program Considerations?

- What is the nature of your activities and associated exposures (sites, contracting or both)?
- In which countries are you operating? Is it solely EU territories?
  - Are there any compulsory or contractual environmental insurance requirements?
  - Is non-admitted insurance allowed?
  - Can insurers provide local paper?
  - What is the potential for significant claims activity?
  - Are there any compulsory financial assurance requirements?
- Program structuring options:
  - Local Admitted Policies / Global Indemnity / Controlled Master Program
  - Advantages / Disadvantages
  - Captive involvement
- Is it possible to integrate coverage provided by GL or existing environmental policies?
- What are the optimum Limits/Retentions?
Who are the Environmental Insurers?

- US carriers with International capability:
  - e.g. ACE, Chartis, Chubb, XL, Zurich, Liberty
  - Country by country capability varies

- Some environmental coverage available from non-US general liability carriers (e.g., AXA, Allianz, Gerling, etc.)

- European pollution “pools” e.g. Assurpol
Practical Implications – an Insurer’s Perspective

Stephen Andrews – European Regional Environmental Liabilities Manager, Chartis, London

- European environmental insurance market
- How to navigate the patchwork of Local Insurance Requirements
Insurance Products & Coverages to Help Manage New Liabilities

Common coverage themes - EU Environmental Insurance Market

- 3rd party claims for Bodily Injury & Property Damages (on and off-site)
- Clean-up Costs (on and off-site)
- Gradual and Sudden & Accidental pollution
- Defence (inside the limits)
- Environmental damages arising from pollution conditions
- Mitigation expense
- Premise based coverage
- New conditions
Insurance Products & Coverages to Help Manage New Liabilities

A multitude of enhancements possible

- Operations at 3rd party locations
- Transportation
- Business interruption
- Products pollution
- Non-owned locations
- Pre-existing conditions / historical coverage
- Non-pollution related Environmental Liability Damages
- Coverage for the ‘Insured Business’
- Global/International programs and Captive integration
Insurance Products & Coverages to Help Manage New Liabilities

Varying local practices and issues (examples – there are many!)

- German GL pollution modules (UHV, USV)
- Spanish article 30 no2, of law 26/2007, a maximum deductible of 0.5%
- France, Italy and Spain – Environmental Insurance pools
- France – 3rd Party claims from fortuitous historical incidents
- Limit of Liability best practice can vary widely
- Appropriate local services such as UW in local language, IPT and claims handling and local language insurance certificates
- Integration of the limited pollution coverage that may exist in current GL and property policies
Global Program Structure Example

Controlled Master Programs

- A coordinated, international service platform through which to secure locally admitted policies for international operations.

- Master policy can act as “difference in conditions” (DIC) coverage to fill gaps in local policies’ coverage and provides “difference in limits” (DIL).

- Addresses regulatory, insurance, currency, customs and language differences in different jurisdictions through underlying policies.

- Provide local underwriting support and claims reporting/handling.

- Provide acceptable proof of insurance (compulsory insurance).

- Access the insurance companies’ global network with a lead underwriter, who can provide consolidated terms detailing the international program and can control the binding of the international program.
Global Program Structure Example

Master Policy acts DIC/DIL of local policies

FOS MASTER POLICY

GERMANY (UHV, USV)

PORTUGAL

SPAIN

FRANCE

€50 Mio.

Primary Limit

Deductible
Underwriting – Process & Challenges

What are environmental underwriters looking for?

- Materials
- Storage and containment
- Environmental management systems
- Site history and plans for future use
- Effluent exposures
- Atmospheric Emissions
- Surrounding Environment
Underwriting – Process & Challenges

How do you collect this information?

- Completed Application (customized questionnaires)
- Existing engineering (property or GL) surveys
- Process information regarding on-site operations
- Any available Environmental Reports / Assessments
- Database Searches and publicly available maps
- Site Visits
- Telephone surveys
- Regulatory correspondence
Global Environmental Insurance
Q&A and Thank You...

- **Mike Balmer**
  - Phone: 617 351 7530
  - Email: michael.balmer@willis.com

- **Neil Cameron**
  - Phone: +44 20 3124 7097
  - Email: neil.cameron@willis.com

- **Valerie Fogleman**
  - Phone: +44 1483 401 226
  - Email: valerie.fogleman@stevens-bolton.com

- **Stephen Andrews**
  - Phone: +33 1 49 02 43 61
  - Email: stephen.andrews@chartisinsurance.com