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jl.soulier@soulier-avocats.com

Tel.: +33 (0)1 40 54 29 29, + 33 (0)4 72 82 20 80

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Operators' new environmental liability: Publication of the decree implementing The law dated August 1, 2008

For the Law dated August 1, 2008 on the operator's new environmental liability to come into force, the adoption of a Decree on preventing and remedying damage caused to the environment was necessary, which has recently been done (D. no. 2009-468 dated April 23, 2009, published in the Official Journal of April 26, 2009).

With regard to the Law dated August 1, 2008, please refer to the article published in our October 2008 e-newsletter.

Pursuant to this Law, a Decree was to determine, in particular (i) the list of activities subject to the new regime of liability, (ii) the conditions of determining the gravity of an environmental damage and whether such damage is imminent, (iii) the terms and conditions of implementing the preventive or remedial measures, (iv) the conditions concerning informing and consulting the public, associations for environmental protection and the appropriate local authorities, as well as (v) the conditions in which certain persons may be authorized to carry out remedial measures set forth by the appropriate authority (prefect) in case of the operator's failure or difficulty in identifying the party liable for the damage.

In our October 2008 article, we expressed our concern that this new regime of liability would significantly increase the restrictions imposed on companies subject to the legislation governing classified facilities.

The decree begins by listing the activities to which the Law dated August 1, 2008 applies. Twelve are listed and cover all classified facilities subject to authorization, waste collection, transport and treatment, the transport of dangerous goods or hazardous materials, the confined use of genetically modified micro-organisms, and the placing of these GMOs on the market and the deliberate release of genetically modified

organisms (GMOs) into the environment.

Applicability of the Law dated August 1, 2008 is limited to significant damage to the environment. Pursuant to the European Directive dated April 21, 2004, which the Law transposed into French legislation, the decree defines as “significant” damages to species and their habitats which also have proven effects on human health.

The Decree then describes the conditions of implementing the preventive and remedial measures for environmental damage.

According to the Law, the operator must, without delay and at its own cost and expense, take the necessary measures to prevent or limit environmental damage.

Further, the decree details what information must be communicated by the operator to the prefect if there is a threat of environmental damage. Specifically, this includes the origin and extent of the threat, the identification of the damages likely to affect human health and the environment, the measures taken by the operator to prevent or limit the threat, the foreseeable evolution thereof, and the elements that may suggest that these measures are not likely to prevent the damage.

In the event the damage occurs, the information provided by the operator to the prefect must include, in particular: the origin and extent of the damage, the identification of the damages affecting, or likely to affect, human health and the environment, the foreseeable evolution thereof and its consequences on human health and the environment, and the measures taken.

In accordance with the “polluter pays” principle, the operator must bear all the costs relating to the preventive and remedial measures for the environmental damage regardless of whether he was at fault or negligent. In other words, even if he has scrupulously complied with the regulations on classified facilities (with the exception of damages caused to protected species and their habitats, in which case the operator may only be deemed liable if he has committed a fault or has been negligent).

According to the Decree, the prefect, in his capacity as the competent administrative authority, must ensure that the operator is compliant with the law, for which he has been given extensive powers.

First and foremost, he has the authority to examine the files on prevention and remedy. Specifically, he must consult with the associations for environmental protection as well as any persons directly concerned.

After having gathered the operator’s comments and the opinion of the environmental committee at the “*département*” level (local administrative sub-division), he can then set forth, by reasoned order, all the preventive and/or remedial measures to be carried out as well as the timeframe(s) in which to do so. And if applicable, the prefect can order the operator that refuses to comply to put in escrow a sum corresponding to the cost of the preventive or remedial measures.

The associations for environmental protection (even those that are not registered as such) and all persons directly concerned, once they have reliable information establishing the existence of a threat of or actual

damage, now have the possibility to alert the prefect thereof. The prefect must then inform the association or the person concerned of the follow-up given to the “request to take action”.

What can be expected from this new regime of liability for the operators?

If the operator does not inform the prefect of a threat of environmental damage, he may be fined even though he has scrupulously complied with the applicable regulations. But isn't there an ongoing and continuous threat with most industrial activities? At what point will the law be considered to have been breached?

By institutionalizing the role of the associations, whose right to alert has been officially recognized, will this not bolster the most radical environmentalists for whom all industrial activities are reprehensible? What will be the prefect's position, whose decisions have a political dimension by nature, if the case has media coverage just a few weeks or even a few days before a general election?

There is a large risk that decisions will be made in haste without all the investigations at the scientific level on the reality of the threat, or even the damage, having been carried out. Too often have bans been issued or procedures been initiated by applying the precautionary principle on the basis of non-official expert studies later refuted by in-depth investigations by the French Food Safety Agency, the French Agency for Environmental and Occupational Health Safety or the French Institute for Health Monitoring.

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