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Letter from: Dirk Wouters, Permanent Representative, Belgian Permanent Representation to the EU

Date: 18 July 2013

To: Karl Falkenberg, Director-General, DG ENV

Subject: Directive 2004/35/EC (environmental liability with regard to the prevention and remedying of environmental damage): reporting pursuant to Article 18; Flemish Region

Ref.: 20130708/01038

In accordance with Article 18(1) of Directive 2004/35/EC Member States are required to report to the Commission on the experience gained in the application of the Directive by 30 April 2013.

The Flemish Government's experience of implementing the Directive has been recorded in a report, a copy of which is enclosed.

(Complimentary close)

Letter from: Joke Schauvliege, Flemish Minister for the Environment, Nature and Culture, Department of the Environment, Nature and Energy, Flemish Government

Date: 8 July 2013

To: Axel Buyse, Representative of the Flemish Government to the EU

Subject: Directive 2004/35/EC (environmental liability with regard to the prevention and remedying of environmental damage): reporting by the Flemish Government pursuant to Article 18

Ref.: 2.13.0049699

In accordance with Article 18(1) of Directive 2004/35/EC Member States are required to report to the Commission on the experience gained in the application of the Directive by 30 April 2013.

The Flemish Government's experience of implementing the Directive has been recorded in a report.

Please notify this report to the Commission.

(Complimentary close)

## **Report to the Commission**

**in accordance with Article 18(1) of Directive 2004/35/EC (environmental liability and environmental damage)**

**Member State: Belgium**

**FLEMISH GOVERNMENT**

### **CHAPTER 1: BACKGROUND**

Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage ('the Environmental Damage Directive') provides for national reporting to the Commission on the experience gained in the application of the Directive. The national report includes the information and data set out in Annex VI. On that basis, the Commission must submit a report to the European Parliament and the Council before 30 April 2014, including any appropriate proposals for amendment.

Article 18(1) of Directive 2004/35/EC lays down the information to be included in the national report, namely:

- a list of instances of environmental damage and instances of liability under the Directive, with the following information and data for each instance:

1. Type of environmental damage, date of occurrence and/or discovery of the damage and date on which proceedings were initiated under the Directive.
2. Activity classification code of the liable legal person(s)(1).
3. Whether there has been resort to judicial review proceedings either by liable parties or qualified entities. (The type of claimants and the outcome of proceedings shall be specified.)
4. Outcome of the remediation process.
5. Date of closure of proceedings.

- Member States may include in their reports any other information and data they deem useful to allow a proper assessment of the functioning of the Directive, for example:

1. Costs incurred with remediation and prevention measures, as defined in the Directive:
  - paid for directly by liable parties, when this information is available;
  - recovered *ex post facto* from liable parties;
  - unrecovered from liable parties. (Reasons for non-recovery should be specified.)
2. Results of the actions to promote and implement the financial security instruments used in accordance with the Directive.
3. An assessment of the additional administrative costs incurred annually by the public administration in setting up and operating the administrative structures needed to implement and enforce the Directive.

The following report was drawn up in accordance with the non-binding guidance for MS reports under Article 18(1) in conjunction with Annex VI<sup>1</sup>.

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<sup>1</sup> Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143, 30.4.2004, p. 56, as amended OJ L 102, 11.4.2006, p. 15 and OJ L 140, 5.6.2009, p. 114.

## CHAPTER 2: CASES REPORTED IN THE FLEMISH REGION IN ACCORDANCE WITH ARTICLE 18(1) OF DIRECTIVE 2004/35/EC

The points which must be reported in accordance with Directive 2004/35/EC will be discussed in the order laid down in Article 18(1) of that Directive.

1. Type of environmental damage, date of occurrence and/or discovery of the damage and date on which proceedings were initiated under the Directive.

There was one instance of environmental damage which will be discussed below.

→ Death of fish in the Upper Scheldt → type of environmental damage: water damage

→ Date of occurrence and/or discovery of environmental damage

On Monday, 24 September 2012 the Flemish Environment Agency (VMM) was informed of the death of a large number of fish in the region of Kerkhove and the lock at Bossuit, just on the Flemish side of the language border. A serious oxygen deficit was identified. The VMM examined the water and concluded that the pollution was organic: putrescible material which suddenly exhausted the oxygen supply, causing the fish to suffocate. The initial readings showed that the source of the pollution was in Wallonia. RIS (River Information Services) Evergem then sent a 'request for information' to the Walloon Region in accordance with the WASS (warning and alarm system for the Scheldt river basin district) procedure.

On the evening of Tuesday, 25 September the Walloon Region provided the following information:

'The oxygen content was measured [REDACTED]. All the measurements taken showed a reading of 4 mg/l. The purification plant will be inspected in detail on Friday. [REDACTED].'

48 hours after the initial contact (on Wednesday, 26 September 2012) the Walloon Region submitted the following report to the VMM:

'We were not informed of the problem of the fish found dead in the Bossuit channel late on Monday morning until around 21.30. Checks conducted over the course of Tuesday found the following:

The dissolved oxygen content measured on Tuesday

- [REDACTED] was 4.5 mg O<sub>2</sub>/l
- [REDACTED], was 4.5 mg O<sub>2</sub>/l
- [REDACTED], was 3.2 mg O<sub>2</sub>/l
- [REDACTED], was 3.3 mg O<sub>2</sub>/l.

Although additional detailed analysis was scheduled for Friday, 28 September 2012, the VMM received no further results.

Since then the VMM has reported that the oxygen deficiency which occurred in the Scheldt caused significant damage to water (quality) as referred to in the Environmental Damage Decree (Title XV of the Flemish Decree of 5 April 1995 laying down general provisions on environmental policy, DABM). The significant damage to the water was established based on the Prati index which reflects the quality class of the oxygen balance in surface water.

As the identity of the perpetrator of the damage was not known, no special measures could be enforced. The pollution has now stopped and there was no immediate need to take additional (remedial) measures. Readings taken showed that the concentration of oxygen has returned to normal levels.

In addition, two fisheries biologists (Alain Dillen and Klaar Meulebrouck) from the Nature and Forest Agency (ANB) investigated whether protected species (of fish) or their habitats had also been harmed. Their report 'Vissterfte op de Bovenschelde, September 2012' ('Death of fish in the Upper Scheldt, September 2012') states that the affected stretch of water on Flemish territory is approx. 25 km long and covers an area of between 55 and 60 ha. 7 to 10 tonnes of fish are said to have died. The population of river lamprey, a species listed in Annex II to Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora<sup>2</sup>, is also said to have diminished. Although no river lamprey were found among the dead fish, the larvae of this protected species may have been harmed. The fish stock found in the Upper Scheldt prior to the pollution was built up naturally without a single fish ever having been introduced there. As the Upper Scheldt has already shown that it is able to recover naturally following improvement of the water quality and since there are sufficient resources from tributaries, ports and above all the Lower Scheldt, the fisheries biologists advocate an entirely natural recovery in their report. This will also mean that the fish stock is better adapted to local conditions and less sensitive to any minor changes in the biotope (e.g. variation in temperature) or limited fluctuations in water quality.

In the framework of the Environmental Damage Decree the competent authority, the Department of the Environment, Nature and Energy (LNE) of the Flemish Government, took the only action available to it in view of the circumstances outlined above (the perpetrator of the damage is located in Wallonia), i.e. on 5 October 2012 it sent the competent Walloon authority (under Article 15.10.1 DABM) a registered letter requesting that it provide any useful information which might lead to the formal identification of the perpetrator. On 29 October 2012 the Environmental Enforcement, Environmental Damage and Crisis Management Division (AMMC) of the LNE Department received a reply giving the details of the contact person, Mr Olivier Dekyvere (DPC Mons), and stating that all available information would be passed on. On 9 November 2012 the AMMC sent a second registered letter reiterating its request to receive the information available to identify the perpetrator. On 6 December 2012 the AMMC received a letter from Mr Dekyvere stating that there was no available information that would point to any particular undertaking on Walloon territory as being the perpetrator.

Efforts to identify the perpetrator are now being made through the appropriate criminal law channels.

The VMM drew up a report which was submitted to the public prosecutor's office in Ghent (as there is an internal agreement between prosecutors that that office conducts all environmental investigations in East Flanders). In view of the source of the pollution, the report was sent to the Tournai public prosecutor's office. The VMM also submitted to the office a complaint with an aggrieved party declaration.

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<sup>2</sup> This species is also included in Annex II to the Flemish Decree of 21 October 1997 on the conservation of nature and the natural environment.

The ANB also drew up and submitted a report to the public prosecutor's office in Ghent which then forwarded the report to the Tournai office. The Flemish Region, ANB, also submitted to the office a complaint with an aggrieved party declaration.

Lastly, the Waterways and Ship Canals Agency (W&Z) also submitted an aggrieved party declaration to the public prosecutor's office.

The results of the ongoing criminal investigation (identification of the perpetrator) are being monitored by the LNE Department as the competent authority.

2. Activity classification code of the liable legal person(s).

N/A as identity of perpetrator unknown.

3. Whether there has been resort to judicial review proceedings either by liable parties or qualified entities.

(The type of claimants and the outcome of proceedings shall be specified.)

N/A

4. Outcome of the remediation process.

N/A

5. Date of closure of proceedings.

N/A

Member States may include in their reports any other information and data they deem useful to allow a proper assessment of the functioning of the Directive, for example:

1. Costs incurred with remediation and prevention measures, as defined in the Directive:

- paid for directly by liable parties, when this information is available;
- recovered *ex post facto* from liable parties;
- unrecovered from liable parties. (Reasons for non-recovery should be specified.)

No remedial measures have yet been imposed.

2. Results of the actions to promote and implement the financial security instruments used in accordance with the Directive.

No such action has yet been taken.

3. An assessment of the additional administrative costs incurred annually by the public administration in setting up and operating the administrative structures needed to implement and enforce the Directive.

The additional administrative cost is one FTE per year → EUR 55000 (gross). An LNE environmental damage working group has also been set up which meets every other month with representatives of the AMMC, the Environment Inspection Division (AMI), the VMM, the ANB, the Public Waste Agency of Flanders (OVAM), the Nature and Forest Research Institute (INBO), the Legal Service of the LNE Department, the Flemish Land Agency (VLM) and a member of Cabinet staff.