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The White Paper on Environmental Liability

A study of its effects on Swedish legislation and
environmental protection

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Summary

In February 2000 the Commission of the European Community presented the long awaited White Paper on Environmental Liability. The White Paper outlines the key elements for a future directive on environmental liability, covering contaminated soil and subsoil, water pollution and damage to biodiversity. The directive will be a framework regime containing essential minimum requirements to be completed over time by using a step-by-step approach.

The proposal for a directive covers professional and commercial activities that cause Significant Environmental Damage. Strict liability will apply to activities dangerous or potentially dangerous to the environment, as defined in an annex by reference to EC environmental legislation. For other activities the directive will probably introduce a fault-based liability that only will be applied to damage to biodiversity.

The main purpose of my thesis is to examine the effects that the proposed regime on environmental liability will have on current Swedish environmental liability legislation. In conclusion, the directive will be based on Article 175 of the Treaty and can therefore be made subject to more stringent protective measures in national legislation. When Swedish legislation prescribes more stringent regulation this will continue to apply. However, it seems likely that changes will have to be made in Swedish law in areas where there is weaker regulation or no regulation at all, compared to the proposal. Such areas are primarily pollution to water areas, the right of access to justice for public interest groups and liability for damage to biodiversity. In the future it also seems that the introduction of environmental quality standards in the area of water and later on possibly also in the area of soil through the Commission's soil strategy, will increase. This is a fairly new concept in Swedish environmental legislation and in the course of such standards being elaborated on an EC level, these will have to be implemented in Swedish legislation as well.

I have also examined the proposal's anticipated effects on environmental protection to see if the proposal promotes environmental efficiency. I have reached the conclusion that, even if the proposal can be criticised in some aspects, a directive setting minimum standards for restoration of environmental damage for all Member States is a suitable instrument to achieve environmental efficiency.

Abbreviations

DG	Directorate general
EC	European Community
EELR	European Environmental Law Review
EU	European Union
GMO	Genetically Modified Organisms
IPPC	EC Directive in Integrated Pollution and Prevention Control
NGO	Non-governmental Organisation
NJA	Nytt Juridiskt Arkiv (part I contains the Swedish Supreme Court Reports)
OJ	Official Journal
Prop.	Regeringens proposition (Swedish Governmental Bills)
SNV	Naturvårdsverket (the Swedish Environmental Protection Agency)
SOU	Statens offentliga utredningar (Swedish Official Governmental Commission Reports)
SED	Significant Environmental Damage
SCA	Special Conservation Area
SPA	Special Protection Area

1 Introduction

1.1 The aim of the thesis

The Commission of the European Community¹ presented the long awaited White Paper² on Environmental Liability³ in February 2000. The White Paper outlines the proposal for a directive on environmental liability, covering contaminated soil and subsoil, water pollution and damage to biodiversity. The need for such a directive on a European level has been deemed as necessary after a series of recent environmental incidents, leading to severe damage to the environment. The objective of the White Paper was to explore how the polluter pays principle, one of the key environmental principles in the EC Treaty, can best be applied to serve the aims of Community environmental policy. It was considered that the best way to regulate liability for environmental damage is done by introducing a directive at a European level.

The main purpose of my thesis is to examine the effects the proposed regime on environmental liability will have on current Swedish legislation in this area. When the Environmental Code⁴ was introduced in 1999 previous Swedish environmental legislation was consolidated in the Code. The Code introduced several of the environmental principles⁵ that also can be found in EC legislation, and the concept of environmental quality standards. It is interesting to see possible future development and further changes that might be necessary in Swedish legislation in order to be in compliance with the a new directive on environmental liability and other relevant EC legislation.

One of the purposes of this thesis is also to look into whether there truly is a need for a directive at a European Community⁶ level. The question here is whether a new directive will help to achieve environmental efficiency. In other words, will a directive on environmental liability help to enhance the protection of the environment and does the proposed directive sufficiently ensure protection of the environment?

¹ Hereafter referred to as "the Commission".

² A White Paper sets forth the Commission's proposals for dealing with an issue and typically includes proposals for EC legislation. It often follows a Green Paper published to launch a consultation process at a European level. *See* <http://www.europa.eu.int/comm>.

³ Commission of the European Communities, White Paper on Environmental Liability, COM (2000) 66 final, Brussels, 9 February 2000. Hereafter referred to as the "White Paper".

⁴ Miljöbalk SFS 1998:808 - The Swedish Environmental Code. Hereafter referred to as "the Environmental Code" or "the Code".

⁵ *See* below Chapter 1.2.

⁶ Hereafter referred to as the EC.

1.2 Purpose of the EC proposal

One of the purposes of introducing a regime for environmental liability at a European level is to improve the application of the environmental principles in the EC Treaty that can be found in the EC Treaty Article 174(2).⁷

“Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.”

In line with the polluter pays principle it is believed that by introducing a liability scheme adequate restoration of the environment will be ensured since polluters will have to pay for restoration or compensation of the damage they caused.⁸

Another important reason to introduce a directive on environmental liability is that, although most Member States have introduced laws to deal with the liability and clean-up of contaminated sites, these rules vary and it is important to apply the same minimum rules and standards across the boards. Examples of such rules are that the same type of liability, defences and burden of proof and that the same objectives and standards for the restoration of environmental damage apply in all the Member States. By applying the same minimum rules in all Member States it will also contribute to avoid competition distortions in the internal market, resulting from divergent national regimes.⁹

One important part of the proposal is to introduce liability also for certain damage to biodiversity. This is an attempt to introduce the possibility to claim compensation also for ecological damage that often is not regulated in most national regimes. The wider environment has instead traditionally been seen as a “*public good*”¹⁰ for which society as a whole should be responsible, rather than something individual players who cause damage should be responsible for. It is expected that the introduction of an EC liability regime that covers also damage to biodiversity will bring a change

⁷ Article 174 (2) of the Consolidated version of the Treaty establishing the European Community, signed in Rome 1957, incorporating the changes made by the Treaty of Amsterdam on 2 October 1997, OJ 1997 C340, pp. 173-308; hereinafter referred to as “The Treaty”.

⁸ White Paper, *supra* note 2, p. 13.

⁹ *Ibid.*, p. 20.

¹⁰ *Ibid.*, p. 5.

of attitude, which should result in an increased level of prevention and precaution.

1.3 Method, material and delimitation

1.3.1 Method

Since the purpose of this thesis mainly is to examine the effects the proposal to introduce a directive concerning environmental liability will have on Swedish legislation, a comparative method has been used. To be able to compare two different systems it is necessary to first examine how different important legal issues are dealt with in the two systems. It should be noted that the proposal for a directive so far only contains the main features for a future directive. Based on the existing proposals I have made a comparison with the corresponding Swedish legislation. One problem has been to present and look at a proposal that is not yet final. The proposal for a directive was expected by the end of September but has now been postponed until the end of 2001. Many of the suggestions introduced in the White Paper have recently been partly altered by a consultation that should be finished by the end of September.¹¹ It is likely that the consultation will bring more alternations to the proposal. Also, it should be noted that once the Commission's proposal is finalised it can be made subject to several alternations after having gone through the procedure in the European Parliament and Council of the European Community. The legal basis of the proposal will be Article 175¹² that concerns how EC environmental protection is implemented. A proposal for a directive according to Article 175 must be adopted in Council by qualified majority vote under the co-decision procedure and can be made subject to alternations before adoption.¹³

1.3.2 Material

The basis for my research has been the White paper, that puts out the basis for the coming directive, and the Consultation Paper that newly was made

¹¹ The working document for the public consultation, Environment Directorate General Working Paper on Prevention and Restoration of Significant Environmental Damage, hereafter referred to as "the Consultation Paper", can be found at DG Environment's webpage: <http://www.europa.eu.int/comm/environment/liability/consultation.htm>.

¹² Article 175 of The Treaty.

¹³ Article 251 of the Treaty (ex Article 189b).The co-decision procedure gives the Parliament legislative powers (which it shares equally with the Council) over most environmental policy issues. After a first reading of a proposal by the Parliament, in which the Parliament usually amends the proposal, the Council adopts its "Common Position", which contains the Council's own changes to the Commission's proposal. Parliament then holds a second reading. If it does not agree with the Council's Common position, representatives from the two institutions must negotiate a compromise text, which must then be adopted by each institution.

available at DG Environment's web-page.¹⁴ To get a more complete picture of how a future Directive possibly will be formed it has also been necessary to look into the studies and consultations performed by DG Environment.¹⁵ For this task the information given by people involved in the work within the DG Environment has also been of great help.

The current Swedish legislation that since 1999 is gathered in the Environmental Code, has been my main source when examining the Swedish legislation. When studying the Swedish legislation it is necessary to look into the preparatory works leading up to legislation. In the area of liability for damage to biodiversity, that is not regulated in Swedish legislation, additional jurisprudence is available in the form of some current case law that partly has changed the view on compensation for damage to natural resources in Swedish case law.¹⁶

1.3.3 Delimitation

The proposal for a directive is supposed to cover many important legal issues, which makes it necessary to have a rather broad approach when doing a comparison to Swedish legislation. At the same time this means that some delimitation have been necessary to do. Issues closely linked to the proposal are for example financial insurance aspects and economical impact expected from a directive on environmental liability. When working on a liability scheme for the environment it is also important to look into different options for valuation and restoration of environmental damage. This has been the subject to studies performed by independent consultants on behalf of the Commission. Comparisons have also been made with the existing liability system in the USA, known as the Superfund.¹⁷ Even if these issues have played an important role for the proposals made in the White Paper and the Consultation Paper, the limitation of the scope of my thesis has forced me to not account in dept for these considerations.

1.4 Plan of the study

After this introduction, Chapter 2 presents the system of liability in the area of the environment and highlights some of the important issues and definitions that arise when regulating liability for environmental damage. Chapter 3 thereafter contains the background and the main features of the proposed EC regime and the Swedish legislation in the area of environmental liability. Hereafter follows a presentation of, first in Chapter 4, the regulation for contaminated sites and, then in Chapter 5, for damage to

¹⁴ When referring to a "proposal" these are the documents I refer to.

¹⁵ The studies and consultations are available at DG Environment's web-page for environmental liability; <http://www.europa.eu.int/comm/environment/liability/index.htm>.

¹⁶ See Chapter 5.3.

¹⁷ The US Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") is commonly known as the Superfund.

biodiversity. In Chapter 6 two suggestions in the proposal that help to achieve environmental efficiency are presented. These are duty on Member States to ensure restoration of environmental damage and access to justice for interest groups.

In order to make it easier for the reader to follow the problems that arise, each chapter is followed by a comparison between the EC regime and the Swedish legislation, where the main differences are highlighted. The thesis is concluded by a discussion that analyses whether environmental efficiency is achieved by the proposal for a directive. Finally, a conclusion of the effects on Swedish legislation is presented.

2 Definitions

2.1 Introduction

When comparing the proposal for a directive with the Swedish regulation it is useful to identify some of the problems and issues that arise when trying to regulate liability in the field of the environment. To do this it is also important to look into some of the definitions related to environmental law. Further definitions related to environmental damage and an environment liability scheme will be explained in their context in the following chapters.

2.2 Environmental damage

There are no uniform definitions for environmental damage in either national or international law, or under EC legislation. The term environmental damage is often used to point out different sorts of damage to the environment, including injury to property, pure economic loss and personal injury.¹⁸ In the thesis I will use the term environmental damage for such damage to the environment that is covered by the proposal in the area of contaminated sites. This will include damage to soil, sub-soil and water. Damage to biodiversity or damage to natural resources¹⁹ are the terms used to specifically point out if the discussion concerns damages to nature resources that have a specific value to the public.

“Liability” in this thesis relates to the responsibility to remedy the damage caused to the environment, both in relation to contaminated land and water and damage to biodiversity. Thus, liability according to the proposal includes the responsibility to remedy the incurred damage by response actions, such as clean-up, removal actions and preventive actions taken to remedy environmental damage. However, damage can after such measures have been taken still remain for damaged natural resources. Restoration²⁰ action can therefore be necessary in addition to response measures to restore damage to biodiversity. It should be observed that the proposal for an EC environmental regime does not include liability for traditional damage or criminal liability.

¹⁸ Edward H.P Brans, Uilhoorn Mark, *Liability for Damage to Natural Resources*, Background Paper for EU White Paper 17 September 1997, p. 5. Hereafter referred to as “Liability for Damage to Natural Resources”.

¹⁹ “Damage to biodiversity” is the term used in the Consultation Paper but the term “damage to natural resources” is the term used in most of the consultations and material I have used.

²⁰ In the Consultation Paper the term ”restoration” seems to include both actions taken to remedy environmental damage to contaminated sites and restoration for remaining damage to biodiversity.

2.3 Parallel systems of law

The regulation of liability in most countries' environmental law regimes can be described as two parallel systems that sometimes overlap without being in conflict.²¹ One of the systems is based on non-contractual strict liability in civil law, that covers damage to persons, property and in some case also economic loss – so called traditional damage. The other regime consists of administrative liability under public law, and this regulates environmental damage such as contaminated land and risks to public health. An administrative liability under public law regulates the relationship between private parties and the public such as the State and local authorities. Responsibility for pollution is therefore valid in relationship to the authority and is pursued by the competent authority. It is more common to adopt administrative schemes of liability concerning restoration of contaminated land since civil liability has proved unsuitable. One reason for this is that the rules concerning civil liability are not applicable to damages that occur within the site of the activity but only in the surroundings. Concerning damage within sites there is a public interest to clean up the site.²² Also, compensation to a party under civil law does not assure that the money is used to remedy the environmental damage.

When preparing a system of liability for environment related damages it is also important to look at the growing importance of possibilities to insurance. Marie-Louise Larsson²³ categorises the possibility to award compensation through private insurance as a third generation of responsibility in addition to the two regimes mentioned above.²⁴

2.4 Liability and environmental damage

It is first of all important to note that not all kinds of damage can be remedied by liability. According to general liability rules in tort law²⁵ some conditions must be fulfilled to be able to claim compensation (liability).²⁶

- a) There needs to be one or more identifiable actors (in the environmental context polluters)
- b) The damage needs to be concrete and quantifiable

²¹ Larsson, Marie-Louise, *On the Law of Environmental Damage – Liability and repairation*, 1st edition, Akademitryck AB, Edsbruk, Sweden, 1997, p. 119. Hereafter referred to as Marie-Louise Larsson.

²² *Ibid.*, pp. 404-405

²³ Marie-Louise Larsson, LL D, is Research Professor at the Faculty of Law at Stockholm University. She has also commented on the White Paper on behalf of the Swedish Ministry of Environment.

²⁴ Marie-Louise Larsson, *supra* note 21, p. 119.

²⁵ See Hellner Jan, *Skadeståndsrätt*, 5th edition, Juristförlaget, Stockholm, Sweden, 1995, for a presentation of Swedish tort law.

²⁶ White Paper, *supra* note 2, p. 13.

- c) A casual link needs to be established between the damage and, in an environmental context, the identified polluter.

When applying these conditions to damages to the environment some problems arise. First of all it can be difficult to identify one specific polluter. Also there is the problem of stating a concrete and quantifiable damage. In environmental cases it can be more difficult for a plaintiff and easier for a defendant to establish facts concerning the causal link between an activity carried out by the defendant and the damage. It is therefore not unusual with provisions in national environmental liability regimes that alleviate the burden of proof concerning fault or causation in favour of the plaintiff.²⁷

Finally, when applying these conditions to damages to the environment it is clear that not all cases of environmental damage can be covered by a liability scheme, since there needs to be a concrete damage that can be traced to a specific polluter. Examples where liability is not a suitable instrument are effects of climate change caused by CO₂ emissions and forests dying as a result of acid rain.²⁸ This kind of environmental damage is caused by pollution of a diffuse character where it is impossible to link the environmental damage with a certain individual actor. It is also more difficult to evaluate the occurred damage.

2.5 Criteria for repairing damage

Reparation is shorthand for all kinds of activities to achieve the same situation as if damage never occurred. Clean-up, restoration, response and aftercare are all terms used to indicate reparation of the environment, with particular regard to public interests.²⁹

One of the most difficult questions related to reparation of environmental damage is what type of reparation to be required in the event of an environmental accident. First of all the objective of the restoration must be defined. The alternatives here are to return the natural resource to the state it was in before the damage occurred, the baseline condition, or simply to remove the undesirable effects. It is clear that the first alternative is preferable if environmental efficiency is to be achieved, but it can prove to be extremely costly. It is thereafter necessary to set rules on the costs of reparation that can be recovered and to formulate the criteria for calculating them. Finally, there needs to be provisions to cover situations where the damage can not be repaired. In the case when damages are irreparable, other measures should be taken to compensate the damage, such as acquiring

²⁷ Ibid., p. 19. It is proposed that a directive on environmental liability would contain some form of alleviation of the burden of proof, but this has not been closer defined in the Consultation Paper.

²⁸ Ibid., p. 13.

²⁹ Marie-Louise Larsson, *supra* note 21, p. 19.

equivalent resources. If also this is impossible one solution can be to set up a fund to repair the environmental damage.³⁰

The problem of how to evaluate the damage to the environment per se, has been evaluated in consultations by the Commission. There exist several methods, which the scope of this thesis does not allow deeper account for.³¹

³⁰ Liability for Damage to Natural Resources, *supra* note 18, p. 15.

³¹ I recommend the reader wishing to read more on valuation of damage to natural resources to consult MacAlister Elliott and Partners LTD and the Economics for the Environment Consultancy Ltd 's “ *Study on the Valuation and restoration of Damage to Natural resources for the Purpose of Environmental damage*” from May 2001, published at DG Environment's web-page, *see supra* note 15.

3 Two different regimes

3.1 Introduction

In this chapter the background and the main features for environmental liability of the proposed EC regime and the current Swedish legislation are presented.

3.2 EC proposal for an environmental liability regime

3.2.1 Background

The work leading up to the White Paper started already in 1989, when the Commission proposed a directive dealing only with liability for damage caused by waste.³² This proposal was however abandoned and the Commission instead started working on a broader liability scheme.

In 1993, the Commission published its Green Paper on remedying environmental damage.³³ Numerous consultations were thereafter performed with Member states, industry, environmental non-governmental organisations (NGOs) and other interested parties. The European Parliament adopted a resolution in 1994, calling on the Commission to submit a proposal concerning a directive dealing with environmental liability³⁴ and in 1997 the Commission decided to start preparing a White Paper on Environmental liability.

In 1999 Margot Wallström took over as a new environment Commissioner and indicated that environmental liability was one of the priorities for DG Environment. The Commission published the White Paper on Environmental Liability in February 2000 after having held consultations with experts from Member States and interested parties. In the White Paper it is suggested to introduce a directive on a Community level covering environmental liability. Other suggestions were given but a directive was considered to be the most effective way to regulate environmental liability and justified according to the principle of subsidiarity.³⁵

³² Proposal for a Directive on civil liability for damage caused by waste, OJ C 251/3 (1989); as amended (COM (91) 219 final) OJ C 192/6 (23.07.91).

³³ Communication of 14 May 1993 (COM(93) 47 final) presented to the Council, the Parliament and the Economic and Social Committee.

³⁴ Resolution of 20 April 1994 (OJ 128, 9.5.1994, p 165).

³⁵ According to the principle of subsidiarity community action is only to be taken when the objectives can be attained better through regional action than through measures taken by the individual Member States.

It is suggested that the legal basis for the proposed directive will be Article 175 of the EC Treaty. The Directive³⁶ will be a framework regime containing essential minimum requirements to be completed over time by using a step-by-step approach.³⁷ The first step of this approach consists in establishing a framework of minimum requirements, leaving scope to complete the regime over time by the addition of other elements that might appear necessary after having gained experience from the initial period of application.

3.2.2 Scope of the Proposal

It is proposed that the directive will cover prevention and restoration of Significant Environmental Damage.³⁸ In the White Paper it was first proposed to include traditional damage in the directive, which would have meant that the directive would involve both regulation in the area of civil law and administrative law. This was taken out of the proposal since it was considered that the best way to ensure clean-up and restoration of the environment is to use a regime based on administrative law.³⁹ Another reason for excluding traditional damage is that all the Member States already have regimes in place to compensate individuals for personal damage and damage to property. Also the revised proposal does not ignore harm to humans, it simply shifts the focus from protecting individual persons to protecting human health in general.⁴⁰

After having excluded traditional damage, the term “environmental liability” used in the Commission proposal now only covers the area of administrative liability for contaminated soil, subsoil, water and damage to biodiversity.

The Commission’s aim of the proposed regime is to prevent degradation of the environment in the future. Liability will therefore not be retrospective and the operator can not, on the basis of the directive, be held liable for damage that occurred before the entry in force of the directive. It is instead up to the Member States to deal with historical pollution. In case of doubt, it is the operator that must establish that the cause of the damage occurred before the entry in force of the EC regime. Also, there is a thirty years limitation period on liability under the directive.⁴¹

³⁶ When using the term “the Directive” I hereby refer to the proposal for a directive on environmental liability.

³⁷ White Paper, *supra* note 2, p. 28.

³⁸ Consultation Paper, *supra* note 11, p.1.

³⁹ See above chapter 2.3.

⁴⁰ E-mail contacts with Sara Feijao, working on the proposal on environmental liability during spring 2001.

⁴¹ Consultation Paper, *supra* note 11, p. 1.

3.2.3 Damage covered

The proposed directive will only regulate “**Significant Environmental Damage**”.⁴² To make it easier to define the threshold between significant damage and negligible damage some criteria will be introduced in the Directive. For an environmental damage to be considered as significant it is proposed that Significant Environmental Damage will be defined according to the following definitions:

- Damage that adversely affects the favourable conservation status of **biodiversity**
- **Pollution of water** covered by the Water Framework Directive⁴³ that causes water quality to deteriorate from one quality status to a worse one
- Damage that creates **serious harm to human health** as a result of a damage according to either of the two categories above or land (soil and sub-soil) contamination

3.2.4 Activities covered

The Directive is proposed to cover professional/commercial activities that cause Significant Environmental Damage. **Strict liability** will apply to those activities that are dangerous and potentially dangerous to the environment. The option for strict liability goes in line with international development in this area⁴⁴ and the Commission opted for strict liability as this is considered to better implement the polluter pays principle. Another reason to opt for strict liability is that it is difficult for plaintiffs to establish fault, and a person in control over the dangerous activity, rather than the victim or society, should bear the risk of the potential damage.⁴⁵ The activities subject to strict liability would be defined by reference to directives in an Annex. According to the Consultation Paper the following categories of activities under EC legislation would be suitable to be subject to strict liability:⁴⁶

- Activities subject to the “Integrated Pollution Prevention and Control”⁴⁷
- Discharge of dangerous substances into air and water /groundwater
- Waste management operations

⁴² Ibid.

⁴³ 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. Hereafter referred to as “Water Framework Directive”.

⁴⁴ See McKenna & Co. *Study of Civil Liability Regimes for Remedying Environmental Damage*. Report to EC Commission DG XI, 1996.

⁴⁵ White Paper, *supra* note 2, p. 19.

⁴⁶ Consultation Paper, *supra* note 11, p. 3.

⁴⁷ Council Directive 96/61 of 24 September 1996 concerning Integrated Pollution Prevention and Control. Hereafter referred to as IPPC Directive.

- Contained use of genetically modified micro-organisms and deliberate use of GMOs
- Manufacture, use, storage, transport or release of biocidal products, plant protection products or dangerous chemicals and preparations
- Practises covered by Euratom Basic Safety Directive 96/29

The proposed regime will however be without prejudice to the international arrangements concerning the compensation of damage caused by oil pollution.⁴⁸

When determining whether an activity is subject to strict liability or not the scopes of the directives listed in the Annex apply. Activities, according to the definition in the directives, falling outside the scope of the directive in question will therefore not be subject to strict liability even if it causes Significant Environmental Damage. For activities other than covered by the legislation enumerated in the Annex the Directive will instead introduce a **fault-based liability** that only will be applied to damage to biodiversity.

3.2.5 Liable party

The person(s) in control of the activity that caused the damage would be the liable party. Primarily the **operator** would be responsible. The operator is defined as the natural or legal person who controls the activity concerned. The authorisation holder would also be considered as the operator if the activity is subject to authorisation.

Multiple parties would be liable where two or more operators have caused Significant Environmental Damage. Each operator, who is able to establish to which extent the damage results from its activities, would be liable only for that part of the damage. Those operators who can not demonstrate their part of the damage would be jointly and severally liable for the remainder of the Significant Environmental Damage. This means that parties liable for the same contamination can be held responsible for the whole amount of the restoration irrespective of their actual contribution. It is then left to the party who compensated the whole damage to seek contribution from the other liable parties.

In certain circumstances it is further proposed to hold natural persons controlling other legal persons joint and severally liable. Also legal persons controlling other legal persons should be responsible, if they had knowledge or ought to have had knowledge of the damaging factor. Persons providing financial security to a liable person and insolvency practitioners would not

⁴⁸ Consultation Paper, *supra* note 11, p. 3.

be liable unless they could be considered as controlling the liable party at the relevant time.⁴⁹

It is suggested to allow recourse from the polluter against other responsible parties.⁵⁰

3.2.6 Defences to liability

The proposal only suggests limited possibilities to defences to ensure that the Community regime is no less stringent than the average level of the Member States' regimes. Only commonly accepted defences to liability for the operators should therefore be accepted. The defence would apply where the Significant Environmental Damage 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.⁵¹

3.3 Swedish legislation

3.3.1 Background

The Swedish Environmental Code is an integrated body of environmental legislation. The Swedish Environmental Code entered into force 1999, replacing the provisions previously contained in fifteen environmental acts, to create a more coherent system. Its rules relate to the management of land and water, nature conservation, environmentally hazardous activities and health protection, GMOs, chemical products and waste. The Code is a general framework act supplemented by detailed ordinances and further instructions for application from governmental authorities such as the Swedish Environmental Protection Agency⁵² and the National Chemicals Inspectorate.

Most of the regulation in the new Environmental Code only consolidates existing legislation in the area of the environment but it also brings several changes to Swedish legislation. Examples of this is, for example, the general rules of considerations such as the polluter pays, precautionary and prevention principles and a knowledge requirement concerning measures to prevent harm from any activities. The Environmental Code also introduced a new system of environmental courts, environmental sanctions charges and stricter penal sanctions.

⁴⁹ Ibid., p. 3.

⁵⁰ Ibid., p. 15.

⁵¹ Ibid., p. 2.

⁵² Hereafter referred to as SNV.

An important novelty in the Environmental Code is the new system for dealing with Environmental Quality Standards. This is an instrument in Swedish legislation to deal with protection of the environment. The standards establish a minimum environmental quality with respect to land, water, air or other aspects of the environment in a geographical area. The purpose of environmental quality standards is to specify the levels of pollution and levels of disturbance to which humans may be exposed without risk of disturbance, or to which the environment may be subjected without danger of manifest disturbance. Environmental quality standards have so far been adopted with respect to nitrogen dioxide, sulphur dioxide and lead levels in outdoor air. The standards have been adopted in compliance with the EC Directives on air quality.⁵³

3.3.2 Scope of Swedish legislation

The objectives of the Environmental Code are presented in the first chapter. It is here stated that the provisions of the Environmental Code are aimed at promoting sustainable development to guarantee present and future generations a healthy and good environment. Sustainable development is based on the insight that nature is worthy of protection and that the right of humans to alter and use nature is linked to responsibility to manage nature well.

The second chapter of the Code contains general rules of considerations applicable to all measures, except those of negligible significance for the individual case. This is a major change compared to the previous regulation. These general rules were earlier only applicable to certain fields, for example, environmentally hazardous activities, water undertakings and handling chemicals. Whether the measure is taken within the framework of a commercial operation or not is of no importance. Neither is it of any importance whether the operation requires a permit or not. Everybody must observe the rules of consideration, irrespective of any intervention on the part of a public authority. The rules lay down common requirements for all activities that involve a risk of harm to the environment.⁵⁴

After the amalgamation of the previous environmental legislation the Swedish Environmental Code now regulates environmental liability both in the field of administrative law and civil law. The provisions concerning contaminated land or polluted areas, based on the earlier provisions in the Environmental Protection Act from 1969⁵⁵, are set out in Chapter 10. Apart from this administrative liability, civil liability is regulated in chapter 32 of

⁵³ Bengtsson Bertil, Bjällås Ulf, Rubenson Stefan, Strömberg Rolf, *Miljöbalken. En kommentar Del I (1-15 kap.)*, Norstedts Juridik, Stockholm, 2000, section 5:1-3. Hereafter referred to as "Miljöbalkskommentaren".

⁵⁴ Rubenson Stefan, *The Swedish Environmental Code*, EELR, nr 12, 1999, p. 328.

Hereafter referred to as Stefan Rubenson.

⁵⁵ Miljöskyddslagen SFS 1969:387; Environmental Protection Act.

the Code. In this chapter compensation to private parties, for damage that has occurred to their property or person as a consequence of an activity that has taken place on a property, is regulated. The rules are largely unchanged from the Environmental Damage Act from 1986.⁵⁶

Rules protecting natural resources can be found in chapter 7 of the Environmental Code, but there are in Swedish legislation no liability rules concerning compensation for loss of natural resources per se. Strictly non-pecuniary loss of natural resources is not compensated in Swedish legislation.⁵⁷

It is indicated by the transitional provisions of the Environmental Code that the liability to remedy damage and perform after-treatment applies to an environmentally hazardous activity that has been continued after 30 June 1969. The liability for after-treatment in Swedish legislation is not time-barred.

3.3.3 Damage covered

Environmental damage that requires clean-up is considered to have occurred when pollution on land and water areas can cause harm to human health or the environment.⁵⁸ The regulation for clean-up of contaminated sites can be found in chapter 10 of the Environmental Code. The regulation in this chapter includes environmental damage both to land and water.

3.3.4 Activities covered

As earlier explained the fundamental rules in chapter 2 of the Environmental Code apply, in principle, to all human activity that may harm the environment. Unless otherwise provided, the rules of the Environmental Code apply to all operations and measures that affect the environment. It is of no importance whether the operation or measure takes place as part of a commercial operation or if a private individual conducts it. Not only commercial activity is included but all human conduct – also non-professional, private activity.⁵⁹ Thus, the Environmental Code applies to everything from major projects, such as building and operating hydroelectricity plants or motorways, to small individual measures, such as washing a car with detergents or composting household waste.⁶⁰ In practise it is almost only environmentally hazardous activities according to the

⁵⁶ Miljöskadelagen SFS 1986:225; Environmental Damage Act.

⁵⁷ See Chapter 5.3.

⁵⁸ The Environmental Code, *supra* note 5, Chapter 2 section 1.

⁵⁹ Marie-Louise Larsson, *supra* note 21, p. 484.

⁶⁰ Swedish Ministry of the Environment, The Swedish Environmental Code – *A résumé of the text of the Code and related Ordinances*, January 2001. The résumé can be found at the ministry's web-page; http://www.miljo.regeringen.se/english/pdf/env-code_resume.pdf. Hereafter referred to as “Résumé of the Environmental Code”.

definition in chapter 9 that cause pollution damage and therefore trigger liability according to chapter 10.⁶¹ Environmentally hazardous activity is defined in chapter 9 as all use of land, buildings or fixed installations that involves an emission to land, the atmosphere or water. The same applies to such use as entails other nuisance to human health or the environment, for example, by noise, vibration or radiation. To be regarded as comprising an environmentally hazardous activity, the activity does not need to be hazardous to the environment in the individual case. Nor need too much be read into the word activity. The concept 'use' should be viewed in a long-term perspective, which means, for example, that a rubbish dump were waste is no longer deposited is covered as long as it may result in pollution. It is the effect of the activity and not the actual running of the operation that is decisive.

However, many provisions in the Environmental Code have a more limited scope. There is a need of special provisions in certain fields. Special provisions exist, for example, on protected geographical areas, water undertakings, genetic technology and handling of chemicals. Many operations that fall within the scope of the Environmental Code are also subject to other acts. Examples of such operations include the construction of roads and railways, mining and forestry. The Environmental Code applies in parallel with these other acts, in these cases the Roads Act, Railway Construction Act, Minerals Act and Forestry Conservation Act. Those who build roads or railways, mine minerals or conduct forestry operations must thus observe the rules of both the Environmental Code and the special act.

3.3.5 Liable party

According to the Environmental Code it is primarily the **operator** conducting the activity, who is responsible for clean-up of the damage. This responsibility also applies to former operators. In the case of several operators or landowners they are to be held jointly and severally responsible.⁶²

If none of the operators can perform or pay for restoration and aftercare then the **landowner** is reachable in the second instance under the condition that the landowner at the purchase of the land was not aware of the contamination or should have been aware of it. If the property is owned for private housing, a precondition for liability is that the purchaser had knowledge of the pollution when he acquired the property. If the person liable cannot be identified or is insolvent the public pays for the clean-up.⁶³

⁶¹ Miljöbalkskommentaren, *supra* note 53, 10:2.

⁶² The Environmental Code, *supra* note 5, Chapter 2 section 8.

⁶³ See below Chapter 6.2.

Also in Swedish legislation it is possible to hold persons providing financial security to a liable person and insolvency practitioners liable if they can be considered as controlling the liable party at the relevant time.⁶⁴

Recourse actions are available according to the Environmental Code.

3.3.6 Defences to liability

The liability to remedy environmental damage in Swedish legislation is strict. The duty, to carry out or pay for any after-treatment measures that are necessary to prevent or combat damage or detriment to human health or the environment, can however be limited since the obligation instead only have to be carried out “to the extent reasonable”. When the extent of the liability is to be decided, matters to be taken into account include the length of time that has passed since the pollution occurred and what obligation the operator of the activity had under the rules then applicable to prevent future injurious effects and other relevant circumstances.

3.4 Conclusion

To start with, it is clear that one difference in scope is that the proposal for a directive on environmental liability will not apply retroactively. This means that it is left to the Member States to decide what to do in respect of historic pollution and damage. The existing Swedish legislation would therefore continue to cover historic damage and pollution. National legislation would also continue to cover damage that remains after the thirty year limitation period on liability that is suggested in the EC liability scheme.⁶⁵

Also, when comparing the scope of the two regimes it becomes obvious that the scope of the liability regimes differ. The EC environmental liability regime only covers damage to contaminated sites and biodiversity. The Swedish Environmental Code on the other hand covers both liability for traditional damage and contaminated sites but not liability for damages to biodiversity.

Apart from this obvious difference in scope, when comparing the remaining proposal to Swedish legislation the following should be noted.

First of all, the proposal covers Significant Environmental Damage to polluted soil, sub-soil, water and damage to biodiversity. In the case of contaminated soil serious harm to human health is covered. In Swedish legislation instead all damage (for contaminated soil and water) that causes “harm to human health and the environment” is covered. Thus, there is in

⁶⁴ Clarke Chris, *Up-date Comparative legal study on Environmental Liability*, DG Environment’s web-page, *supra* note 15.

⁶⁵ Consultation Paper, *supra* note 11, p. 1.

Swedish legislation no qualification of the damage such as the proposed “serious damage”. The definition for pollution to water differs in the proposal and is dealt with more in dept in Chapter 4.

Secondly, the activities covered by the environmental liability schemes in the proposal and Swedish legislation differ. When introducing a liability regime in the field of the environment, two possibilities arise. It is possible either to use a “damage approach” or a “source approach”.⁶⁶ It has been criticised that the EC regime favours the source approach by only covering professional and commercial activities. There is so far no exact definition what is to be considered as being a commercial activity. This approach can be compared to the Swedish regulation that instead favours the damage approach since the Environmental Code covers all activity that may have a harmful effect to the environment. Strict liability for the professional activities only apply for activities listed in an annex to the proposed directive. In the comments from the Swedish Government it was agreed that a list of activities for which strict liability is to apply is necessary but pronounced reservations as to whether such a list should be linked exclusively to EC legislation. This was considered to impose an unnecessary restriction on the liability of environmental damage.⁶⁷ It should however be observed that the proposed list, of directives covering potentially environmentally hazardous activities that will be subject to strict liability, in reality covers most activities. Activities falling under the proposed list of directives will range from everything from large chemical plants to a small dry-cleaning. Activities falling outside of the scope of the annex will in reality apply to a small group of activities.⁶⁸ These activities will be subject to fault-based liability. The fault-based liability will however only apply to damage to biodiversity. It is therefore difficult to compare this to Swedish legislation, as regulation on liability for damages to nature resources per se is not regulated in Swedish law.

When comparing the regulations in the two regimes concerning liable parties some differences becomes obvious. Swedish regulation differs as Sweden also imposes liability on the owner of the polluted land. This is justified by the rule that the owner has to control the risks presented by his land and thus eventually has to take precautionary measures. No responsibility on the owner is suggested in the proposal. In the background document concerning liability for contaminated sites it is however suggested to, on a subsidiarity basis, allow Member States to maintain other liability rules which make other persons liability (inter alia. fault liability, liability of

⁶⁶ Poli Sara, *Shaping the EC Regime on Liability for Environmental Damage: Progress or Disillusionment?*, EELR, nr 11, 1999, p. 303. Hereafter referred to as Sara Poli.

⁶⁷ Summary of Comments from the Swedish Government on the White Paper on Environmental Liability. See DG Environment’s web-page, *supra* note 15.

⁶⁸ Bergkamp Lucas, *The Commission’s White Paper on Environmental Liability: A Weak Case for an EC Strict Liability Regime*, EELR, nr 4, 2000, p. 111. Bergkamp gives the example of a bakery. Hereafter referred to as Lucas Bergkamp.

the owner of the polluted ground.) This coexistence will mean that Sweden still can enforce liability for the owner of the contaminated land.⁶⁹

Finally, the proposal for an environmental liability regime proposes certain defences to liability. The Swedish Government's opinion is that commonly accepted defences should be allowed but considers it important to restrict the scope for defences. Under Swedish law, a plaintiff's contribution to the damage is a mitigating factor and not a defence. Also it is in Swedish legislation no defence to conduct an activity in accordance with a compulsory order given by a public authority.⁷⁰

⁶⁹ Sophie Deloddere and Donatienne Ryckbost, *Liability for Contaminated Sites*, Background Document 26 September 1997, p. 15. See DG Environment's web-page *supra* note 14. Hereafter referred to as "Liability for Contaminated Sites".

⁷⁰ Summary of Comments from the Swedish Government, *supra* note 67.

4 Contaminated sites

4.1 Introduction

By contaminated land is generally meant soil or ground polluted by substances to such an extent that it threatens public health and/or the environment, creating at least a risk of pollution damage. The largest part of contaminated sites is of historic origin, created as a result of the industrial revolution during the 20th century. The sources of pollution include, for example, spills, storage and transport of products and deposit of waste. Also, atmospheric pollution and polluted surface water may cause soil pollution in an indirect way.⁷¹ It should be noted that one of the major costs in case of soil pollution concern clean-up costs, often incurred by public authorities in response to a pollution accident.⁷²

4.2 Contaminated sites EC

Most Member States already have legislation that deals with the clean-up of contaminated sites, both old and new. The purpose to introduce regulation on an EC level would therefore primarily be to implement the environmental principles (polluter pay, prevention and precaution) for future contamination. The aim of the proposed directive is also to impose a certain level of harmonisation with respect to clean-up standards, clean-up objectives and clean-up obligations.

It is however clarified in the back-ground document that “*the introduction of the proposed liability system at an EC level will not prevent MS from organising their own administrative decision making process as regards the clean-up of contaminated sites or from choosing the most appropriate legal instruments to that end.*”⁷³ This means that the Member States will be responsible of identifying the pollution, for example through soil investigation and registers of polluted soils. Also, it is up to the national authority to impose the administrative obligation to carry out a clean-up or to finance clean-up costs. It is in addition left to the Member States to guarantee a minimum of efficiency and due process. This concerns the control of the clean-up operations by public authorities, the possibility for the public authorities to act ex officio, the right of access to polluted land, the participation of the directly affected parties in the decision making process, and a dispute settlement procedure at the administrative level. It was first proposed in the White paper to include pollution to water under the definition of contaminated sites. In the Consultation Paper pollution to

⁷¹ Liability for Contaminated Sites, *supra* note 69, p. 1.

⁷² *Ibid.*, p. 13.

⁷³ *Ibid.*, pp. 1-2.

water is instead defined according to the regulations in the new Water Framework Directive,⁷⁴ and both the definition of Significant Environmental Damage and the objective of restoration differs from the regulation proposed for contaminated sites.

4.2.1 Soil and subsoil

Strict liability would apply to Significant Environmental Damage caused by soil or subsoil contamination by the activities defined in the Annex by reference to EC environmental legislation.⁷⁵

Most Member States requires clean-up of soil pollution only if the pollution produces unacceptable effects for man and the environment.⁷⁶ For contaminated soil and subsoil it is proposed to consider the damage as significant if the contamination leads to “**serious harm to human health**”.⁷⁷ When determining the acceptability of the effects of an environmental damage for man and the environment different methods of standards can be used. Either this can be determined on the basis of specific numerically quantified clean-up standards or on the basis of a general non-quantified criterion such as the proposed “a serious harm to human health”. It should be noticed that the use of non-quantified criteria gives a better case-to-case evaluation but can be more expensive and mean a greater degree of legal uncertainty.⁷⁸

It was suggested in the background document to combine the quantified standards with non-quantified standards to create a system that can be fine-tuned for each case and consistent as a whole. The proposal suggested to use quantified clean-up standards as guidelines for clean-up actions. One factor to see if damage has been caused could here be to see if there are any infringements of quality standards, excesses of tolerance levels or violations of emission norms. Reference could for example be made to norms and standards in various EC directives.

Today there exist no numerically quantified clean-up standards for soil in the EC legislation. The Commission is however presently working on a soil strategy. The strategy is one of the thematic strategies presented in the Commission’s Sixth Environmental Action Programme.⁷⁹ If the new soil strategy elaborates quality standards and emission values and limits for soil it is likely that the Directive will be revised, once the strategy is finalised, according to the proposed step-by-step approach.⁸⁰ Since it is a strategy the Commission recently started working on it can be expected to take several

⁷⁴ See below Chapter 4.2.2.

⁷⁵ See above Chapter 3.2.

⁷⁶ Liability for Contaminated Sites, *supra* note 69, p. 5.

⁷⁷ Consultation Paper, *supra* note 11, p. 1.

⁷⁸ Liability for Contaminated Sites, *supra* note 69, p. 6.

⁷⁹ Sixth Environmental Action Programme OJ CE 154/01.

⁸⁰ See Chapter 3.2.1.

years before such a strategy, containing numerically quantified clean-up standards will enter into force.

It is in the meantime suggested to use the general non-qualified standard “serious harm to human health” as the objective for clean-up for soil and subsoil. The objective of restoration will be to remove serious or potential harm to human health. When deciding if restoration is assessed regard will be given to the present and plausible future land uses as resulting from land use regulations in force at the time of the damage.⁸¹

4.2.2 Water Areas

The new Water Framework Directive entered into force in December 2000 and the deadline for implementation in the Member States is 22 December 2003.

The environmental objective of the Water Framework Directive is to achieve "good status" for all groundwaters and surface waters by 2010 at the latest. To this aim, it establishes river basin management based on an assessment of the characteristics of the river basin; monitoring of the status of its surface and groundwaters; definition of quality objectives; establishment of programmes of measures to achieve the defined objective. However, the administrative structure to achieve this river basin management is left to the discretion of Member States.

The Water Framework Directive will use the setting of numerically quantified standards such as emission limit values and water quality standards for ground and surface waters. In this context the full implementation of existing EC emission limit value legislation has to be provided, i.e. Urban Waste Water Treatment Directive, IPPC Directive, Nitrates Directive, Plant Protection Products Directive, Dangerous Substances Directives. In addition, the water quality standards established under the Water Framework Directive and other relevant EC water legislation (e.g. Bathing Water Directive) have to be complied with⁸².

The Consultation Paper proposes to link the definition of Significant Environmental Damage for water to the Water Framework Directive. Instead of using the concept “serious harm to human health”, Significant Environmental Damage will for water be considered to have occurred when the pollution causes water quality to **deteriorate from one quality status to a worse one**.⁸³ The Water Framework Directive contains the standards for the different water quality status for ground and surface waters.

⁸¹ Consultation paper, *supra* note 11, p. 4.

⁸² For more information on the Water Framework Directive see; <http://www.europa.eu.int/comm/envi/guide/part2d/htm>.

⁸³ Consultation Paper, *supra* note 11, p.1.

Damage covered by article 4(7) will be excluded. Such damage include Member States' failure to comply with the Water Framework Directive when this is a result of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater. Also certain deterioration that is the result of new sustainable human development activities can be allowed if certain conditions are met.

The objective for restoration for water pollution is to return the polluted water area to **baseline condition**, i.e. return the polluted water to the status it was in before the damage occurred. It would also be required to **remove serious harm to human health**.⁸⁴

4.3 Contaminated sites Sweden

4.3.1 Contaminated sites

The general rules of consideration in chapter 2 are applicable to contaminated sites. The more specific regulation concerning contaminated land or "polluted areas" is however found in chapter 10 of the Environmental Code. The scope of the Swedish legislation is extensive and covers land and water areas, buildings and structures that, due to pollution, can cause damage or detriment to human health or the environment. The liability is strict concerning clean-up and restoration costs and applies to any activities which cause the relevant damage.⁸⁵

Liability for pollution means that the party responsible must, to a reasonable extent, perform or pay for the after-treatment measures necessary to counteract damage or nuisance to health or the environment. The regulations in chapter 10 concerning polluted areas are applicable if the pollution can lead to "**harm to human health or the environment**".

When determining the objectives of restoration, the government has not suggested any particularities. The SNV has taken the position that, "a reasonably high ambition norm" should be used accomplished through an case-by-case analysis based on "planned and supposed future use of the land and surroundings, and an assessment of long-term risks in the light of established goals of environmental policy".⁸⁶

4.3.2 Water Areas

Water areas are covered by the regulation in the Environmental Code. The same regulation that is applicable to soil and sub-soil in Swedish legislation

⁸⁴ Ibid., p. 4.

⁸⁵ See above Chapter 3.

⁸⁶ Marie-Louise Larsson, *supra* note 21, p. 489.

is also applicable for water. The introduction of the Water Framework Directive will however mean that the Swedish legislation in this area will have to be altered to be in compliance with the Directive.⁸⁷

One of the largest differences introduced in the Water Framework Directive is the establishment of river basin management. Also, the Water Framework Directive and the directives connected to it establish minimum environmental quality standards for ground and surface water.

The SNV concludes that in many cases the existing instruments for estimation in Swedish legislation is sufficient. In Sweden there today exist Estimation Instruments for Environmental Quality. The SNV considers that these will be useful to determine whether Sweden meets the demands in the Water Framework Directive for good status for water. These can be used to determine the natural conservation status for respective water. It is however clear, that some of the new Water Framework Directive's demands for other parameters will have to be elaborated in Swedish regulation since these are not supervised in Sweden today. It is here possible that complementary additions will be necessary to the programmes of measures. It might also be necessary to increase the biological supervision and the supervision of environmental poisons to met the demands in the Directive

The deadline for implementation in the Member States is 22 December 2003. Within the Commission the work now continues to elaborate connected legislation and recommendations on how the Member States should adapt national legislation to implement the Directive. The work has already started in Sweden to implement the provisions into Swedish legislation. The Swedish Environmental Protection Agency is currently looking over the Water Framework Directive, partly with the intention to set rules to be in compliance with the demands in the Directive. Also, the Environmental Code Committee is instructed to review Swedish legislation compared to the Water Framework Directive by July 2002. The review looks especially at the issues related to environmental objectives, environmental measure programmes and emissions to water.

4.4 Conclusion

One of the main differences when comparing the Swedish legislation for contaminated sites with the proposal is that the proposal introduces different regulation for polluted soil and sub-soil compared to the regulation for water. In Sweden the regulation in the Environmental Code covers both contaminates sites and pollution of water.

⁸⁷ Naturvårdsverket (SNV) – *Helhetssyn i vattenvården*. The material concerning the Water Framework Directive and its implications for Swedish legislation can be found on SNV's home-page; <http://www.environ.se>.

The regulation for contaminated land (soil and sub-soil in the proposal) is today not that different if one compares the proposal for a European liability scheme with Swedish legislation in this area. Both regimes use a non-quantified standard to determine if the pollution or contamination leads to unacceptable effects for man or the environment and therefore trigger liability. Swedish law is however more stringent as damage that leads to “harm to human health or the environment”, triggers liability. The proposed EC regime instead uses the criteria “serious harm to human health”. In both regimes the non-quantified standards are also the basis for restoration objective.

The differences between the proposal for liability for pollution of water and the Swedish regulation for water are on the other hand greater. The same criteria as for contaminated land “harm to human health or the environment” is used for polluted water in Swedish legislation. The proposal instead defines liability for pollution to water by referring to the new Water Framework Directive. Significant Environmental Damage will be considered to occur when the pollution causes water quality to deteriorate from one quality status to a worse one as defined in the Water Framework Directive. The restoration objective for water in the proposal is to return the polluted water area to baseline condition. It is clear that changes will have to be made to Swedish legislation for it to be in compliance with the rules in the new Water Framework. The Water Framework Directive’s deadline for implementation is 2003 and a review of Swedish legislation is at the moment on its way. It should also be observed that the Commission is still working on recommendations for the implementation of the Water Framework Directive. It is therefore difficult to say exact what implications the proposal will have to current Swedish legislation.

When looking into the future for the proposed liability scheme it is interesting to see the increased importance of quantified standards according to other EC legislation when determining if Significant Environmental Damage has occurred. It is proposed in the background document for contaminated sites⁸⁸ to combine the use of non-quantified standards with quantified standards, such as environmental quality standards and emission values and limits. One of the purposes of the new Water Framework Directive is to use emission limit values and water quality standards for ground and surface waters. These parameters will help to determine whether water status has changed and will therefore have a direct impact on determining whether Significant Environmental Damage has occurred to water areas. It is however today impossible to say exactly how the new Water Framework Directive will influence Swedish legislation as the work to implement the Directive will take several years.

In the area of soil the Commission are presently working on a thematic soil strategy. In current EC legislation there are no quality standards for soil but

⁸⁸ Liability for Contaminates Sites, *supra* note 69, p. 4.

it is possible that this will be a part of the new strategy. The strategy will however not be completed in the nearest future but environmental quality standards and other quantified standards will possibly be developed also for soil.

5 Damage to biodiversity

5.1 Introduction

When speaking of damage to nature resources or biodiversity no uniform definition exists but the terms include both living and non-living natural resources. One definition of natural resources can be found in the Oil Pollution Act of the USA “*land, fish, wildlife, biota, air, water, groundwater, and drinking water supplies*”.⁸⁹ Another definition can be found in the Convention of Biological Diversity, Article 2, and refers to “*the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems*”.⁹⁰

Marie-Louise Larsson identifies two sorts of damage to natural resources.⁹¹ The first is property damage with ecological dimension. This is damage to the environment that is connected to a traditional damage. This damage either is a consequence of traditional damage or generates traditional damage. Example of such damage is loss of aesthetic view or access to nature such as a beach. The loss of these values can however be measured in economical terms as a loss in market value can be calculated. The second form of damage to natural resources is pure ecological damage, damage to the environment per se. Damage occurs in this case without connection to individual owners’ interest and instead constitutes damage to public interests. Example of such damage is damage to a rare, protected species.

The growing awareness of environmental values has lead to an increased recognition of damage to natural resources per se. The difficulty when trying to regulate this in law is however the problem of evaluating the damage as the resources are often unowned property. The traditional tort rule based on the economic theory of diminution in market value can therefore not be applied to this kind of damage. Instead alternative methods of evaluation of the damage must be used.

5.2 Damage to biodiversity EC

The Council of Europe adopted in 1993 a draft Convention on Civil Liability for Damages resulting from the Exercise of Activities Dangerous

⁸⁹ Oil Pollution Act, 33 USCA § 2623

⁹⁰ Convention on Biological Biodiversity, 31 ILM 818 (1992)

⁹¹ Marie-Louise Larsson, *supra* note 21, p. 486.

for the Environment.⁹² When working on a liability scheme for biodiversity at a European level one option was to sign this Convention, also known as the Lugano Convention. The Convention establishes a broad liability scheme, covering both traditional injury and damage to the environment as such. However, it was considered that the Convention's scope was too wide and that it gives too little legal certainty, as there is a certain vagueness of the key definitions and concepts. If the EC had assessed the Convention, supplements would have been necessary. It was therefore preferred to propose a directive since this can be better delimited and results in more legal certainty.⁹³

The current national liability regimes concerning environmental damage are often only operational with respect to damage to human health or property, or contaminated sites. It is more rare that they also cover damage to natural resources per se. The aim of the proposed Directive is therefore to cover also "damage that adversely affects the **favourable conservation status**"⁹⁴ of biodiversity, in order to remedy some of the gaps in the environment protection regimes of the Member States.⁹⁵

So far, there is no definition of biodiversity in the proposal. It is suggested in the White Paper that damage to biodiversity should be limited to damage that occurs in sites which have been designated as Natura 2000 sites under the Habitats and Wild Birds Directives. These sites are collectively referred to as the "Natura 2000 network". In the Consultation Paper it is further suggested to also include natural sites protected by national legislation. Certain reservations against this were however presented in the background paper. There might be a difference between Member States in the requirements necessary to appoint an area as a nature reserve, and the extent of control and management of the public authorities over the resources located in these areas might differ. It might also be that the geographical boundaries of these areas are not as clearly drawn as the areas appointed under the Wild Bird and Habitats directives. This may lead to differences in the application of the liability regime between Member States.⁹⁶

Also for damage to biodiversity, only Significant Environmental Damage would be covered.⁹⁷ In the case of damage to biodiversity Significant Environmental Damage is such damage that adversely affects the favourable conservation of biodiversity. The liability will be strict and fault-based. The liability is strict for such activities that are covered by the enumerated EC legislation in an Annex and fault-based for all other activities.

⁹² Council of Europe Convention on Liability and Compensation for Damage Resulting from Activities Dangerous to the Environment, 32 ILM 1228 (1993).

⁹³ White Paper, *supra* note 2, p.25-26.

⁹⁴ As defined in Article 3 of the Habitats Directive.

⁹⁵ The Commission has chosen to use the term biodiversity instead of natural resources

⁹⁶ Liability for Damage to Natural Resources, *supra* note 18, p. 8.

⁹⁷ White Paper, *supra* note 2, p. 19.

5.2.1 Natura 2000

When damage is caused to biodiversity protected under the Natura 2000 network, measures have to be taken to restore the natural resources, that are part of the Natura 2000 network, in order to meet the conservation needs of the regimes.⁹⁸ The directives contain obligations concerning the need to take restoration measures, but an explicit provision on liability is not included.

EU Directive on the Conservation of Wild Birds⁹⁹

The Birds Directive requires Member States to take special conservation measures to conserve the habitat of two specific groups of birds; namely species listed in Annex 1 of the Directive; and populations of regularly occurring migratory birds. It is only the species protected under Annex 1 that will be covered by the Directive.

According to article 4 of the Directive Member States has an obligation to classify the most suitable territories in number and size as so called Special Protection Areas (SPA).

EU Directive on the Conservation of Natural Habitats and of Wild Fauna and Flora¹⁰⁰

The Habitats Directive purpose is to promote the maintenance of biodiversity in the Member States by defining a common framework for the conservation of wild flora and fauna and habitats of Community interest. ”

The Habitats Directive introduces the concept of a network of special areas of conservation – the Natura 2000 network. The network is composed of sites hosting the natural habitat types listed in Annex 1 of the Directive and habitats of species listed in Annex II that are considered to be of European importance. It is stated in the Habitats Directive that the Natura 2000 network also shall include special protection areas, (SPA) as classified according to the Birds Directive, to harmonise the conservation measures for birds with all other species of wild fauna and flora and natural habitats.

The Consultation Paper proposes to define Significant Environmental Damage to biodiversity as such damage that adversely affects the favourable conservation status of biodiversity. The definition for favourable conservation status can be found in Article 3 that places an obligation on Member states not only to maintain Natura 2000 sites but also to restore them, where appropriate, to a favourable status. The conservation status is to

⁹⁸ See Art. 3 and 4 of the Wild Bird directive and Art. 3 of the Habitat directive.

⁹⁹ Council Directive 79/409/EEC on the Conservation of Wild Birds. Hereafter referred to as “Birds Directive”.

¹⁰⁰ Council Directive 92/43/EEC on the Conservation of Natural habitats and of Wild Fauna and Flora. Hereafter referred to as “Habitats Directive”.

be considered as 'favourable' when:

- population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats
- the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future
- there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis

In other words, when these conditions are no longer fulfilled Significant Environmental Damage will be considered to have occurred.

Damage authorised under Article 6(3) and (4) of the Habitats Directive would be excluded from the scope of the Directive.¹⁰¹ This includes damage that have been caused by plans or projects with a significant effect on the site, authorised by the competent national authorities, after assessment based on the sites conservation objectives.

5.2.2 Restoration objectives

Restoration when Significant Environmental Damage has occurred to biodiversity will be achieved by returning damaged habitats to **baseline condition**.¹⁰² This means the status of the resource prior to the damaging incident. The baseline is defined in terms of the type and quantity of the resource, and also by the services the resource provides. When determining the services of the resource it is proposed to look at the ecological functions or the various uses the resource provide. It would also be required to remove **serious harm to human health**.¹⁰³

5.3 Damage to biodiversity Sweden

It is stated in the Environmental Code that it shall be applied so that protection and conservation is given both to nature protection areas and biodiversity. The concept of biodiversity in Swedish legislation includes diversity in ecosystems and between and in species.¹⁰⁴ The general rules of consideration are applicable also to damage to biodiversity but the Environmental Code does not cover non-pecuniary damage without connection to property or personal damage and the position concerning compensation for damage to the environment as such has been restrictive. The Committee preparing the Environmental Code discussed liability for

¹⁰¹ Consultation Paper, *supra* note 11, p. 1.

¹⁰² *Ibid.*, p.4.

¹⁰³ *Ibid.*

¹⁰⁴ *See* prop.1997/98:45, part 2-3, p. 7.

loss of natural resources¹⁰⁵ but it was decided not to regulate the issue in the Code.

5.3.1 Legislation

The Environmental Code implements the Natura 2000 legislation. In Chapter 7 section 28 the Environmental Code regulates special areas of protection and special areas of conservation. According to this regulation the Government can appoint an area as a special area of protection, if it is especially important according to the Birds Directive. Special areas of conservation according to the Habitats Directive can also be appointed by the Government. The special areas of protection and conservation do not however, as one might think, constitute separate protection areas. The necessary protection must also exist according to other regulations in the Environmental Code or other national rules for example the rules concerning nature reserves, or even national parks.¹⁰⁶ Relaxation from the regulations for such a nature reserve may not be issued without the permission of the Government. However, this does not apply if it is obvious that the activity will not cause more than insignificant harm to the nature value of the area.

5.3.2 Case law

Even if protection for loss of natural resources, in the form of liability, does not cover non-pecuniary damage for damage to natural resources in Swedish legislation, compensation for damage to natural resources has been recognised to a certain extent in recent case law.

In **NJA 1993 s 753** it was stated that authorities can have a right to compensation as representative of the care and protection of cultural heritage.¹⁰⁷ The case concerns protection of public interests on private land. B damaged a grave from AD 200-300, during works on his land by moving some of the stones. Due to the damage archaeological studies was initiated since it was not possible to repair or restore the grave. The state through Riksantikvarieämbetet (The Swedish Central Office of National Antiquities) claimed compensation for the research costs (70 000 SEK) as the result of the criminal offence.

B was held liable by the Supreme Court for the property damage caused to the grave. It was further concluded that the authority as representative of the care and protection of the cultural heritage had a right to compensation. B was held liable for all the expenses incurred by the authority being forced to carry out an archaeological study to protect values otherwise ruined.

¹⁰⁵ See SOU 1996:103, Part 1, pp. 630-631.

¹⁰⁶ Miljöbalkskommentaren, *supra* note 53, 7:71.

¹⁰⁷ According to the Act on Cultural Heritage SFS 1988:950.

In the “Wolverenes case”, **NJA 1995 s 249**, it was also concluded that an authority can claim compensation for public interests. The case addresses protection of unowned resources and contains an interesting discussion as to what extent the loss of natural resources or ecological damage can be compensated.

In this case L had killed two wolverenes during unlawful hunting on land owned by the state, and was sentenced to prison for the offence. The Swedish State, through SNV, also claimed damages for the loss of the animals. SNV based the claim on the so-called “Hungarian list” pricing endangered species by their rarity. According to the list, a wolverene ought to be given a value compared to 50 000 SEK. The state subsequently claimed SEK 100 000 in damages for the loss of the animals.

The Court of First Instance concluded that since wolverenes are an endangered species the animals can not be subject to a hunting licence. It is therefore impossible to apply the principles for compensation for losses caused during illegal hunting. In the case of, for example, killing of bears a market exists to the meat value, trophy value, breeding value and recreational value, and compensation can be granted to the licensee/holder of hunting rights. However, the Court concluded that the wolverenes should be valued according to their recreational value, and also stated that since the wolverenes are very rare this recreational value should be set high under the principle of rarity (the more endangered, the higher value). Lacking studies of the occurrence of wolverenes, the Court estimated a value of 20 000 SEK reasonable.

The Court of Appeal accepted that the loss of recreational value should be compensated as an economic loss and found no reason to reduce the award.

The Supreme Court reached the same decision, although the Secretary recommended that since the claim concerned a non-pecuniary loss of biological biodiversity, it should be rejected as not being accepted under Swedish law. The Supreme Court noted that Sweden is obliged under ratified international agreements to protect endangered species (Notably CITES and the 1992 Rio Convention on Biological Diversity). With a reference to the Act of Cultural Heritage, the Supreme Court concluded that the state has a duty to protect and conserve the population of wolverenes.¹⁰⁸ The harm at issue was categorised as being a hybrid between non-pecuniary and economic damage. Concerning the value, the Court noted that this species does not have any economic value since it is placed under protection of the law. However, the State had had large expenses for conservation of the species that now had become useless due to the killing. The breeding value should therefore be considered and the compensation should be calculated according to an analysis of “reasonability” with conservation

¹⁰⁸ NJA 1995 p. 42,p.253.

costs as the starting point. The Supreme Court awarded the state with SEK 40 000 as compensation for the loss of the wolverenes.

The judgement is important as it recognises compensability of public interests and acknowledges SNV as a representative of such interests like a “public trustee”. The ruling has been referred to as a landmark case establishing ecological tort law in Sweden.¹⁰⁹ However, the case has several shortcomings. The valuation measures for the damages is based on the parameter of expenses, either in the form of expenses that are useless due to the harm, or new expenses caused by the harm.¹¹⁰ Kleineman has said that if one accept the concept of environmental damage, this means that one has accepted that certain nature values, such as the conservation of rare species, can not be evaluated in economical terms. He instead suggests that the relation to non-pecuniary infringements of ecological values represented by the state ought to be valued as punitive damage.

Another shortcoming in the case concerns the application of environmental efficiency. The award is not conditioned to be used for restoration of the damaged resources, but for any purpose the victim, even if it here was the public authority, chooses.¹¹¹

When working on the proposal for the Environmental Code the Environment Code Committee referred to the case.¹¹² The Committee came to the conclusion that damage to natural resources could be protected by the existing rules. This includes for example the rules in the Environmental Code concerning precaution and prevention and also the possibility to recall or alter authorisations if damage occurs. It was not considered necessary to implement any regulation concerning compensation for natural resources and the reasoning in the Wolverenes case was considered to have sufficiently clarified the Swedish legal situation in this area.

However, the importance of this statement and the Wolverenes case was later diminished in the discussion by the Drafts Legislation Advisory Committee Report. The government here pronounced that further analysis of the current legal situation should be made and that the question of compensation for damages to public natural resources should not be discussed before when implementing the Environmental Code.¹¹³

¹⁰⁹ Kleineman Jan, *Ideell skada eller förmögenhetsförlust – nytt synsätt under framväxt*. Juridisk tidskrift vid Stockholm universitet 1995/96 s. 101. Hereafter referred to as Jan Kleineman.

¹¹⁰ Marie-Louise Larsson, *supra* note 21, p. 499.

¹¹¹ *Ibid.*

¹¹² SOU 1996:103 s 630-631.

¹¹³ Marie-Louise Larsson, *En doktorsavhandling och en miljöbalk*, Nordisk Försäkringstidskrift 1997, nr 3, p.272.

5.4 Conclusion

5.4.1 Expected impact by regulation of damage to biodiversity

When preparing the proposal to include liability for damage to biodiversity the expected impact on costs of prevention and restoration was a consideration that was made. Damage of biodiversity can, according to the Consultation Paper, only occur in areas either protected under the Natura 2000 network or by national law. Areas protected by the Natura 2000 regulation are expected to cover 10% of the EC territory.¹¹⁴ According to the Natura 2000 network the only activity allowed in these areas are environmentally friendly. This means that most of the damages in these areas will be caused by potentially dangerous activities in neighbouring areas. These activities are already covered by the pillar that addresses contaminated sites which means that the only additional cost, after clean-up of the site has been performed, will be to also restore damage to biodiversity. Where an area protected under the biodiversity regime is a part of a contaminated site, the regime for biodiversity damage would apply to that area, in addition to the regime for contaminated sites. This might mean that restoration of the natural resources to the baseline condition has to be carried out after decontamination of the site. The scope of the EC regime concerning liability for biodiversity is limited to those injuries to biodiversity that are not fully remedied by response actions, including clean-up, removal actions and preventive actions taken to limit environmental damage. Should the clean-up be completely successful restoration measures to the damages occurring for biodiversity may prove unnecessary or only have to be performed to a very limited extent. The measures for restoration of damage to biodiversity are taken in addition to response measures and are aimed at returning the damaged natural resources to their baseline condition.¹¹⁵

In the White Paper the impact to activities is not expected to be that extensive. It is expected that increased costs will only occur for IPPC industries or large plants for which costs and competitiveness is a critical issue. The environmentally friendly activities allowed to operate in the protected areas are instead expected to internalise cheaply the desired levels of prevention and restoration.¹¹⁶

¹¹⁴ White Paper, *supra* note 2, p. 20.

¹¹⁵ Study on the Valuation and restoration of damage to natural resources for the purpose of environmental liability, *supra* note 44.

¹¹⁶ White Paper, *supra* note 2, p. 20.

5.4.2 Impact on Swedish legislation

Liability for damage to natural resources is not explicitly included in the Swedish Environmental Code. In other words, strictly non-pecuniar damage to biodiversity without connection to personal or property damage is not covered by Swedish legislation. Even if the general rules of consideration gives a certain protection and case law to a certain extent has recognised compensation for damage to natural resources the current legal situation remains unclear. The Swedish Government has however welcomed the proposal to introduce liability for biodiversity within the scope of the Natura 2000 network and national protected areas.¹¹⁷ Should the proposal for an European liability scheme come to include liability for damage to biodiversity, it seems likely that this in the future would be incorporated in the Environmental Code.

¹¹⁷ Summary of Comments from the Swedish Government, *supra* note 67.

6 Achieving Environmental Efficiency

6.1 Introduction

The proposal for an environmental liability scheme is, as we have seen, based on administrative liability. It is therefore the national authorities that have a responsibility to assure that the environment is remedied in a satisfying way. To make sure that environmental efficiency is achieved it is proposed to introduce certain duties on the Member States. Another way to ensure environmental efficiency is to give public interests groups access to justice.

6.2 Duty on Member States

6.2.1 Introduction

To protect the environment and human health it is important that damage to the environment is remedied also when it is not possible to find any liable party. It is therefore important that there is a responsibility on the Member States to ensure that remedy of environmental damage is guaranteed.

6.2.2 EC Proposal

If Significant Environmental Damage 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 afterwards recover the costs from the operator.¹¹⁸

It is also proposed to introduce a responsibility on the Member States to ensure that operators will comply with their restoration obligations when they have caused Significant Environmental Damage. A part of this responsibility is that the Member State has the responsibility to take appropriate action and cover the costs, should the operator fail to comply.

It would be up to the Member State to ensure that restoration or prevention occurs in the case that the liable part cannot be identified or doesn't have the sufficient means to either do any of the necessary restoration or a part of it. The Member State would also be forced to ensure restoration and prevention in the case that no liable part exists. It should however be noticed that the Directive will set the objective, i.e. that Member State is responsible to

¹¹⁸ Consultation Paper, *supra* note 11, p. 2.

make sure that environmental damage is remedied. The Member State is however free to decide the best way to achieve this objective. There are several different ways to do this – requiring operators to be covered by some kind of financial security, setting up a fund system fed through contributions from the industry, imposing liability on other categories of persons, such as the owner of the polluted site.

6.2.3 Swedish regulation

Liability for clean-up of contaminated land and water areas is regulated in detail by Chapter 10. The provisions also point out the liable parties. This does however not always mean that it is the party who is responsible who must take the actual measures to remedy the damage. In some instances a better result may be attained by having the liable party pay for the remedy of the environmental damage but it can be more effective if the authorities then perform the actual clean-up. Difficulties also occur when it is not possible to find a liable party.

In Swedish legislation the public has the option to pay for clean-up in the case that no polluter can be found or can finance the clean-up. In first hand it is of course the polluter that shall pay for the damage. In Sweden the possibility to also enforce liability to other persons than the operator gives a greater chance of claiming liability from others than the mere operator in the case of contaminated sites. In the case where no polluter can be found or can not finance the clean-up and remediation of environmental damage the authorities are responsible for clean-up. The costs may be financed by a fund financed by a compulsory insurance.

Chapter 33 of the Environmental Code establishes a system of compulsory insurance that finances payments in the case of liabilities arising from hazardous activities, where the liable party is unable to pay. Everybody who conducts an environmentally hazardous activity that requires a permit must pay an annual fee in respect of environmental damage insurance and clean-up insurance. Contribution must normally be paid both to an environmental damage insurance scheme and an environmental remediation insurance scheme.¹¹⁹

Compensation is paid from the environmental damage insurance fund to those suffering traditional damage such as personal injury or property loss, provided that the injured party is entitled to compensation but for various reasons cannot obtain compensation from another source. Examples are, that the party liable who caused the damage no longer exists; the party liable to pay damages is unable to pay; or the claim for damages is time barred. Compensation may also be paid when it is impossible to establish who is liable to pay the damages.

¹¹⁹ Résumé of the Environmental Code, *supra* note 60, p. 38.

A part for traditional damage, compensation is paid from the environmental remediation insurance scheme for clean-up expenses arising when the supervisory authority has decided that a polluted site must be rectified. Compensation is also paid when the supervisory authority decides that rectification shall take place at the expense of the defaulting party. A precondition in both cases is that the party responsible for the damage cannot pay or is not under an obligation to pay.¹²⁰

6.3 Access to Justice for Public Interest Groups

6.3.1 Introduction

There is a difference in the case of damage to the environment compared to the case of traditional damage, where victims have the right to raise a claim to protect a private interest. The protection of the environment is instead a public interest where the State has the first responsibility to act. It has however been acknowledged that it is important that also the public feels responsible for the environment and one way to achieve this is to give the public a possibility to act.¹²¹

6.3.2 EC Proposal

It was first suggested in the White Paper to use a two-tier approach that meant that in the first place it is the Member States that would be under a duty to ensure the restoration of damage to biodiversity and the contamination of sites. If the Member State did not act, or did not act in a satisfactory way, then public interests groups should have the right to apply for administrative or judicial review of the State's inaction or improper action; or bring a claim directly against the polluter. It was also suggested that it should be possible for public groups to act in urgent cases where there is a risk of significant environmental damage. It should in these cases be possible for public groups to apply to a court for an injunction in order to prevent significant damage from occurring. They should also have a right to carry out preventive measures and then claim reimbursement of the reasonable costs of those measures from the polluter.¹²²

However, this proposal was restricted in the Consultation Paper. The Paper speaks of the right for so called "qualified entities" to act in the field of environmental protection.¹²³ The concept "qualified entity" would mean any body or organisation that, according to criteria laid down in national law,

¹²⁰ Stefan Rubenson, *supra* note 54, p. 332.

¹²¹ White Paper, *supra* note 2, p. 22.

¹²² *Ibid.*

¹²³ Consultation Paper, *supra* note 11, p. 3.

has an interest in ensuring that significant environmental damage is restored. It is considered that bodies and organisations whose purpose is to protect the environment should be deemed to have such an interest.

The qualified entities will, according to the proposal, be entitled to submit observations on incidents of Significant Environmental Damage to national authorities responsible for the enforcement of the Directive. They would also 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. Also, the qualified entity would be entitled to bring legal proceedings to review the 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.

6.3.3 Swedish legislation

In Swedish legislation there already exists a possibility for public groups to raise claims according to section 13 in chapter 16 of the Environmental Code. This was a new rule introduced in the Swedish Environment Code in 1999. For an environmental group to raise such claim certain conditions must be fulfilled. The group must have at least 2000 members and must have been established in Sweden at least three years. An additional condition is that the organisation must be a non-profit-making association with statutes and board, membership should be open to the public and the members must be able to have an influence on the organisation's activity.

To be considered as an environmental group or organisation according to Swedish legislation the purpose of the organisation must be to safeguard environmental and nature interests. The organisation can however at the same time also be active within other areas. Should there be doubt as to whether the organisation can be considered as an environmental organisation, the organisation has the burden of proof to show that it is the case to have the right to raise a claim.

The right to raise claims does not cover all decisions according to the Environment Code but is limited to judgements and decisions concerning permit, approval and exemption. The organisation is not obliged to have been active in the lower courts to raise a claim.¹²⁴ Environmental organisations have no right to appeal decisions given by authorities in its supervising role.¹²⁵ Swedish legislation does not contain any right for

¹²⁴ Prop. 1997/98:45, p. 482.

¹²⁵ Stefan Rubenson, *Miljöbalken – den nya miljöretten*, 2nd edition, Norstedts Juridik, Stockholm, Sweden, 1999, p. 116.

organisations to raise a claim and they can not appeal authorities' decision not to act or intervene.

6.4 Conclusion

The proposal to introduce a duty on Member States to ensure that clean-up of environmental damages is performed will not influence Swedish legislation. The system of financing reparation of environmental damage in the case that no liable party can be found already exists in Swedish legislation through the compulsory insurance fund.

Concerning the right of access to justice for public interest groups there are some differences in the two regimes. First of all, it can be noted that the qualification criteria for environmental interest groups in Swedish legislation will continue to apply. However, in Swedish legislation the right for such groups to raise claims is limited to judgements and decisions concerning permit, approval and exemption. Environmental organisations have no right to appeal decisions given by authorities in its supervising role and there is no right for an organisation to raise a claim and they can not appeal authorities' decision not to act or intervene. This can be compared to the proposal to entitle environmental organisations to submit observations on incidents of Significant Environmental Damage to national authorities responsible for the enforcement of the Directive. They would also be entitled to request that action be taken. The competent authorities would be under a duty to consider such requests and observations. There would be a possibility for the organisation to start legal proceedings to review the competent authority's response to their observations and request for action in a national court. The proposal gives the organisation a possible to influence the authorities at an earlier stage than in Swedish legislation, which should help to achieve environmental efficiency.

7 Discussion

The questions in the introduction will be discussed in this last chapter. First of all – will environmental efficiency be achieved by introducing a directive on environmental liability? And, the main question – what are the possible implications for Swedish legislation?

7.1 Environmental efficiency

The Commission's proposal to introduce a directive on environmental liability has been long awaited and hopefully the proposal should be presented by the end of this year. The directive will, as accounted for above, introduce important new regulation on an EC level. For example, the directive will introduce strict liability for damages to the environment caused by certain activities that can be considered as having a harmful affect to the environment. The proposal also embraces damage to biodiversity and proposes to regulate legal standing for non-governmental organisations. One important question when looking into the proposal is however if the directive will improve the protection of the environment. In other words - does the directive help to promote environmental efficiency?

In the work leading up to the proposal other options were discussed but a directive was considered to be the most effective way to regulate environmental liability and justified according to the principle of subsidiarity. To impose a directive on the Member States has been criticised by, for example, Lucas Bergkamp.¹²⁶ He considers that the Commission's arguments, that an EC liability regime would ensure decontamination and restoration of the environment and boost the implementation of, and compliance with, EC environmental legislation, are very weak. For example he points out that in the case of contaminated sites liability is not an appropriate way to ensure decontamination since it dictates the means the Member States must use. It would instead be more appropriate to just impose an obligation on Member States to remedy contaminated sites. He also makes the observation that the Member States are already required to ensure restoration to damaged habitats according to the Habitats Directive. He means that, if EC legislation is justified, then the EC should dictate only the ends (restoring certain damaged natural resources), and let the Member State freely choose the means.¹²⁷

The proposal for a liability regime can also be criticised, from an environmental efficiency point of view, as it accepts, at least theoretically, certain restrictions on the future use of the land. The ideal objective of clean-up to contaminated land should be to remove all contamination.

¹²⁶ Lucas Bergkamp is professor at Erasmus University, Faculty of Law, Rotterdam

¹²⁷ Lucas Bergkamp, *supra* note 68, pp. 106-107.

However, this is of course a goal that would be much too costly to achieve. In the EC regime it is instead suggested to restore the contaminated land to a level suitable for certain predetermined purposes (remove serious harm to human health). When restoration is assessed, consideration is to be given to present and plausible future land uses as resulting from the land use regulations in force at the time of the damage. This is in line with most countries' regulation in this area, including Sweden's.

To achieve a higher degree of environmental efficiency, environmental organisations have been lobbying to get a stronger legal standing in a future European environmental liability scheme. It can be noted that the first proposal in the White Paper gave such organisations a stronger legal standing than the proposal in the Consultation Paper. The latest proposal does however give the organisations a right to request that national authorities take action when Significant Environmental Damage has occurred. The proposal will therefore increase the level of environmental efficiency compared to the situation today.

Despite the criticism directed against the proposal for environmental liability it is, according to me, evident that a directive imposes a stronger incentive for Member States to ensure that environmental damage is remedied and restored. Even if most countries already have regimes that in many cases have more stringent rules than the proposed regime, a directive would set important minimum standards for clean-up of damages to the environment. According to the White Paper, several of the Member States have expressed a favourable opinion towards the proposal but it is also known that several others with no national legislation in this field, especially concerning liability on damages on biodiversity, are awaiting the Commission's proposal.¹²⁸

The proposal to also regulate liability for damage to biodiversity will also help to achieve environmental efficiency, as most Member States today do not have any regulation in this area. To introduce a directive instead of relying on the existing rules concerning restoration of damages to biodiversity according to the Natura 2000 legislation, will probably increase the impact on the protection of natural resources.

7.2 Effect on Swedish legislation

First of all it is important to clarify that a directive on environmental liability will not have any impact on Swedish legislation in the cases that the national legislation is more stringent. The legal basis for the directive will be Article 175. Regulation adopted on this basis can according to Article 176¹²⁹ be made subject to more stringent protective measures in national legislation.

¹²⁸ White Paper, *supra* note 2, p. 12.

¹²⁹ Article 176 (ex Article 130t) of the Treaty.

“The protective measures adopted pursuant to Article 175 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. They shall be notified to the Commission.”

The proposal will therefore only have an effect on Swedish legislation in the cases where the national legislation does not regulate the issue, or does not regulate it sufficiently. As have been accounted for in my thesis the main difference occur for liability for damage to natural resources, as this is not regulated in Swedish law. Also, the possibility for interest groups to demand action from the national authorities will have to be implemented in the Swedish legislation as no such right exist in current Swedish legislation. Another area where quite significant differences are found is for regulation of water pollution.

In the future it also seems that the introduction of environmental quality standards in the area of water and later on possibly also in the area of soil through the Commission’s soil strategy, will increase. This is a fairly new concept in Swedish Environmental legislation. In the course of such standards being elaborated on an EC level, these will have to be implemented in Swedish legislation as well.

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