



Types of Environmental Damage Covered under the **2004 Environmental Liability Directive** and **1992 Oil Pollution Conventions**

UNESCO, Paris, 4 December 2008

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donderdag 8 januari 2009





History ELD:

- **Damage to public natural resources difficult to recover**
 - unowned and owned natural resources
- **Standing**
- **No or very limited economic value**



Key features of the regime:

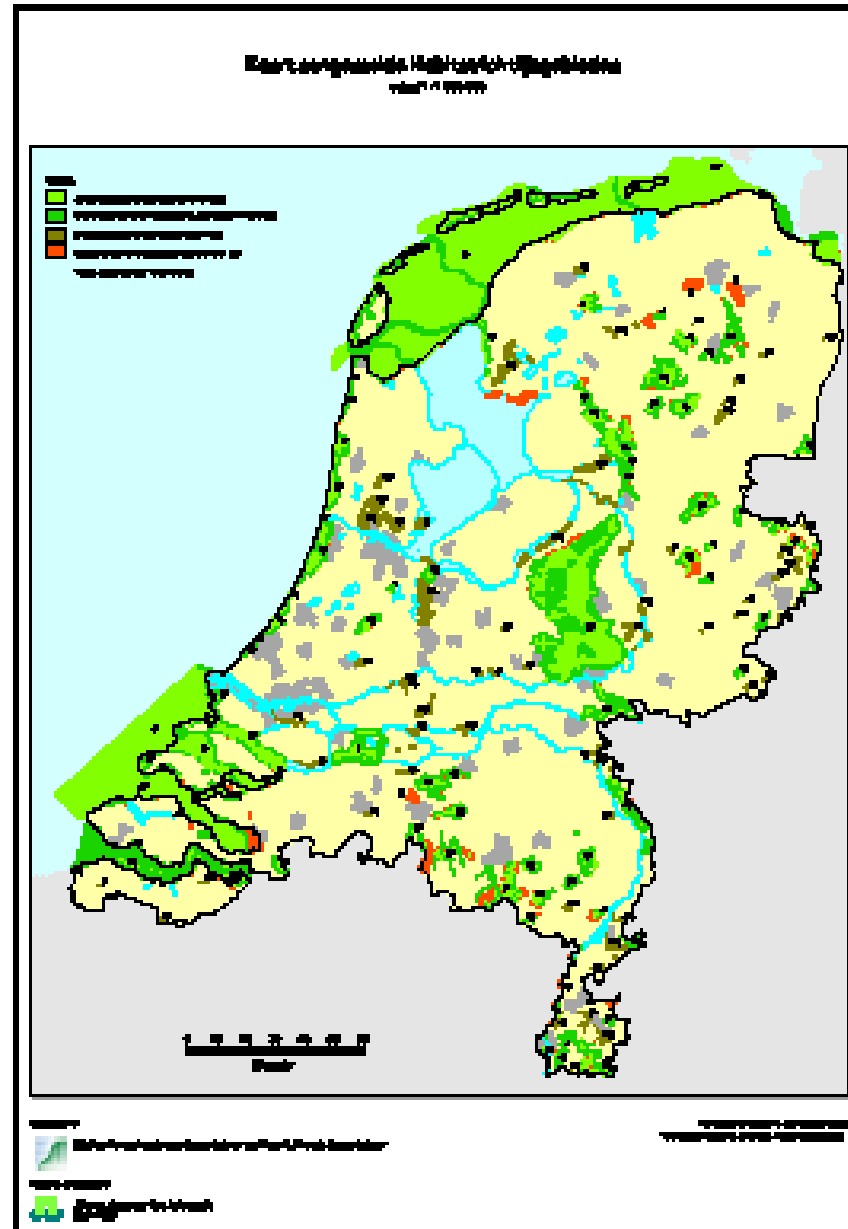
- **Unlimited liability**
- **Occupational activities**
- **Strict liability / fault based liability**
 - Dangerous activities - related to relevant Community legislation (Annex III).
 - Non-dangerous activities (Non-annex III)
- **Public authorities act as trustees for public natural resource**

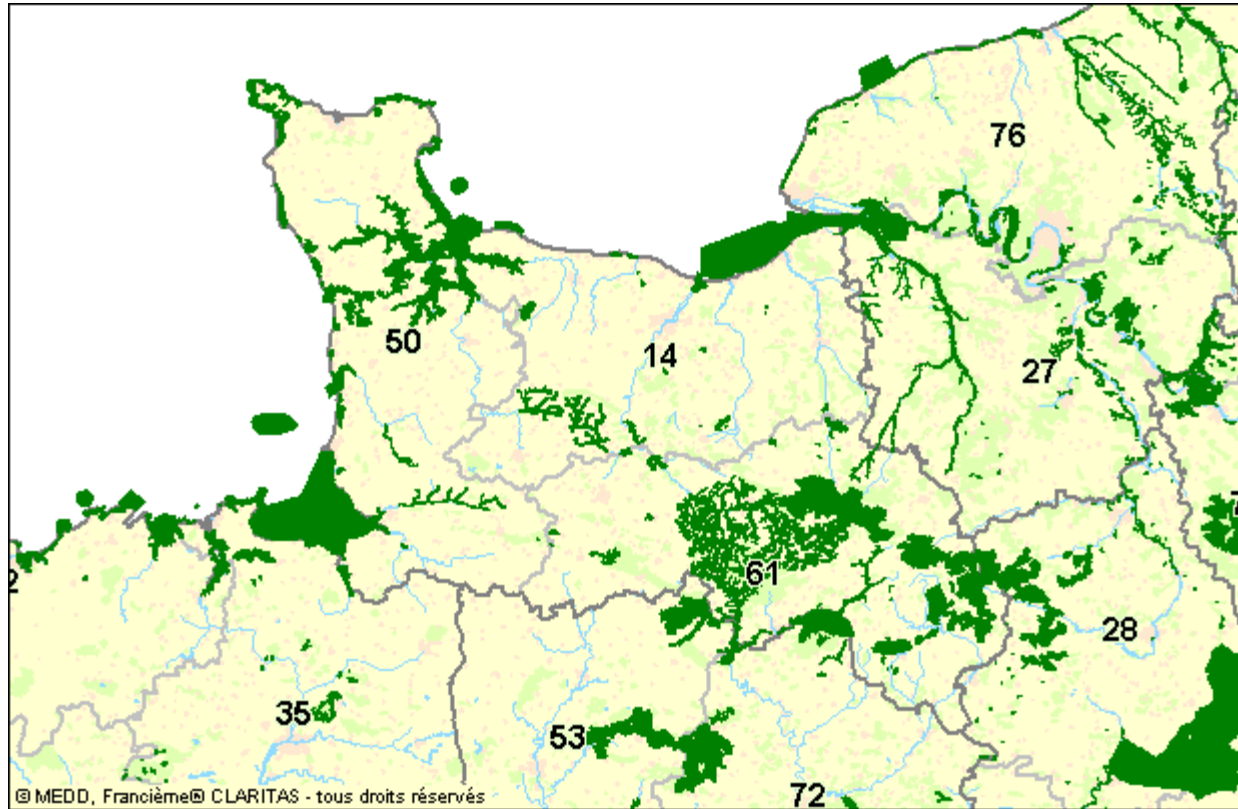


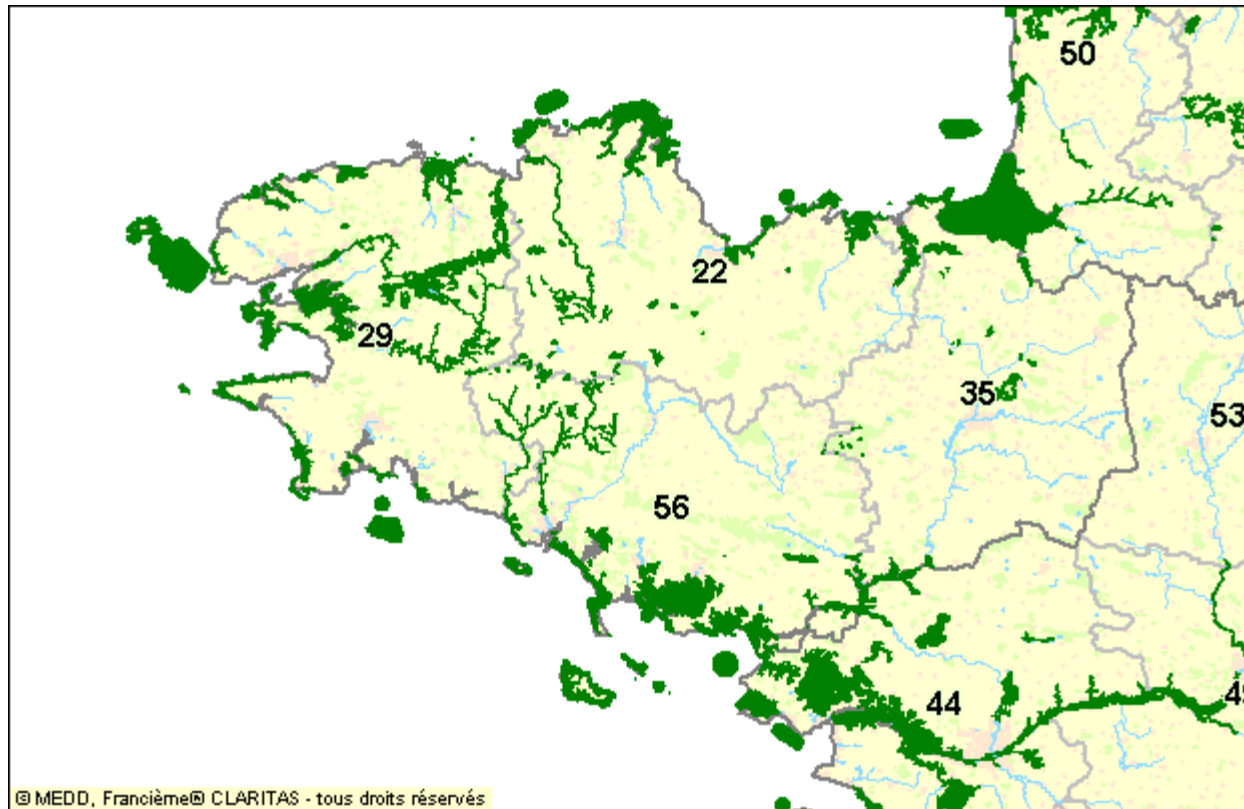
Only public natural resources covered:

- Natural habitats and wild flora and fauna covered by **Wild birds and Habitats Directives**
- Waters covers by the **Water framework Directive**
- Natural resources not covered by EC law, but protected by MS law (where a MS so determines)
- Land ??

- **Owned as well as unowned natural resources covered**









Recoverable types of harm:

Dangerous activities (Annex III / strict liability)

- Damage to protected habitats and species (Wild Bird and Habitats Directives)
- Damage to certain waters (Water framework Directive)
- Land contamination

Non-dangerous activities (Non-annex III / fault liability)

- Damage to protected habitats and species (Wild Bird and Habitats Directives)



Damage threshold I

Damage to protected habitats and species:

Only covered by the ELD if the damage is such that it has “significant adverse effects on reaching or maintaining the favourable conservation status” of the habitats and species concerned (Habitats Directive)

Water damage:

Only if the damage is of such a significance that it “adversely affects the ecological [...] status and/or ecological potential” of the waters covered (WFD)



Damage threshold II

Land damage:

Only if the land contamination creates a “significant risk of human health being adversely affected”.

- No reference to risks for natural resources.

Scope ELD:

Under the ELD, damage to public natural resources only recoverable if the damage is beyond these thresholds (art. 2(1) and 3).



Baseline condition

Significance is to be assessed with reference to the baseline condition:

“the condition at the time of the damage of the natural resources and services that would have existed had the damage not occurred, estimated on the basis of the best information available”.

Natural fluctuations, seasonal factors and or other (natural) causes to be taken into account? Yes, it is not a penal law regime.

Services: functions performed by a natural resource for the benefit of another natural resource or the public



How to determine the baseline condition?

Wild birds and Habitats Directives and WFD:

- Ms are required under these Directives to collect data on the conservation and biological status of certain natural habitats and species and on the quality of surface- and groundwaters.

Data will become available on a natural resources level.

Under Wild Birds and Habitats Directives and WFD no requirement to collect data on human use services.

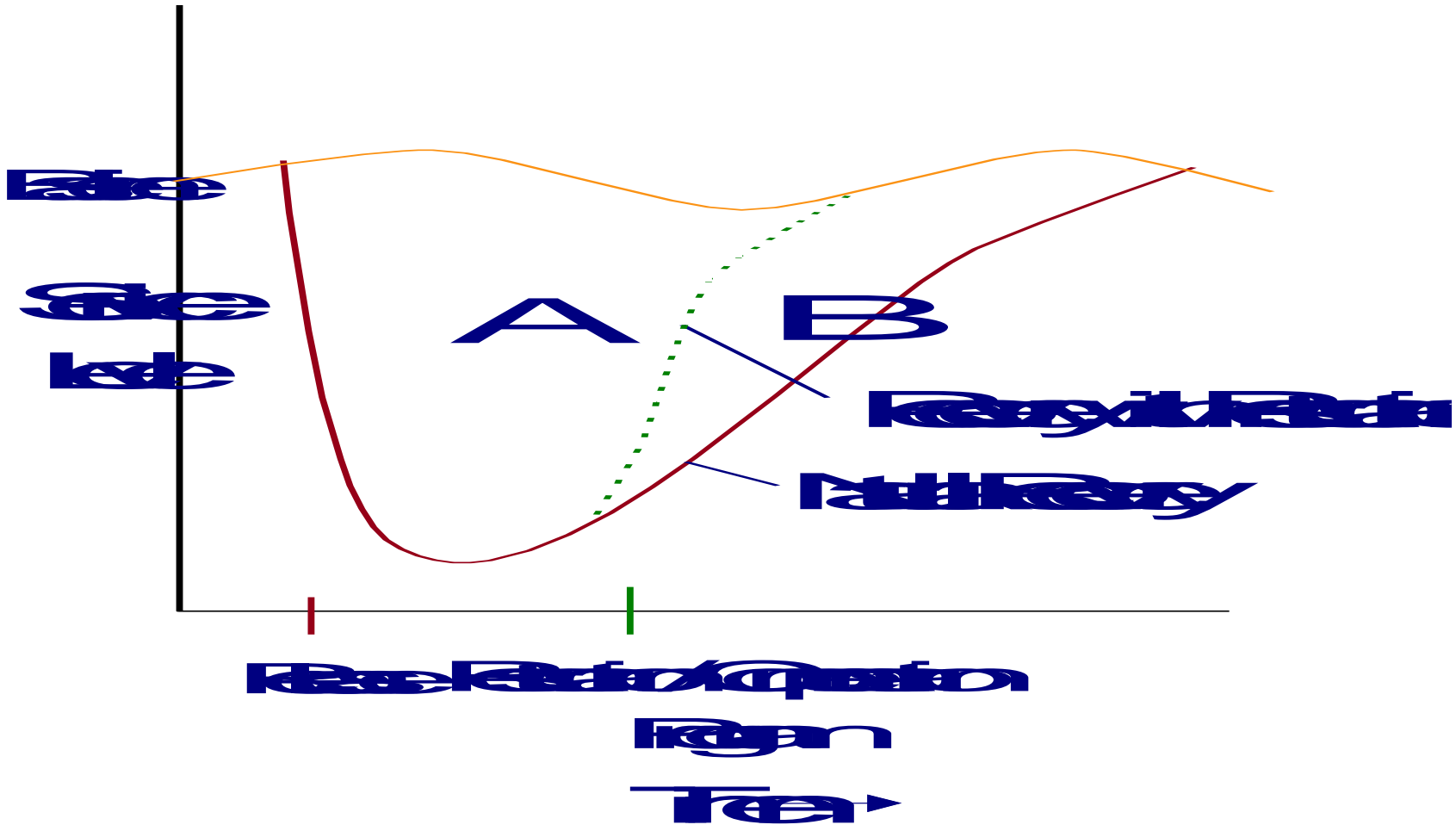
No or very limited data available on the services the natural resources covered under the ELD provide to humans



Objective remediation I

Objective ELD: restoration of the environment to its baseline condition (Annex II).

Baseline condition: “the condition at the time of the damage of the natural resources and services that would have existed had the damage not occurred, estimated on the basis of the best information available”.





Objective remediation II (Annex II ELD)

- **primary remediation measures** (any remedial measure which returns the damaged natural resources and/or impaired services to, or towards, baseline condition)
- **complementary remediation measure** (any remedial measure taken in relation to natural resources and/or services to compensate for the fact that primary remediation does not result in fully restoring the damaged natural resources and/or services)
- **compensatory remediation measure** (any action taken to compensate for interim losses of natural resources and/or services that occur from the date of damage occurring until primary remediation has achieved full effect)



Measure of damages under the ELD

- Damages for the injury to, destruction of or loss of the natural resources covered, including
 - Loss or impairment of natural resource and human services during the period of recovery (interim losses), and the
 - Costs of assessing injury and damages
- To some extent comparable with the 1990 US Oil Pollution Act



1992 CLC en 1992 FC

- The ELD does not apply to environmental damage arising from an incident in respect of which liability or compensation falls within the scope of any of the International Conventions listed in Annex IV of the ELD, which is in force in the Member State concerned.
- Is the measure of damages under the ELD comparable with the one under the International Oil Pollution Conventions?
 - relevant for Natura 2000-areas



Damage definition 1992 CLC en 1992 FC

- [...] damage caused outside the ship by contamination resulting from the escape [...] of oil from the ship, [...] provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken.
- The pollution damage definition was negotiated on in 1984.



Measure of damages 1992 CLC en 1992 FC

- Property damage
- Pure economic loss
- Cleanup costs
- Costs of reasonable measures of reinstatement

- Loss or impairment of natural resource and human services during the period of recovery (interim losses)?



Circumventing the 1992 CLC and 1992 FC

- **Art. III CLC:** the CLC channels liability to the owner of a vessel carrying oil in bulk as cargo by exempting third parties from liability (except under certain conditions).
- **Art. III.4 CLC:** No claim for compensation for pollution damage under this Convention or otherwise may be made against [...] the pilot or any other person who, without being a member of the crew, performs services for the ship, any charterer [...] of the ship [...] unless the damage resulted from their personal act or omission, committed with the intent to cause such damage [...]



Prestige (1976)

Spain/American Bureau of Shipping (ABS)

US Dist. Court. S.D. NY, 2 jan. 2008

- Claim against a classification society for negligence in classifying the Prestige as fit to carry oil as cargo
- Claim: compensation for damage “suffered as a result of oil released [...] by the M.T. Prestige off the coast of Spain”
 - Unclear what type of (environmental) damage is claimed for.

Court: ABS is “another person who performs services for the ship” and is therefore excluded from liability.



Erika (1975)

Paris Criminal Court, 16 jan. 2008

- Total SA, a classification society and others were held jointly and severally liable for economic losses, damage to the image of several regions and municipalities, moral damages and damages to the environment (total €192.8 million).
 - Environmental damage (€ 1.3 million)
 - Actual damage to 662 hectares of sensitive areas
 - Violation of the collective interest an NGO safeguards
 - No costs of measures of reinstatement???
 - Court: these parties are not mentioned in article III.4 CLC
 - The ruling does not provide much detail on how the “damage is to environment” is assessed and what is covered by this term.



Erika (1975)

ECJ 24 June 2008 (Case C-188/07)

Commune de Mesquer v. Total France SA

- Oil accidentally spilled at sea, mixed with water and sediment, constitutes a waste within the meaning of the Waste Directive.
- The seller of the oil and the charterer of the ship carrying oil are producers of that waste.
- If the cost of disposing of the waste is not borne by the FC or cannot be borne because the ceiling for compensation for that incident has been reached, that cost is to be borne by the producer. However, only if he has contributed to the risk that the pollution was caused.
- Only cost of disposing of waste. No other types of damage



Claims outside 1992 CLC and 1992 FC

- Incentive for claims outside 1992 CLC and 1992 FC does not seem to be linked to the limited scope of the damage definition of the 1992 CLC and 1992 FC:
 - no claims for interim losses or measures of reinstatement
- The claims are probably a consequence:
 - of the liability limits of the 1992 CLC and 1992 FC
 - the (political) will to hold apart from the shipowner others responsible for the environmental damage done.



Outlook

- ELD damage definition is broader and covers other types of environmental damage than the 1992 CLC and FC.
- Difference in scope relevant for EU Member States:
 - Many Natura 2000 sites located in coastal areas
- Claims outside 1992 CLC and 1992 FC not always successful and do not necessarily result in applying the broader ELD damage definition
 - Spain/ABS: not successful
 - Case C-188/07: only the “cost of disposing of the waste”
 - Exception is (maybe) the Erika-case (Paris Criminal Court)



- REMEDE-toolkit (Annex II ELD): www.envliability.eu