



GLOBAL AND NATIONAL EXPERIENCE OF CUMULATIVE ENVIRONMENTAL DAMAGE LIABILITY AND APPROACHES TO RISK MANAGEMENT

In this article the author considers the concept of accumulated environmental damage and issues related to its mitigation. The author reveals the mechanisms of historical pollution risk management through the example of various countries, including the Russian Federation. Particular attention is paid to insurance and financing cumulative environmental damage mitigation costs by public-private partnerships.

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As of January 1, 2017, the Federal Law On Amendments to Certain Legislative Acts of the Russian Federation No. 254-FZ, dated 03.07.2016, became effective, which introduces the concept of "cumulative environmental damage" into the Federal Law On Environmental Protection No. 7-FZ, dated 10.01.2002, and establishes a legal regime and mechanisms for mitigating such damage. Cumulative environmental damage means harm to the environment that has arisen as a result of past economic and other activities, and obligation to mitigate which has not been met or has been met not in full. The adoption of these amendments is not only an important milestone in the development of the national environmental legislation, but also a significant practical step towards solving the global issues related to environmental pollution.

According to the results of inventory conducted in 2015 by the Ministry of Natural Resources and Ecology of the Russian Federation (hereinafter referred to as the Ministry), there are at least 340 "hot spots" left over from Soviet times, with accumulated industrial pollution of 400 million tons. Most of these spots are the territories inhabited by about 17 million people¹.

According to the policy of the Ministry, the Clean Country project will have the priority in the coming years. The project involves three measures to mitigate the cumulative damage in the Arctic zone of the Russian Federation: mitigation of cumulative damage in the Franz Josef Land archipelago, oil pollution in Kuznetsov stream water protection zone (Arkhangelsk Oblast) and tailings of the Kular gold mining plant of the Ust-Yansky District (the Sakha Republic (Yakutia). Works on the Franz Josef Land archipelago to reduce the level of environmental pollution caused by past economic and other activities is the largest in terms of project financing, with a total value of 1.4 billion roubles.²

The problems of mitigating the cumulative environmental damage or historical pollution are being solved differently by different countries, but there are three dominant approaches. Depending on such factors as: a) the level of development of environmental legislation in a particular country; b) the culture of filing claims for compensation of damage; c) the level of insurance culture; d) the prevalence of state participation in the economy of the country, the mitigation of cumulative environmental damage can be carried out in the framework of:

- introduction of environmental liability institution;
- establishment of public-private partnerships;
- state initiatives.

If cumulative environmental damage is detected, the following issues arise:

- Is it possible to identify the responsible person?
- What is the liability regime under the legislation of the country where the damage occurred?
- How can this damage be compensated?

If the person responsible for causing damage is not found, then, as a rule, the legislative approach of most countries is to impose the liability for covering costs of cleaning-up on a person responsible for the territories where the source of pollution is located. The arguments in favour of such approach are the following: a) the person is liable under the law for risks originating from property under his possession or ownership, and such person is obliged to take the necessary measures to prevent these risks and adverse effects; b) the person has access to the territories that need to be cleaned-up³. For example, in the UK, pollution liability is borne by the person who caused the environmental damage or knowingly approved such pollution. If the competent authority can not establish such person during the reasonable investigation, the liability shall lie with the owner of the land plot. In this case, retrospective liability is possible. In Sweden, the owners of land plots are responsible for investigating the incident, implementing preventive measures, and recultivation of contaminated

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¹ http://www.mnr.gov.ru/news/detail.php?ID=141422&sphrase_id=2995778

² http://www.mnr.gov.ru/news/detail.php?ID=342068&sphrase_id=2995283

³ <http://www.oecd.org/env/outreach/50244626.pdf>

land, including cases when the owners carry out economic activities in the territories with cumulative environmental damage⁴.

If the current owner or the person operating the property is not the person who has caused the damage, as a rule, such person has the right of recourse, i.e. the possibility to file a claim for compensation of expenses incurred to mitigate the damage against the persons responsible for environmental damage. According to the legislation of Romania, the owner of the land plot is responsible for pollution and costs of investigating the incidents and cleaning-up the contaminated land, including historical pollution, unless he proves that another person is responsible. After cleaning-up the territories, the owner has the right to recover the costs from the responsible person under recourse claim, provided that he can find such person.

The legislation of a number of countries sometimes specifies the date that indicates when environmental damage can be considered as cumulative or historical pollution. For example, in Belgium (Flanders) the pollution that occurred before October 29, 1995 is considered historical. The company must mitigate historical pollution if it poses a threat to the life and health of third party or the environment. In the case of historical pollution as well as pollution in the course of current economic activity, such pollution is given the status of the latter, unless the responsible person can prove that the pollution occurred after October 29, 1995. In Poland, the current owner of the contaminated site is responsible for cleaning-up the historical pollution (until April 30, 2007), regardless of activity which caused the pollution of the land. In the Netherlands, the costs of cleaning-up contamination that occurred before 1975 are borne by the state. The costs of mitigating the damage caused after 1975, as judiciary practice shows, shall be borne by the current operators of contaminated territories. In Germany, the current owner is responsible for cleaning up the territory and property acquired before March 1999, while the former owner shall be responsible if the property was sold or transferred after that date.

In event when several persons are responsible for the damage caused, some countries establish the following order: the current property operator is responsible first, and the owner will be obliged to bear the costs for recultivation only if the person responsible for pollution was not found.

With the transfer of ownership under sales and purchase transactions, as a general rule, the new owner of the property inherits all obligations, including environmental liability. Given the latent and unforeseen nature of claims arising from potential environmental liability, the companies that purchase property should pay due attention to assessing such risks and take the necessary measures to manage them. At the stage of concluding a sale and purchase transaction, the new owner must conduct a comprehensive analysis of financial and economic activities of the seller of the property, as well as the previous owners of the latter, regarding the potential environmental risks. At the first stage, environmental pollution and risks are identified, while the second stage involves comprehensive analysis of potential adverse effects⁵.

It should be noted that the legislation of some countries provides the current owners with a certain remedy called "bona fide owner", i.e. the possibility of avoiding liability for recultivation of contaminated areas if the current owner can prove that he did not cause the damage and was not aware of damage at the moment of acquisition of the property that became the source of pollution. Nevertheless, in the US, the introduction of such a provision at the legislative level in the past did not convince the developers to purchase industrial or abandoned territories: the liability regime introduced by the Comprehensive Environmental Response, Compensation, and Liability Act remained clearly in their subconscious. This act allowed to recover the costs of recultivating contaminated areas from the current owner, regardless of whether he was related to such pollution or not.

The non-appealable regime of environmental liability, established in the US in 1980, led to development of environmental insurance market. Today, comprehensive environmental insurance is one of the ways to manage environmental risks, including the risks of historical pollution and cumulative environmental damage. This, of course, does not mean that the insurers, providing such insurance products, cover the risks of all industries. However, the situation has changed significantly compared to the end of the last century, when there was demand, but no offer. The main feature of such insurance policy is that it is issued as "a claims-made policy", i.e. an insured event is not the fact of causing damage, but the fact of filing a claim during the period of insurance. Since the damage resulting in claim could have occurred several years or even decades ago, the insurers sometimes include so-called retroactive date in the policy: claims regarding damage that occurred before such date are not considered as insured event. The introduction of retroactive date is characteristic of high-risk industries or territories with a long industrial history. In addition, in respect of the latter, the insurers, in order to make a decision to provide coverage for cumulative environmental damage, require environmental survey of the subject of insurance as a mandatory prerequisite. Such survey with subsequent report on potential risks and their consequences can be carried out by either the insurer or organization specialized in the field of environmental auditing and consulting. Naturally, the principle according to which the insured event shall have characteristics of probability and chance of occurrence must be observed. This means that at the moment of conclusion of insurance contract the insured must be unaware of the fact of cumulative environmental damage at the insured object. The US has perhaps the most extensive range of insurance products in the field of environmental insurance. For example, one of such products is the Property Transfer Policy. This is an effective tool for managing environmental risks in the course of buying and selling property, pollution of which is still unknown, but may be discovered later. The policy includes two insurance agreements: on third party liability and on cleaning-up the territory and the insured property. This policy assumes the transfer of rights and obligations thereon to the subsequent owners of the sold property. The period of insurance under such policies is usually

⁴ http://ec.europa.eu/environment/archives/liability/eld/eldimplement/pdf/ELD%20implementation_Annex%20Part%20A.pdf

⁵ *Environmental liability and Insurance Recovery*, David L. Guevara, Frank J. Deveau. 2012.

from 7 to 10 years. For European and Russian markets, this is rather an exception: as a rule, the insurance period does not exceed one year.

In many countries, in the absence of a legislative regime of liability for historical pollution or abandoned contaminated territories, the state assumes obligations to mitigate the cumulative environmental damage. In Russia, since January 1, 2017, the state register of objects of cumulative environmental damage has been established. Mitigation of cumulative environmental damage is carried out only at sites included in such register. The organization of work to mitigate the cumulative environmental damage is the prerogative of the state authorities of the subjects of the Russian Federation and local self-government bodies.

In other countries, one of the mechanisms for financing the costs of mitigating historical pollution is the establishment of a certain compensation fund, which is eventually replenished by certain business entities. For example, in Finland, according to the 1998 Act On Environmental Insurance, compensation payments in the event of environmental damage are paid out from the fund formed with compulsory insurance premiums of operators of high-risk industries, in cases where the responsible parties are not found or have become bankrupt. The above-mentioned Comprehensive Environmental Response, Compensation, and Liability Act⁶, valid in the United States, has established a trust fund financed by gasoline tax, tax on environmental pollution, and tax levied on manufacturers of those chemicals from which hazardous waste is usually generated.

In some countries, the state actively involves business representatives to address issues related to mitigation of soil pollution through establishment of public-private partnerships ("PPP"). Some experts are of the opinion that the underlying agreement on risk distribution has several advantages:

- The ability to finance risk, despite the fact that there is no accurate information on the likelihood of damage. Sufficient statistics on risks of historical pollution are necessary for the insurers to determine the frequency and scale of potential consequences, and, therefore, to offer economically justified rates. Accordingly, the lack of such information makes this category of risks not quite simple from insurance point of view. And, as a rule, statistics is not important for PPP. The parties agree "from the get go" that they are willing to pay a certain amount of money.

- When each of the parties has a financial interest, i.e. the opportunity to incur expenses, the priority is shifted towards risk prevention and control: the parties carefully monitor the risks and implemented ways to manage them.

- In addition, the businesses that are participants in partnerships have access to more complete information regarding the risk, than the insurers. And they are ready to openly share this information, as they have a financial interest⁷.

Experts note that the key to success of joint projects is the existence of clear goals shared by all partners of the partnership. In addition, the nature of interaction between the parties implies the possibility of compromise solution with each of the parties, rather than the instrument of government control⁸.

With regard to managing the risks of cumulative environmental damage, the experience of public-private partnerships in Belgium and Germany is quite interesting.

The first successful project in this field in Belgium was the activities of organization called SUBAT⁹, which was established in 1991. The goal of the project was to liquidate gas stations, which did not meet the established environmental standards, and cleaning-up their territories from the cumulative environmental damage. SUBAT is an organization that coordinated and financed the work on pollution mitigation and clean-up. The budget of the institution was replenished with contributions from a certain number of oil companies, which could eventually include this amount in oil prices. The initial estimate of the cost of potential works was about EUR 750 million. In the period from 1991 to 2001, the works were conducted on 1,911 gas stations. The role of the state was nominal and amounted to issuing permits for work and monitoring their results. In order for the gas station owner to become eligible for assistance from the public-private partnership, it was necessary to comply with several mandatory requirements: a) the owner was obliged to confirm that, according to the available information, the pollution of the land plot of the gas station occurred solely in the course of normal economic activity of the gas station; b) the owner was obliged to stop the operation of gas station for three months after signing the agreement with SUBAT; c) the gas station owner was forbidden to establish and operate a new gas station in the same place. It was possible to file an application to SUBAT until August 31, 1993.

Despite some downsides, the short-term SUBAT project proved itself as efficient one, and in 2004 in Belgium a non-profit organisation called Bofas¹⁰ was established, the purpose of which was to clean-up gas stations pollution throughout the entire country. The project was funded by drivers and representatives of the fuel industry (50/50). Contributions of the drivers were included in gasoline prices: their participation in the project reflected the principle "the polluter pays". The main difference between this project and SUBAT is that the owner of a closed gas station could open a new gas station in the same place after a while. The initial forecast covered about 4,000 gas stations throughout the country.

In 2002, the authorities of the federal state of North Rhine-Westphalia in Germany and business representatives signed an agreement on November 14, 2002, under which both parties pledged to invest in cleaning the territories of the federal land from cumulative environmental damage. The agreement was designed for 3 years and assumed the following

⁶ *Shifts in Compensation for Environmental Damage, Tort and Insurance Law. Vol. 21. Michael Faure, Albert Verheij (eds.), Springer-Verlag/Wien, 2010.*

⁷ *Shifts in Compensation for Environmental Damage, Tort and Insurance Law. Vol. 21. Michael Faure, Albert Verheij (eds.), Springer-Verlag/Wien, 2010.*

⁸ *The Role of Public-Private Partnerships in U.S. Environmental Policy: Case of the EPA and the U.S. Semiconductor Industry. Manjyot Bhan, 2013.*

⁹ *Stichting Uitvoering Bodemsanering Amovering Tankstations.*

¹⁰ *Bodemsaneringsfonds voor tankstations*

distribution of financial costs between the parties: businesses pay EUR 3 million in 2005 and EUR 2 million in 2006, and the authorities pay EUR 3.5 million on annual basis during the whole period of the agreement. The funds were accumulated by the institution called AVV¹¹, which was responsible for organization of work on cleaning-up the contaminated areas¹².

In conclusion, we would like to note that the year 2017 in Russia is declared as the year of ecology, and introduction of "cumulative environmental damage" on the legislative basis indicates that the state is taking active steps to bring the national environmental legislation in line with the world trends in environmental policy development.

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¹¹ Abfallentsorgungs- und Altlastensanierungsverband Nordrhein-Westfalen.

¹² Shifts in Compensation for Environmental Damage, Tort and Insurance Law. Vol. 21. Michael Faure, Albert Verheij (eds.), Springer-Verlag/Wien, 2010.