The Environmental Pollution Act (USchadG) was pronounced on 14/05/2007 to implement the EU Directive 2004/35/EC. This bill extends the framework of liability to take in the "actual harm to the environment" in addition to the existing liability for third party personal and material losses. This is concerned with damage to flora and fauna and so-called harm to biodiversity.

Was is already applicable under law?
There has been no special regulation in the past for harm to biodiversity itself, hazards could only be removed here on the basis of general law and order legislation. The Environmental Pollution Act now includes pollution to the soil and waters: Regulations on such matters already exist today in the form of the German Federal Water Act (WHG) and in the Federal Soil Protection Act (BBSchG). This legislation, however, solely imposes an obligation to remove hazards, but not to pay recompense the damage itself.

What is new?
Alongside the obligation to remove / avert hazards on a public law basis, USchadG now standardises the duty to rectify damage caused to the environment. The following items can be required:

a) Primary rehabilitation, thus restoring a damaged site to its original state.
b) Supplementary rehabilitation, thus additional action if primary rehabilitation does not suffice to restore an equivalent state seen from environmental viewpoints.
c) Settlement rehabilitation, thus recompense for losses incurred on account of pollution which cannot be directly rectified by primary or supplementary rehabilitation.

The act furthermore contains regulations on matters which could have an influence on the likelihood of damage occurring, namely:

a) The perpetrator's duty of informing official offices: If some of the causes have been hidden to date, such information obliges the authorities to take immediate action, which will generally also lead to duties of rectification.
b) Right of associations to take legal action: It can be assumed that environmental protection agencies will uncover and report even minor pollution, or possibly just unsubstantiated harm. This could trigger responsibility on the part of the perpetrator, even for things that would have been regarded as insignificant pollution to date.

Model of a coverage concept
The insurers organised together in the German Insurance Association (GDV) have presented a model coverage concept for an environmental damage insurance (USV) which provides insurance cover for relevant claims under public law based on the new USchadG act.

The model has a modular design, thus offering insurance coverage which can be put together piece-by-piece. Starting from a basic coverage, the insurance covers pollution of third party soil, third party waters (excluding underground water) and harm to the biodiversity on third party land. It can be supplemented by including additional coverage components.
An additional module offers insurance cover for pollution to own soil, if a hazard for human health exists, to own waters and harm to biodiversity on own land. As an option, pollution to underground water can also be insured.

A second module offers insurance cover for pollution to own soil without this posing a hazard to human health. Insurance coverage then exists on the basis of BBSchG.

**Restrictions**

Set against the framework of liability under USchadG, the insurance concept nevertheless features certain restrictions.

A major restriction is that the insurance coverage under the conditions of the model only refers to sudden and accidental malfunctions, whilst USchadG also foresees liability for normal operating damages. An exception to this is solely for product risk. In principle, claims to damages which arise abroad are excluded. The model only foresees a restricted option for re-inclusion here.

It remains to be seen whether insurers will keep strictly to the parameters of the coverage model, or if they will offer policy solutions which go beyond these and provide further-going insurance coverage.

When assessing the individual risk, the categorisation made in the environmental liability insurance (UHV) is the primary reference point, so that a new review of risk should not be necessary as a rule.

Regardless of this, it may well be prudent to examine and, if necessary, revise the risk information declared when considering coverage under USchadG.

**Risk situation**

The risk situation outside company land has only been rudimentarily determined to date in the context of UHV. It is likely that insurers will avail themselves of publicly accessible sources of information in order to assess potential losses. Policyholders will probably only be involved in establishing the further scope of risk in one-off cases.

USchadG enters into force with effect from 14/11/2007. It nevertheless takes retrospective effect for pollution caused from 30/04/2007, so that legal action can be initiated after 14/11/2007 for pollution caused before that date.

The coverage model excludes insurance for pollution caused before the policy started, this should not be indispensable, at least not for known causes. In order to get to grips with the new liability situation, it is recommendable to tackle the subject at an early date and, if a risk situation is established, to arrange for adequate insurance coverage in good time. As expert consultants, we are always ready to assist you.