COMMISSION OF THE EUROPEAN COMMUNITIES

COM(93) 47 final

Brussels, 14 May 1993

**COMMUNICATION FROM THE COMMISSION
TO THE COUNCIL AND PARLIAMENT
AND THE ECONOMIC AND SOCIAL COMMITTEE :
GREEN PAPER ON REMEDYING ENVIRONMENTAL DAMAGE**

Table of Contents

1.0 Introduction

Seveso, Amoco Cadiz, Sandoz, Corunna and the Braer are names that conjure up memories of major environmental accidents within the European Community. They aroused public outrage and dramatized the need to clean up and restore damaged environments. However, damage from industrial accidents forms only a small part of the environmental damage occurring within the Community today. Emissions from industrial facilities and motor vehicles pollute the air, causing forests to die. Waste waters from cities and farms pollute surface and ground waters. Hazardous substances deposited in the past contaminate soils. The damage caused by these non-accidental activities may be less spectacular than damage from headline-grabbing accidents, but it is more extensive, and no less in need of remedial action.

The questions raised by the content of this **Green Paper** are posed to provoke the wide-ranging discussion which the Commission seeks on this subject of remedying environmental damage in order better to inform its future actions in this area. To facilitate this debate and discussion, the Commission will convene formal consultations, including hearings, with experts from the Member States as well as with other interested parties such as industry and agriculture. Any proposal for possible action presented by the Commission should be in accord with the principle of subsidiarity, should be the subject of a cost-benefit analysis and should take account of its coherence with other propositions (such as taxes etc.)

This **Green Paper** considers <u>first</u> the usefulness of civil liability as a means for allocating responsibility for the costs of environmental restoration. Civil liability is a legal and financial tool used to make those responsible for causing damage pay compensation for the costs of remedying that damage. By requiring those responsible to pay the costs of the damage they cause, civil liability also has the important secondary function of enforcing standards of behaviour and preventing people from causing damage in the future. The subject is on the environmental protection agenda of the European Community today for several reasons:

(a) The public demand for systems of accountability and compensation that becomes strongest whenever environmental accidents occur, like the industrial accident at Seveso or the poisoning of the Rhine during the Sandoz fire.

(b) The pledge of the Council of Ministers to take action in the area of civil liability when it adopted the Fourth and Fifth Environmental Action Programmes and other legislation.(1) Furthermore, the request of the Joint Transport and Environment Council of 25 January 1993 for an "examination of the feasibility

(1) OJ No C 328, 7.12.87, p. 15, paragraph 2.5.5; Council Directive 84/631/EEC on the supervision and control within the European Community of the transfrontier shipment of hazardous waste, OJ No L 326, 13.12.84, p.31.

of developing a system of penalties and civil liability for pollution of the environment". The Commission has already responded to part of this request of the Council by adopting, on 24 February 1993 a Communication on "A Common Policy on Safe Seas"(2)

(c) The Council of Europe has drawn up a Convention concerning strict liability for damage resulting from activities dangerous to the environment; other international organizations are making efforts to set international conventions in place establishing liability regimes for environmental damage.

(d) The use of different systems of civil liability for remedying environmental damage among the Member States could lead to distortions of competition and the single market.

A Community-wide system of civil liability for environmental damage would draw on a basic and universal principle of civil law , the concept that a person should rectify damage that he causes. This legal principle is strongly related to two principles forming the basis of Community environmental policy since the adoption of the Single Act, the principle of prevention and the "polluter pays" principle.

The "polluter pays" principle is evoked, because civil liability is a means for making parties causing pollution to pay for damage that results. The prevention principle is involved in that potential polluters who know they will be liable for the costs of remedying the damage they cause have a strong incentive to avoid causing such damage.

If civil liability for environmental damage operates differently in Member States, industries in some Member States will be required to pay the costs of the damage they cause, while industries in other Member States will be able to avoid those costs, because restoration is not required or the cost is passed on to taxpayers. Industries not required to pay restoration costs receive, in effect, a competitive advantage.

A general system for environmental damage represents for sectors such as transport a way of internalising certain external costs.

The **Green Paper** seeks <u>secondly</u> to investigate the possibility of remedying environmental damage not met by the application of civil liability principles. Details of existing joint compensation schemes, their problems and limitations are therefore canvassed.

It should be noted that despite the importance of the question of penalties, these are not the subject of this Communication.

(2) Com(93)66 final

2.0 Remedying environmental damage using mechanisms of civil liability:

2.1 The problems

The legal doctrine of civil liability provides a way for the injured party to obtain compensation for the damage he has suffered. It was developed to cover situations where it was more just to make the person responsible for the act or incident causing the damage to bear the consequent costs, either because that person was at fault or should for other reasons be held liable for losses resulting from the damage.

Civil liability arises under private law, distinguishing it from obligations arising under public law, such as criminal liability and administrative liability.

There are two possible approaches to civil liability, with fault and strict liability.

2.1.1 Fault-based liability

Liability because of fault requires proof that the liable party committed a negligent or otherwise wrongful act which caused damage. A finding of fault depends on whether the party had a duty to behave according to a certain standard of care or rule of law, and breached that duty.
In the field of environmental liability, there is a strong interplay between fault-based liability and environmental regulations. The standards and the procedures set down in environmental statutes can provide guidance for determining whether a party's actions were reasonable or negligent under the circumstances. Non-compliance with environmental laws can provide evidence of fault. On the other hand, compliance with regulations and permits can indicate the reasonableness of a party's behaviour. As environmental protection laws are enacted, new obligations arise that could lead to potential liability.

Under fault-based liability, the victim may have difficulty proving the other party's act was wrongful.

The vigorous use of fault-based liability by government authorities can thus play an important role in ensuring that environmental legislation is respected, as well as providing a means of recovering the costs of repairing environmental damage caused by wrongful acts. Liability for fault does not, however, provide a means to recover costs where fault cannot be shown.

2.1.2 Strict liability

Strict liability, or liability without fault, eases the burden of establishing liability because fault need not be established. However,

the injured party must still prove that the damage was caused by someone's act. Strict liability provides an incentive for taking measures to prevent damage from occurring in the first place.

Defining the scope of a strict liability regime for damage to the environment is a difficult but essential step. Potentially liable parties need to know the scope of the costs they would be expected to pay in case of damage. This need for legal certainty conflicts with the need for flexible definitions that can take account of new technologies or other unforeseeable developments.

Some major difficulties can arise in applying civil liability concepts to obtain compensation for environmental damage. Conclusive scientific evidence is often unavailable , for example, regarding the long-term effects of a given pollutant on the environment. Concepts such as "liability," "damage," and especially "environment" are vague and ambiguous, and interpretations vary from one legal system to the next. A strict liability regime that is too broad in scope may come to be regarded, in certain cases as too expensive for the sectors concerned. Some argue, for example, that strict liability can stifle investment in industry. On the other hand, a regime that is too narrow in scope runs the risk of not covering all the activities it should and thus improperly allocating costs of restoring damage.

The critical step is to decide which activities and processes should be subject to such a regime. Some of the factors that could be considered in determining the appropriateness of strict liability for a particular sector or type of activity include:

- the types of hazard posed by a particular activity;
- the probability that damage might occur from the activity, and the possible extent of that damage;
- the incentive that strict liability would provide for better risk management and prevention of damage;
- the feasibility and cost of restoring the damage that would be likely to occur; and
- the potential financial burden of strict liability on the economic sector involved.
- the need for and availability of insurance.

2.1.3 Channelling Liability

Determining who should bear the liability can also be difficult. Imposing liability on a specific party, known as "channelling," can be an efficient and equitable way of cost internalization. It can also promote the prevention aspect of strict liability, if liability is channelled to the party having the expertise, resources, and operational control to carry out the most effective risk management.

2.1.4 Multiplicity of liable parties

Where more than one party may have been responsible for the damage, or for a share of the damage, problems in how to apportion liability for the damage may arise. To ease the injured party's burden of bringing suit against multiple parties, legal systems often permit the case to be presented against more than one potentially liable party at the same time. How the liability is then apportioned among the liable parties depends on whether liability is joint or joint-and-several. Under joint liability, the liable party must pay compensation only for that amount of damage which can be actually attributed to his particular activity. In the case of aggregate pollution, precise determinations may be impossible.

Under joint-and-several liability, each party is liable for the entire amount, but may often proceed in turn to seek contribution from other liable parties. This can cause several problems, including congestion in the courts. Inequity results if the injured party sues the party with the most financial assets first, instead of the party who caused the most damage. This is known as the "deep pocket" effect. Joint-and-several liability may also lead to "forum-shopping," if parties are from different countries and one country's laws are more favourable to the injured party.

As liable parties sort out among themselves how the costs of compensation should be shared, litigation becomes complex. This can make civil liability a compensation mechanism with extremely high transaction costs. A way to alleviate such problems is to allocate responsibility in advance by designating the order in which potentially liable parties should be sued or by the channelling of liability.

2.1.5 Who and what is damaging the environment

If the act that causes damage can be characterized as a fault or if there are other circumstances creating a responsibility, the person causing the damage becomes liable for the consequences. Fault can consist of an intention to cause damage, or carelessness which results in a damage. The law of civil liability generally has few problems dealing with damage caused by the wilful or negligent act of a particular party, if the liable party is identifiable and the damage can be causally linked to the wrongful act.
However, problems arise where these elements are not clear:

1) Chronic pollution

Environmental damage may occur because of the aggregate effect of a number of polluting acts spread out over time and place. Where the damage has been caused by the cumulative impact of the activities of many operators, it is not possible to determine which actor's actions caused the particular damage. This is the case with discharges to the atmosphere which result in acid rain. Sometimes none of the acts are such that they would incur damage resulting in liability. For example, a single authorized discharge of pollutants into a river may not cause identifiable damage, but the combined impact of all the authorized discharges is to damage the river.

In the case of damage caused by cumulative pollution it is difficult to attribute damage to the act or responsibility of a particular party and it becomes necessary to explore more collective ways of sharing the responsibility for the costs of restoration, such as joint mechanisms of compensation. (See section 3.0 below)

ii) **Emissions under government authorization**

The purpose of environmental permits is to enable government authorities to limit the total amount of pollutants to a level that will not cause unacceptable impact or damage. This requires a determination of the level of pollution at which damage occurs, then an allocation of permits restricting total emissions to below that level. However, it is often difficult to foresee, let alone assess, all the immediate or long-term effects of pollutants and the margin of safety needed to prevent damage. Consequently the situation can arise where damages to the environment do occur, in spite of the fact that all relevant emissions are authorized.

If the operator exceeds the limit values set in the permit or carries out other activities not foreseen in the permit, the operator should be held liable for any resulting damage. On the other hand, if the operator has fully disclosed all relevant data for evaluation by the permitting authority and complied with the standards set in the permit, there may be reasons for holding the public authority -- and ultimately the taxpayer -- responsible for ensuing damage. It would provide the operator with an incentive for full disclosure and compliance with the permit, so as to avoid liability. It would provide the government authority with an incentive to make responsible decisions, including setting precise and clear restrictions in permits.

iii) **Damage from the past**

Deposits of hazardous substances from long ago pose one of the most significant types of environmental damage within the Community. Other types of damage from the past, such as acid-rain devastated forests, are also in urgent need of cleanup or other remedial action.

Civil liability may not, however, provide a way to recover the costs of restoring such damage. Sometimes the damage is from so far back in time that no liable party is identifiable. Sometimes the party can be identified but is not liable, because liability was not established when the damage occurred. Or the party may be identifiable, liable, but insolvent.

2.1.6 **Limitation of liability**

There is debate on whether strict liability should be limited. Some argue that if a liable party has taken all reasonable measures of prevention and has insured against the cost of foreseeable accidental damage, it does not make sense to drive him out of business if unforeseeable and unpreventable damage occurs. The desired result, after all, is to recover restoration costs and to prevent future

damage, not bankruptcy. On the other hand, limits on liability could reduce incentive for prevention and transfer the burden of restoration costs above those limits to the taxpayer, thus interfering with the "polluter pays" principle.

Any limits on liability would have to be set at a high level so as not to undermine the prevention function of strict liability. An OECD draft recommendation on compensation for victims of accidental pollution(3) suggests that, if limits are set, potential polluters might also be required to contribute to a compensation fund to cover the portion of costs over the limits paid by liable parties.

2.1.7 Defining environmental damage

A legal definition of damage to the environment is of fundamental importance, since such a definition will drive the process of determining the type and scope of the necessary remedial action -- and thus the costs that are recoverable via civil liability. Legal definitions often clash with popularly held concepts of damage to the environment, yet are necessary for legal certainty. But the debate over how to define the object of environmental damage, the degree of impact considered damage, and who has the right to decide these issues has not yet been resolved.

Regarding the definition of "environment," some argue that only plant and animal life and other naturally occurring objects, as well as their interrelationships, should be included. Others would include objects of human origin, if important to a people's cultural heritage. The draft Council of Europe Convention, for example, puts forward the following broad definition of the environment: "Environment includes natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; property which forms part of the cultural heritage; and the characteristic aspects of the landscape."

Another debate centres on the degree of impact that should be considered environmental damage. The amended Commission proposal for a Council Directive on civil liability for damage caused by waste defined "impairment of the environment" as meaning "any significant physical, chemical or biological deterioration of the environment"(4). Actual physical destruction or gross contamination is generally considered damage, but what about lesser impacts? All human activities result in emissions, but the point at which these emissions are to be considered "pollution" is not clear. Nor is it clear at which point "pollution" causes actual damage.

2.1.8 Problems in proving causation

To obtain compensation for damage, the injured party must prove that the damage was caused by an act of the liable party, or by an incident for which the liable party was responsible. Special problems arise in the case of environmental damage. As discussed in the section on

(3) C(91) 53, August 1991 (OECD).
(4) Com(91)219 final OJ N° C 192, 23.07.91, p. 6

chronic pollution, establishing a causal connection may not be possible if the damage is the result of activities of many different parties. Difficulties also arise if the damage does not manifest until after a lapse of time. Finally, the state of science regarding the causal link between exposure to pollution and damage is highly uncertain. The liable party may try to refute the injured party's evidence of causality with alternate scientific explanations for the damage.

2.1.9 The right to bring a legal action

In a civil liability case, the right to sue is normally given only to the party with a legal interest in recovering compensation. Where damage occurs to property that is not owned, no injured party with the right to bring a legal action can be identified. With no legal or natural person to sue on behalf of the environment, the costs of restoring environmental damage cannot be recovered via civil liability. There exist several different approaches to the question of access to justice for environmental matters among the Member States.

2.1.10 The question of adequate remedy

The traditional aim of civil liability is to compensate the injured party by requiring the party responsible for the damage to pay the costs of any resulting loss. The loss is generally computed in terms of the depreciation in economic value of the damaged property or the actual cost of repairing the damage. Damage to the environment which does not in itself have an economic value but may have great value in other terms -- such as the loss of a species or of a picturesque landscape -- cannot be compensated directly in terms of economic loss.

However, if there is an obligation to maintain those elements of the environment in a healthy state, a concurrent obligation arises to restore these elements to that state whenever they are damaged. This obligation carries with it the right to claim the costs of restoration from the party who caused the damage. The amount of compensation the liable party is obliged to pay is computed in terms of the actual cost of environmental restoration.

The objective of environmental protection efforts is to maintain the environment at the level of quality that society determines. Where environments are damaged below that standard, restoration is the only environmentally sound remedy. In order for civil liability to function effectively as a legal remedy, a base of legal duty and economic assessment must also be in place.

2.1.11 The problem of insurability

Discussions of civil liability inevitably raise questions about insurability, since insurance is a means of controlling the risk of economic loss.

Insurance serves as an important compensation mechanism where damage occurs accidentally and restoration costs are covered by the insurance policy. If an insurer links availability of insurance to the quality

of an enterprise's risk management, it may have a deterrent effect in promoting better accident prevention and other environmental protection controls over the economic activity.

The uncertainties which make civil liability a difficult fit for environmental damage also create problems with regard to insurance. Insurers are hesitant to provide coverage if they are uncertain about the types and probabilities of damage that may occur, or if unpredicted losses drain the pool of money. The civil liability regime established, the absence of limits on liability, and the coverage of particular risks such as gradual pollution are some of the factors which make it hard for insurers to determine the insurability of what are already extremely complicated risks and, in some cases, to decide how much cover they are able to provide. They react by raising the prices of premiums or by withdrawing from the market of environmental liability insurance altogether.(5)

Today, insurance coverage for pollution-related damage can be difficult and even impossible to obtain in some cases. It is a relatively new service and not all insurers have the technology or capacity yet for providing it. At present there are many cases where studies on the insurability of these risks are preceded by preliminary technical studies. Insurers may limit their potential losses contractually by excluding specific risks from coverage or by lowering the maximum amount of coverage. They may involve the policyholder financially in the effort to avoid loss by applying sizable deductibles to each loss. Insurers have also sought to limit coverage of accidental losses to damage occurring by a "sudden" event, a definition which excludes damage caused gradually, such as a slow leak from an underground tank. France, Italy, and the Netherlands have intervened to set up pools of insurance to cover gradual as well as sudden pollution.

There is some movement today to require certain industries or activities posing particular hazards to cover their potential liability through some kind of financial security. For example, the recent German Environmental Liability Act requires specific installations to ensure security to cover liability. The proposed Directive for civil liability for damage resulting from waste would require the liability of the producer and the eliminator to be covered by insurance or any other financial security.

A number of concerns arise when insurance is required. If insurance is compulsory, enterprises must be able to obtain coverage on the market for the required amount. Such coverage may not be available. If it is available and the cost of restoring the environmental damage is above the policy amount, the liable party must still pay the additional amount.

---

(5) A rise in tort liability claims for pollution-related damage is one reason cited for the liability insurance crisis in the United States in the 1980s. Other explanations for the dislocations within the U.S. insurance market at that time include recurrent historical cycles of hard and soft insurance markets and changes in the supply of capital available to insurers.

Under compulsory insurance, insurers might become "licensors" of industry, by providing or withholding insurance coverage according to whether the industry member seeking coverage was a "good" or a "bad" risk. Some insurers already evaluate the quality of a firm's risk management and loss prevention measures, before providing environmental liability coverage. From an environmental protection point of view, risk evaluation by the insurance industry is beneficial, since it reduces the risk of environmental damage at the same time that it reduces the insurers' risk of economic loss. However, the problem of the "bad risk" who cannot obtain insurance coverage remains.

Imposing liability insurance on firms and activities which represent a danger to the environment presupposes that the insurability of such risks will be determined and if, with due regard to the nature of the risk, insurance is made available, the conditions of coverage and the system of civil liability envisaged will have to be established. State intervention may be necessary if private insurers do not provide insurance coverage adequate to cover the risk of environmental damage, or if premiums are too high for SMEs. One feature of such intervention might be to avoid creating unjustified discrimination between firms or imposing obligations which vary according to company size.

Consideration must be given to the experiences of countries such as France, Italy and the Netherlands, which have already set up insurance pools for covering pollution damage, and the lessons to be learned from the German law on environmental liability, which contains specific provisions on insurance.

It is possible to require insurance cover to be taken out by operators but many industry members oppose compulsory insurance because they fear it would make them captive to high premium demands from insurers. Larger companies are already leaving the insurance market because they find it more economical to self-insure. This creates problems for small and medium sized enterprises (SME) -- those most in need of liability insurance for environmental damage -- because it leaves them with less economic leverage to fight expensive premiums.

2.2 The General Trends in the law on environmental liability

It is important to evaluate the position regarding civil liability in the Member States and in the framework provided by international conventions to identify the trends which they reveal, taking account of the problems raised in relation to reparation of damage to the environment.

2.2.1 General view of the trends at national level

Concepts of liability for damage to the environment are relatively recent. The need to develop specific rules has not been felt by all Member States since a number of cases where damage was caused to the environment could fall under the more traditional types of liability. Most legislation which has been developed has been based on these concepts and has tried to adapt them in order to cover the specific nature of damage to the environment.

In general civil liability for environmental damage in the twelve Member States rests upon fault on the part of the person who causes the damage.

In the absence of specific legislation on civil liability for environmental damage, the courts of law have tended, where damage has occurred, not always to ask for full evidence of the fault of the wrongdoer, or to find other ways of easing the victim's burden of proving damage, or the link of causation between that damage, the wrongful act and the fault. This has been done within the limits for judicial interpretation existing in the Member States and with considerable variations from one Member State to another.

This general approach (fault-based liability) is associated with another trend, the development of a strict liability regime. Several laws have introduced liability without fault for damage caused by specific activities which were deemed to be dangerous. Thus, liability for damage caused during air or railway transport (most Member States), for damage caused by pipelines for hydrocarbons (Denmark), dangerous activities in general (Italy, Portugal), the handling of dangerous substances (Netherlands), nuclear energy (several Member States), or biotechnology (Germany) has been introduced by legislation.

It appears that there is not within the Member States any recent legislation on environmental damage which does not provide for strict liability. In the Annex is a list of certain of the Member State legislation which has adopted this approach. Within this legislation, certain characteristics can be identified.

From these general trends in national legislation for the restoration of damaged environments it is possible to identify certain common characteristics.

The question of what constitutes damage to the environment is scarcely addressed by the different pieces of national legislation. The different pieces of national legislation refer, rather, to general principles of law and provide for compensation for death, bodily injury or for damage to an attributed item of property.

The legislation does not normally contain rules on the burden of proof or the link of causation. Here the general principles of law of each Member State apply as they have evolved through legislation and court jurisprudence. However, the solutions contained in the German

Environmental Liability Law of 1990 should be emphasised. For example the law defines environmental damage by reference to death, personal injury and property damage resulting from modification of the environment. This is defined in Article 3.1 as being the entry into soil, air or water of products, vibration, noise, pressure, rays, gas, steam, a change in temperature or other similar phenomena. This modification of the environment has to arise from an installation listed in the annex to the law. Channelling of liability is towards the person in charge of the installation. Provision is also made for lightening the burden of proving a link of causation. The law establishes a presumption of causation under certain conditions by stating that if an installation is capable of creating the damage it is presumed that that installation caused the damage. The defendant can reverse this presumption. As regards the question of insurance the owners of installations which are capable of causing significant damage are required to take out liability insurance or to have sufficient financial guarantees in case of litigation.

In some instances, the environmental legislation of Member States has gone beyond the traditional rules of liability. For example the Danish legislators considered it necessary, as regards waste sites, to provide a system which authorised the government to recover the costs of clean-up of abandoned contaminated sites from the person who caused the contamination (Act of 1983). A similar system exists in the Netherlands under the Soil Clean-Up Interim Act of 1983.

The general legislative framework existing in each Member State concerning civil liability is far from presenting a homogenous approach to the mechanisms for remedying environmental damage, even if there is a recent legislative trend towards the creation of strict liability regimes for certain activities dangerous to the environment.

However, this clear orientation does not resolve the differences which exist between Member States which stem from the different fields of application chosen made subject to strict liability. Areas covered by strict liability (waste, water resources, industrial installation dangerous to the environment, GMOs) vary from one Member State to another. This disparity cannot evidently guarantee a remedying of environmental damage in identical conditions and does not produce the same results as regards effective environmental restoration.

2.2.2 Solutions adopted at an international level

The need to redress damage resulting from transboundary pollution has led to the development of international liability for damage to the environment.

Under principles of international law, states are held responsible for preventing any activities carried out on their territories from having adverse effects on other states. If transboundary damage does occur, the injured state can seek compensation from the state which failed to meet this international obligation. The famous "Trail Smelter" verdict