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**GUIDANCE DOCUMENT**

**ASSESSMENT OF THE SIGNIFICANCE OF THE  
ENVIRONMENTAL DAMAGE IN THE CONTEXT OF  
LAW 26/2007, OF OCTOBER 23, ON  
ENVIRONMENTAL LIABILITY**

**TECHNICAL COMMISSION FOR THE PREVENTION AND  
REMEDATION OF ENVIRONMENTAL DAMAGES**

***This document is a summary in English of the original version of the document published on the section on Environmental Liability of the website of the Ministry for the Ecological Transition and the Demographic Challenge.***

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## 1. INTRODUCTION

The Law 26/2007, of October 23, on Environmental Liability, establishes a regime of administrative liability, mainly strict and unlimited, based on the precautionary and the “polluter pays” principles, and it is applied, according to its article 3, to the environmental damages and the imminent threat of such damages occurring.

Nevertheless, as it is indicated in the preamble of the Law 26/2007, not all the natural resources are protected by it, only those included in the concept of environmental damage are protected. In the same way, not all the environmental damages may cause environmental liability. For Law 26/2007 to be applied, the imminent threat of environmental damages or damages itself should have significant adverse effects on a natural resource.

Article 2 of the law defines the **environmental damages** as those that have significant adverse effects on **waters, soil, seashore and estuaries, species present permanently or temporarily in Spain, as well as the habitats**. In any case damage to air are excluded, as well as damage to people or property, unless it constitutes a natural resource.

Therefore, it is necessary to distinguish the concepts of “damage” and “environmental damage” that within the scope of the Environmental Liability Law, refers to those damages or imminent threats of damages that have significant adverse effects on the natural resources protected by the law, and **only in these cases the environmental liability normative can be applied**.

In this way, the assessment of the significance of the damage, that has occurred or may occur, is a key and necessary procedure to apply the environmental liability normative, and in consequence to require the operator responsible the implementation of the measures of prevention, avoidance and remediation, as appropriate in each case.

The significance must be evaluated following the criteria established in the Law 26/2007, of October 23, and the Regulation of partial development of Law 26/2007 approved by Royal Decree 2090/2008. Those criteria guarantee the objectivity of the assessment, referring, when it is possible, to the provisions of other regulations for determining the significance of the damage on each natural resource.

The assessment must be carried out in on a case-by-case basis, and sometimes the task may have certain complexity, due to uncertainty associated with the forecast of the effects of the agents causing damage on the natural resources, especially in cases of imminent threats of damages.

In this sense, when there are technical difficulties in the assessment of the significance, as well as to simplify it in time and cost, the “**precautionary principle**” can be considered.

The “precautionary principle” is an essential element of the European policy, which basis are developed in the *Communication from the Commission on the precautionary principle* (2000). The European Commission defends that the precautionary principle is particularly relevant to the management of risk, and that communication is a guidance to the Member States on using this principle in the decision-making process. The communication establishes that: “*Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation*”

Therefore, taking into account the "precautionary principle", and in absence or lack of accurate data, scientific certainty is not required that the potential damage will exceed the threshold of significance, and a reasonable belief would be enough.

This is also suggested by the Commission Staff Working Document REFIT evaluation of the Environmental Liability Directive<sup>1</sup>, that points out that *"the application of the ELD is not triggered by just any impairment of these three natural resources, but only if certain thresholds are exceeded. (...) Also, the obligation to take preventive measures pursuant to the ELD is only triggered when it is likely that a non-action would result in a significant environmental damage. However, in application of the precautionary principle, scientific certainty that the potential damage will exceed the significance threshold is not required, a reasonable belief would be sufficient."*

Moreover, it must be noted that article 6.3. of Law 26/2007 considers that if prevention, avoidance or remediation of significant environmental damages has been fulfilled using other laws, it will not be necessary to apply Law 26/2007.

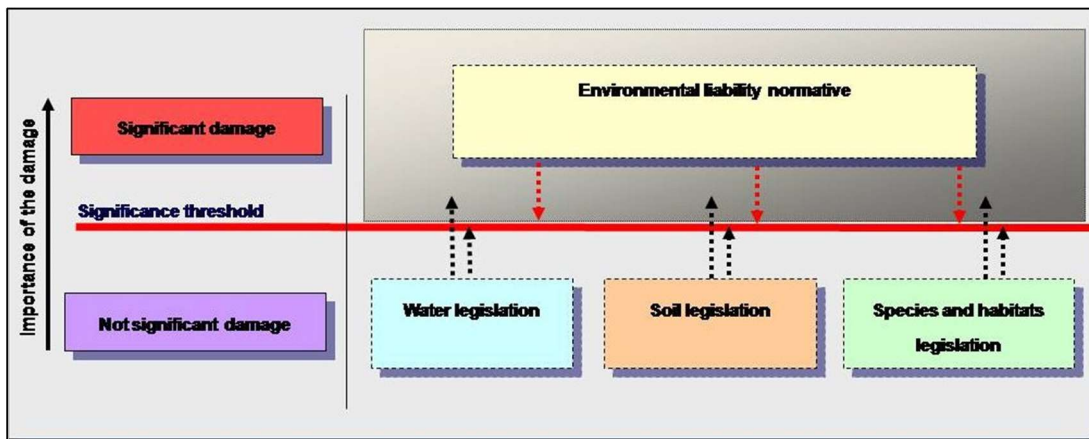


Figure 1. Application of the environmental liability normative and sectoral legislation depending on the significance of the damage.

Furthermore, the geographic scale of the assessment of the significance of the damage is a very relevant element, especially in case of species and habitats resources, as well as in waters, **where the assessment must be made at the level of the water body.**

The Regulation of partial development of Law 26/2007, attributes to the operator causing the environmental damage the responsibility of determining its significance, notwithstanding that this assessment can be carried out by the competent authority when it acts ex-officio, or in situations deemed appropriate.

It is recalled that the Autonomous Communities have in most of the cases the administrative powers to process the environmental liability instances in Spain. According to article 7.1 of the Law 26/2007 the Autonomous Communities are the competent authorities for the development and implementation of the Law 26/2007, notwithstanding the competences of the Central Administration on state-owned public domain natural resources.

<sup>1</sup> COMMISSION STAFF WORKING DOCUMENT REFIT Evaluation of the Environmental Liability Directive Accompanying the document Report from the Commission to the European Parliament and to the Council pursuant to Article 18(2) of Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage.

This document aims to analyse the concept of environmental damage, in order to establish some criteria and/or guidelines that allow its determination as significant, taking as reference the sectorial legal framework in force at the national level, with the objective to facilitate the application of Law 26/2007.

## **2. GENERAL CRITERIA FOR DETERMINING THE SIGNIFICANCE OF THE DAMAGE**

Both Law 26/2007, of October 23, and its Regulation for partial development, establish criteria to determine the significance of environmental damage, as are described below:

### **LAW 26/2007**

The Law 26/2007 defines in its article 2 the concept of damage as a measurable adverse change in a natural resource or impairment of a natural resource service which may occur directly or indirectly. In the same article are defined the environmental damages on the natural resources protected by the law:

#### **Damage to Habitats and Species**

*“a) The damage to habitats and species, which is, any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species. The significance of such effects is to be assessed with reference to the baseline condition, taking account of the criteria set out in Annex I.*

*Damage to species and habitats does not include previously identified adverse effects which result from an act by an operator which was expressly authorised under the following regulation:*

*1.º Article 6.3 y 4 or article 13 of Royal Decree, of December 7, establishing measures to guarantee biodiversity by conserving natural habitats and fauna and flora.*

*2.º The normative, state or autonomous, on forests, hunting and inland fishing, within the framework of the article 28 of the Law 4/1989, of March 27, for the conservation of natural spaces and flora and fauna.”*

#### **Water damage**

*b) The damage to water, which is any damage that significantly adversely affects:*

*1.º The ecological, chemical or quantitative status of the bodies of surface water or groundwater as well as the ecological potential of the bodies of artificial water and heavily modified water, according to the definitions established by the water protection legislation.*

*They will not be considered damage to water the adverse effects to which article 39 of Regulation of Hydrological Planning, approved by Royal Decree 907/2007, of July 6, applies.*

*2.º The environmental status of the marine waters, as defined in Law 41/2010 of December 29, on Protection of the Marine Environment, in so far as particular aspects of the environmental status of the marine environment are not already addressed through the Water Law approved by Royal Legislative Decree 1/2001, of July 20.”*

#### **Seashore and estuaries damage**

*c) The damage to seashore and estuaries, understood as any damage that produces significant adverse effects on its physical integrity and adequate conservation, as well as those that imply difficulty or impossibility of reaching or maintaining an adequate level of quality.*

Soil damage

*d) The damage to soil, which is any soil contamination that creates a significant risk of human health or environment being adversely affected as a result of the direct or indirect deposit, discharge, or introduction of substances, preparations, organisms or micro-organisms in the soil or subsoil.”*

Finally, it is important to highlight that Annex I of Law 26/2007 establishes that “damages with demonstrated effects on human health should be considered as significant damages”.

**REGULATION OF PARTIAL DEVELOPMENT OF LAW 26/2007**

The Regulation of partial development of Law 26/2007 delves into the criteria to determine the significance of the damage.

Thus, article 7 of the Regulation, on determination of the significance of the environmental damage establishes that:

*“To determine the significance referred to in article 2 of Law 26/2007, of October 23, in order to appreciate that there is environmental damage, the operator will carry out the following actions:*

- a) Identification of the agent causing the damage, and of the natural resources and services affected.*
- b) Quantification of the damage.*
- c) Assessment of the significance of the damage.”*

Articles 8 and 9 of the Regulation establish the criteria to identify and characterize the agent causing the damage.

Article 11 of the Regulation establishes how the damage must be quantified, for which the operators must identify, describe and evaluate the extent, intensity and time scale of the damage, taking into account the provisions of Articles 12 to 14 of the Regulation:

*Article 12. Extent of the damage.*

*“1. The extent of the damage will be determined by measuring the amount of resource or service affected. The following circumstances will be taken into account in its determination:*

- a) Properties of the agent causing the damage.*
- b) Characteristics of the natural resource.*
- c) Any changes that the diffusion media and receptors may experience due to the action of the agent causing the damage.*

*2. The determination of the extent of the damage will be carried out in accordance with the provisions of section II of Annex I.”*

*Article 13. Intensity of the damage.*

*“1. The intensity of the damage will be estimated by establishing the degree of severity of the effects caused by the agent causing the damage to the natural resources or services affected.*

*2. In order to establish the effects on the set of natural resources and the services they provide, the operator will take into consideration, among others, the criteria set in Annex I of Law 26/2007 and when possible based on the available information, the effects that the agent causing the damage generates on the key species of the affected natural resources.*

*3. The determination of the extent of the damage will be carried out in accordance with the provisions of section II of Annex I.”*

*Article 14. Time scale of the damage.*

*“To determine the time scale of the damage, the duration, frequency and reversibility of the effects that the agent causing the damage causes on the receiving environment will be estimated.”*

In short, as a previous step to assessing the significance, it is necessary that the operator responsible for the damage, identify and quantify the environmental damage caused. In order to do that, the operator must take into account what is stated in articles 8 and following, and in the Annex I of the Regulation of partial development of Law 26/2007, of October 23.

Furthermore, in accordance with the provisions of article 15 of the Regulation, the following aspects should be considered in the assessment of the significance of the damage:

ASPECTS TO BE CONSIDERED		Article of Regulation
Identification of the agent causing the damage		15.1
Quantification of the damage	Extent	15.1
	Intensity	15.1
	Time scale (duration, frequency and reversibility)	15.1
Analysis of the variation of, among other parameters	a) The conservation status of the affected resource	15.2
	b) The ecological, chemical and quantitative status of the affected resource	15.2
	c) The physical integrity of the affected resource	15.2
	d) The quality level of the affected resource	15.2
	e) The risks to human health or the environment associated with the affected resource	15.2
Demonstrated effects on human health		15.3

*Table 1. Summary of the aspects to be considered in the assessment of the significance of the damage.*

Once these aspects included in article 15 are considered, **the significance of the damage will be evaluated using the criteria established in article 16 of the Regulation**, by reference to the affected natural resource, in line with the definitions in article 2 of Law 26/2007

On the other hand, article 18 of the regulation establishes other criteria for determining the significance of the damage described in a later section of this document, when it is not possible to determine it according to the previous criteria, or in the case of the damage occurs in a previous contaminated soil.

Finally, it should be noted that article 15.3 of the Regulation indicates, in accordance with Annex I of Law 26/2007, that **if the damage have demonstrated effects on human health, they would be considered significant.**



## **2.1 ASSESSMENT OF THE SIGNIFICANCE BY REFERENCE TO THE NATURAL RESOURCE AFFECTED**

Article 16 of the Regulation of partial development of Law 26/2007, of October 23 establishes the criteria to consider the damages as significant taking into account the natural resource affected, in accordance with article 2 and Annex I of the law. Specifically, article 16 of the Regulation, states the following:

### Species and habitats

*“1. Damage caused to species and habitats will be significant when the changes experienced by the receiver produce adverse effects that affect the maintenance of a favourable state of conservation or the possibility that it will be reached. The evaluation of the significance of these damages will be carried out in accordance with the criteria established in Annex I of Law 26/2007 and must take into account any local, regional, national and community available information on species or habitat affected that is relevant.*

### Water

*2. Damage to water will be significant if the receiving water body experiences an unfavourable effect on its ecological, chemical or quantitative status, in the case of surface or groundwater, or its ecological potential, in the case of artificial and highly modified, which brings with it, in both cases, a change in the classification of said state at the time the damage occurs, in accordance with the provisions of the Hydrological Planning Regulation approved by Royal Decree 907/2007, of July 6, and other applicable legislation.*

### Soil

*3. The damages caused to the soil will be significant if the receiver experiences an adverse effect that generates risks for human health or the environment, so that it can be classified as contaminated soil in the terms established in Royal Decree 9/2005, of January 14, which establishes the list of potentially polluting activities of the soil and the criteria and standards for the declaration of contaminated soils.*

### Seashore and estuaries

*4. The damages to seashore and estuaries will be significant in so far as they are the damages experienced by the waters, by the soil or by the wild species and habitats, in accordance with the provisions of the previous sections.”*

The specific criteria for the assessment of the significance of the damage by reference to the different natural resources included under the scope of Law 26/2007, of October 23, are analysed in the following sections of this document.

## **2.2 OTHER CRITERIA FOR DETERMINING THE SIGNIFICANCE**

Article 18 of the Regulation of partial development of Law 26/2007, of October 23 establishes other criteria to assess the significance of the damages when it is not possible to determine it according to the previous criteria, or in the case of already contaminated soils. In accordance with this article, in these cases: *“...the significance of the damage to water and soil may be established analysing the affection that the damage has caused to the hosting or habitat service that such natural resources provide to wild species. To that effect, it will be presumed that damage to water and soil is significant when the damage experienced by species that inhabit such resources as a consequence of the action of the same agent can be classified as significant.”*

Thus, in the cases where it has not been possible to assess the significance of the damages to water or soil, neither due to its demonstrable effects on human health, nor according to the criteria indicated in article 16 of the Regulation, it must be evaluated whether the damage to the water or soil can significantly affect the species that inhabit such resources, using in this case for such evaluation, the criteria provided by Annex I of Law 26/2007.

### **2.3 ASSESSMENT OF THE SIGNIFICANCE BY DEMONSTRATED EFFECTS ON HUMAN HEALTH**

As noted above, in assessing significance it is also necessary to evaluate whether the environmental damage caused, or can be caused, demonstrated effects on human health. According to Annex I of Law 26/2007 and article 15.3 of the Regulation, whether the damages have demonstrated effects on human health, they will be considered as significant.

Regarding the way to assess the effects on human health, Annex I of the Regulation on technical aspects of determining environmental damage, in section III, on intensity of damage, establishes that *“For the assessment of the effects on wild species and human health will be considered any route of exposure through air, water and soil, including ingestion, inhalation and absorption.”*

**This document does not describe the procedure for evaluating whether the damage has demonstrated effects on human health.**

The assessment of the demonstrated effects on human health, or its absence, must be determined by the health authorities. This is recommended in a working document issued by the European Commission within the framework of the Multi-annual ELD Work Programme (MAWP) for the Period 2017-2020<sup>2</sup>, in the case of damage to the soil, and which could be extensible for damage to any resource that may have effects on human health.

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<sup>2</sup><http://ec.europa.eu/environment/legal/liability/index.htm>

### 3. CRITERIA FOR THE DEFINITION OF DAMAGE TO SPECIES AND HABITATS AND ITS EVALUATION AS SIGNIFICANT

Taking into account the general criteria for the assessment of the significance of the damages defined in Law 26/2007 of October 23, on Environmental Liability, and in its Regulation of partial development, its application to the resource species and habitats will follow the diagram shown in figure 2:

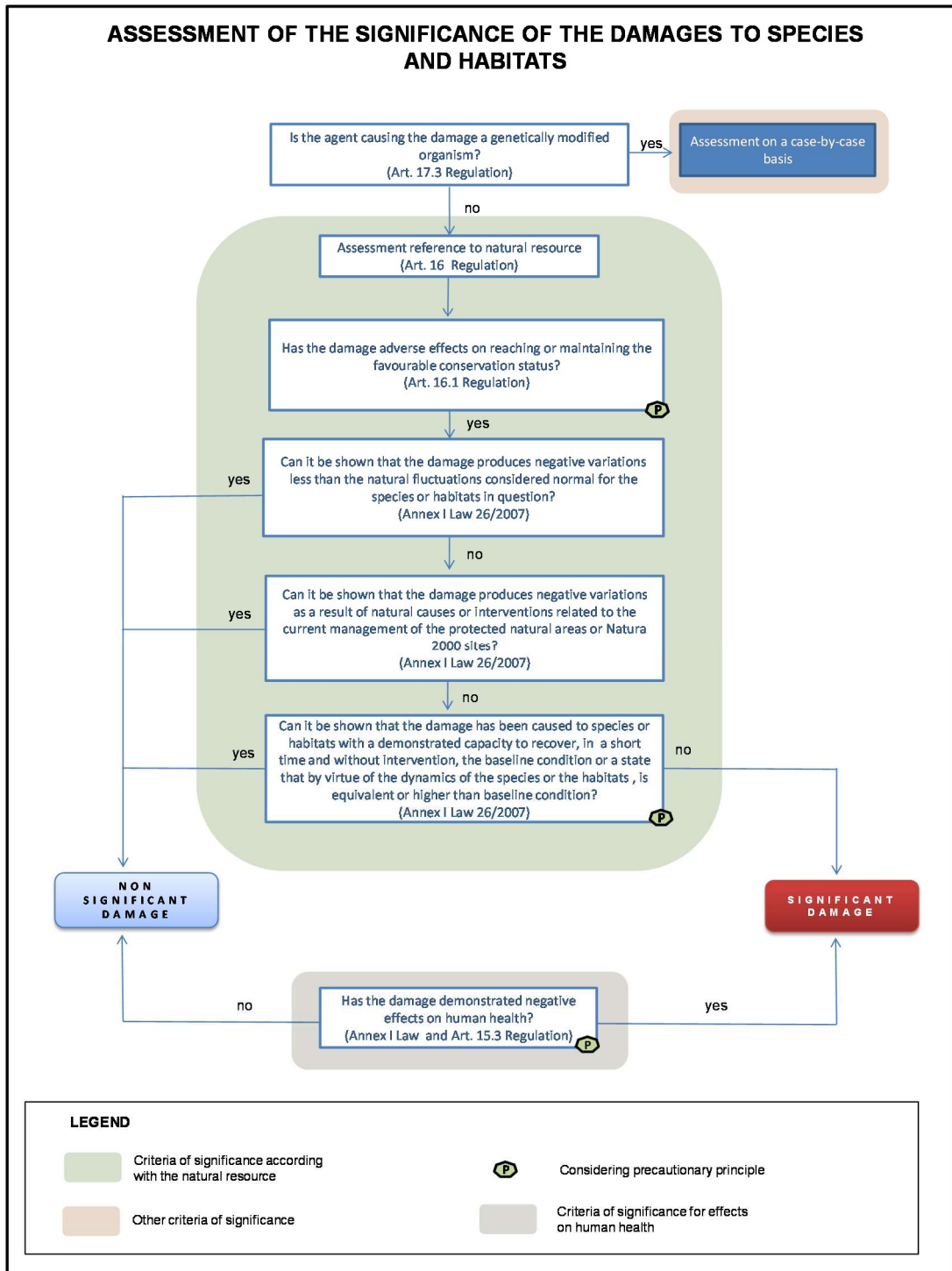


Image 2. Flow chart with the criteria for the assessment of significance of the damages to species and habitats

### 3.1 SIGNIFICANCE OF THE DAMAGE BY REFERENCE TO THE NATURAL RESOURCE

Article 16.1 of the Regulation, shows the criteria for the evaluation of the significance of the damage to species and habitats:

*“Damage caused to wild species and habitats will be significant when the changes experienced by the receiver produce adverse effects that affect the maintenance of a favourable state of conservation or the possibility that it will be reached. The evaluation of the significance of these damages will be carried out in accordance with the criteria established in Annex I of Law 26/2007, of October 23, and must take into account any local, regional, national and community available information on species or habitat affected that is relevant.”*

Annex I of Law 26/2007 compiles a number of indicators or measurable data that operator may use to determine whether have been unfavourable effects on the possibility of reach or maintain a favourable state of conservation of the species or the habitats (number of individuals, density or extent, capacity for propagation, etc.). The annex indicates that the damages with demonstrated effects on human health must be considered significant. Moreover, it sets some criteria that, if met, allow to classify the damage as non-significant, and which are as follows:

*“a) Negative variations less than natural fluctuations considered normal for the species or habitat in question.*

*b) Negative variations that are due to natural causes or derive from interventions related to the current management of protected natural areas or Natura 2000 sites, as defined in their respective management plans or equivalent technical instruments.*

*c) Damage to species or habitats with demonstrated capacity to recover, in a short time and without intervention, the baseline condition or a state that, only by virtue of the dynamics of the species or the habitat, is equivalent or higher than the baseline condition.”*

Information is not always available with respect to the natural fluctuations of the habitats or the species under study. In the absence of information, the operator or the competent authority could evaluate the significance of the damage considering "precautionary principle".

For the assessment of the adverse effects on the maintenance of a favourable state of conservation or the possibility that it will be reached, it must comply with the provisions of Law 42/2007, of December 13, on Natural Heritage and Biodiversity.

The Directorate General for Biodiversity, Forests and Desertification of the Ministry for the Ecological Transition and the Demographic Challenge, has drafted the document *“Methodological guide for the evaluation of environmental impact in the Natura 2000 Network. Criteria for the determination of damage to the integrity of Spaces of the Natura 2000 Network due to the affection to Habitats of Community Interest”*.

The methodology proposed in this document may be used as a basis for determining the significant adverse effect on maintaining a favourable state of conservation or the possibility that it may be reached, caused by an environmental damage, under the scope of Law 26/2007.

This document is available on the website of the Ministry for the Ecological Transition and the Demographic Challenge: [https://www.miteco.gob.es/es/biodiversidad/temas/espacios-prottegidos/red-natura-2000/rn\\_cons\\_evaluacion\\_afecciones.aspx](https://www.miteco.gob.es/es/biodiversidad/temas/espacios-prottegidos/red-natura-2000/rn_cons_evaluacion_afecciones.aspx)

#### 4. CRITERIA FOR THE DEFINITION OF THE DAMAGE TO WATER AND ITS EVALUATION AS SIGNIFICANT

Taking into account the general criteria for the assessment of the significance of the damages defined in Law 26/2007 of October 23, on Environmental Liability, and in its Regulation of partial development, its application to the resource waters will follow the diagram shown in figure 3:

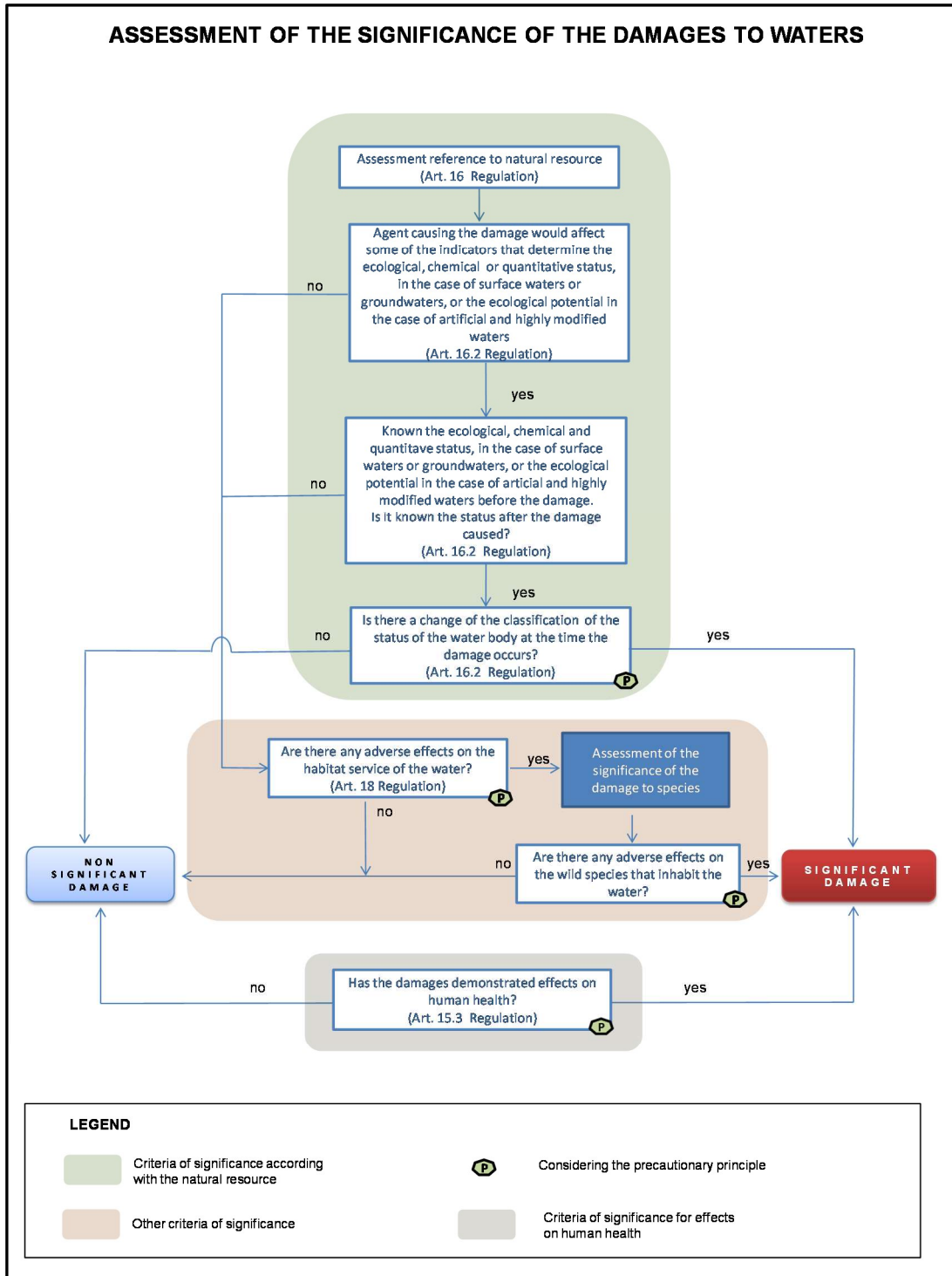


Figure 3. Flow chart of the criteria for the assessment of the significance of water damage.

#### 4.1 SIGNIFICANCE OF THE DAMAGE BY REFERENCE TO THE NATURAL RESOURCE

Article 2.1b) of Directive 2004/35/CE defines water damages as: *[any damage that significantly adversely affects:*

*(i) the ecological, chemical or quantitative status or the ecological potential, as defined in Directive 2000/60/EC, of the waters concerned, with the exception of adverse effects where Article 4(7) of that Directive applies; or*

*(ii) the environmental status of the marine waters concerned, as defined in Directive 2008/56/EC, in so far as particular aspects of the environmental status of the marine environment are not already addressed through Directive 2000/60/EC]*

Therefore water damages refers to the definitions of Directive 2000/60/EC, in which the “status”, as described above, is linked to water bodies. Therefore the evaluation of the significativity has to be carried out at a water body level.

In this sense, the COMMISSION STAFF WORKING DOCUMENT. REFIT Evaluation of the Environmental Liability Directive, states (page 52):

*“Is there scope for policy integration with other policy objectives?*

*[...] The coherence with the Water Framework Directive (WFD) concerning water damage is another important point. Some MS apply a broader approach referring to 'waters' (derived from the definition of 'water damage' in the ELD), thus allowing determination of the significance of the damage according to the individual incidents or emissions without reference to the bigger geographical reference of 'water body'. Other MS apply a narrower approach referring to 'water bodies' (definition deriving from the water status and water management requirements under the WFD). 'Water bodies' are however normally in size much larger as referential point than 'waters'. That means that if the whole 'water body' is used as referential point, it is less likely that a 'significant damage' will be determined that if only 'water' as referential point is used. **The criteria for significance are embodied in the assessment of water status in accordance with the WFD, hence a reference to 'waters' different from 'water bodies' may present difficulties in being coherent with the WFD. It can be concluded that the current legislation (ELD and WFD) with regard to the use of 'water bodies' as referential point ensures coherence.**”*

Therefore, this European Commission documents state that the assessment of the significativity within the Directive 2004/35/CE has to be done to a water body level to ensure coherence with Directive 200/60/CE (WFD).

On the other hand, the wording of article 2.1b) of the Directive 2004/35/CE clearly states that water damages are any damage that significantly adversely affects the ecological, chemical or quantitative status, as defined in Directive 2000/60/EC, of the waters concerned, and in Directive 2000/60/EC, the status is linked only to water bodies.

It is not possible to apply or evaluate the status of an area or volume of water not defined as a water body, and has no sense within the WFD.

Therefore, it is clear from a technical and legal point of view the significativity of the damage within Directive 2004/35/CE has to be evaluated at water body level.

In line with this, Law 26/2007, of October 23, defines the damage to the waters as follows:

*“Any damage that significantly adversely affects the ecological, chemical or quantitative status of the **bodies of surface water** or groundwater as well as the ecological potential of the bodies of artificial and heavily modified water, according to the definitions established by the water protection legislation.*

*(...) the environmental status of the marine waters, as defined in Law 41/2010 of December 29, on Protection of the Marine Environment, in so far as particular aspects of the environmental status of the marine environment are not already addressed through the Water Law approved by Royal Legislative Decree 1/2001, of July 20.”*

Additionally, the Regulation of partial development of Law 26/2007, in its article 16.2, establishes that the damages to waters will be significant if the water body experiences an unfavourable effect on its ecological, chemical or quantitative status, in the cases of surface waters or groundwater, or in its ecological potential, in the case of artificial or highly modified waters, **that entails a change in the classification of its status at the time the damage occurs**, according to the Hydrological Planning Regulation approved by Royal Decree 907/2007, of July 6, and other applicable legislation.

In order to assess whether a water body changes its chemical, ecological or quantitative status when damage occurs, it is necessary to take into account the factors that determined the classification of its status, prior to the damage occurring and after the damage occurred.

In the case of imminent threat of damage, the consequences of the damage should be anticipated if it were to occur. In any case, the same methodology established in the Hydrological Planning Regulation and other applicable legislation for the classification of the status of the water body must be taken into account.

It is important to highlight that in determining the significance of environmental damage to water, **the time scale or temporality** must be taken into account. This is an especially important aspect, since the assessment of the status of the water body under the scope of water legislation is officially carried out at the end of each hydrological planning cycle, although the competent authorities make annual reports on the status of the water bodies. Likewise, the effect of an incident on water, especially in the case of groundwater, may not occur immediately, but may appear some time later.

Nevertheless, under the scope of the environmental legislation it will be **necessary to evaluate the change in the classification of the status of the water body at the time the damage occurs**, although this does not imply the need of its reclassification.

In some cases, evaluating the possible change in the status classification of a water body when the damage occurs can be technically complex to perform. In these cases, two elements must be taken into account:

Firstly, the **precautionary principle** must be followed, the objective of which is to guarantee a high level of protection of the environment, and consequently of the natural resources. Environmental damage should be considered significant even though, due to the complexity of the damage assessment, there is no scientific evidence that the significance threshold is exceeded. This is especially relevant in the case of imminent threats of environmental damage.

Secondly, remember that the Regulation of partial development of Law 26/2007 attributes to the **operator that causes the environmental damage the responsibility of determining its significance**, for which, according to article 7 of the Regulation, it must identify the agent causing the damage and the affected natural resources and services, as well as quantify the damage and assess its significance.

Finally, the environmental damage may occur on a water body that is in poor status before the incident occurs.

In these cases, and according to the provisions of article 18 of the Regulation for partial development of Law 26/2007, the significance of the damage caused to the waters may be established by analysing the affection that the damage has caused to the hosting capacity or habitat service that such resources provide to species. To that effect, it will be presumed that the damage to water is significant, when the damage experienced by species that inhabit such resource can be classified as significant.

#### **4.1.1 ASSESSMENT OF SIGNIFICANT DAMAGE TO MARINE WATERS**

Law 26/2007, of October 23, on Environmental Liability defines the damage to marine water as any damage that has significant adverse effects on *“the environmental status of the marine waters, as defined in Law 41/2010 of December 29, on Protection of the Marine Environment, in so far as particular aspects of the environmental status of the marine environment are not already addressed through the Water Law approved by Royal Legislative Decree 1/2001, of July 20.”*

Therefore, whether the assessment of damage to marine waters is already covered by the assessment of the significance of the damage to surface waters, in the case of coastal waters, no further assessment is necessary.

Otherwise, in accordance with the criteria applied for surface and groundwater, it will be considered that damage to marine waters will be significant whenever it produces a change in the classification of its status.

Law 41/2010 of December 29 defines environmental status as *“the overall status of the environment in marine waters, taking into account the structure, function and processes of the constituent marine ecosystems together with natural physiographic, geographic, biological, geological and climatic factors, as well as physical, acoustic and chemical conditions, including those resulting from human activities inside or outside the area concerned”*.

The good environmental status is *“the one in which it provides ecologically diverse and dynamic oceans and seas which are clean, healthy and productive within their intrinsic conditions, and the use of the marine environment is at a level that is sustainable, thus safeguarding the potential for uses and activities by current and future generations”*.

The good environmental status has been described for each of the five Spanish marine regions based on the eleven descriptors included in Annex II of the Law on Protection of the Marine Environment. The monitoring programmes proposed within the framework of the marine strategies, include indicators to evaluate whether the good status of the marine water has been reached or is maintained.

This information will be used for the assessment of the significance of the damage due to a change in the environmental status of the marine waters.



## **5. CRITERIA FOR THE DEFINITION OF DAMAGE TO SOIL AND ITS EVALUATION AS SIGNIFICANT**

Article 16.3 of the Regulation of partial development of Law 26/2007, of October 23, on Environmental Liability, establishes the significance criteria by reference to the natural resource when such resource is the soil.

*“The damages caused to the soil will be significant if the receiver experiences an adverse effect that generates risks for human health or the environment, so that it can be classified as contaminated soil in the terms established in Royal Decree 9/2005, of January 14, which establishes the list of potentially polluting activities of the soil and the criteria and standards for the declaration of contaminated soils.”*

This way, the significance of the damage to soil is determined according to the provisions of Royal Decree 9/2005, of January 14, which establishes criteria to determine when a soil can be declared as contaminated. When a soil is declared as contaminated according to this Royal Decree, the environmental damage is considered significant under the scope of the environmental liability normative.

A diagram illustrating the evaluation of the significance of the damage to the soil is shown below.

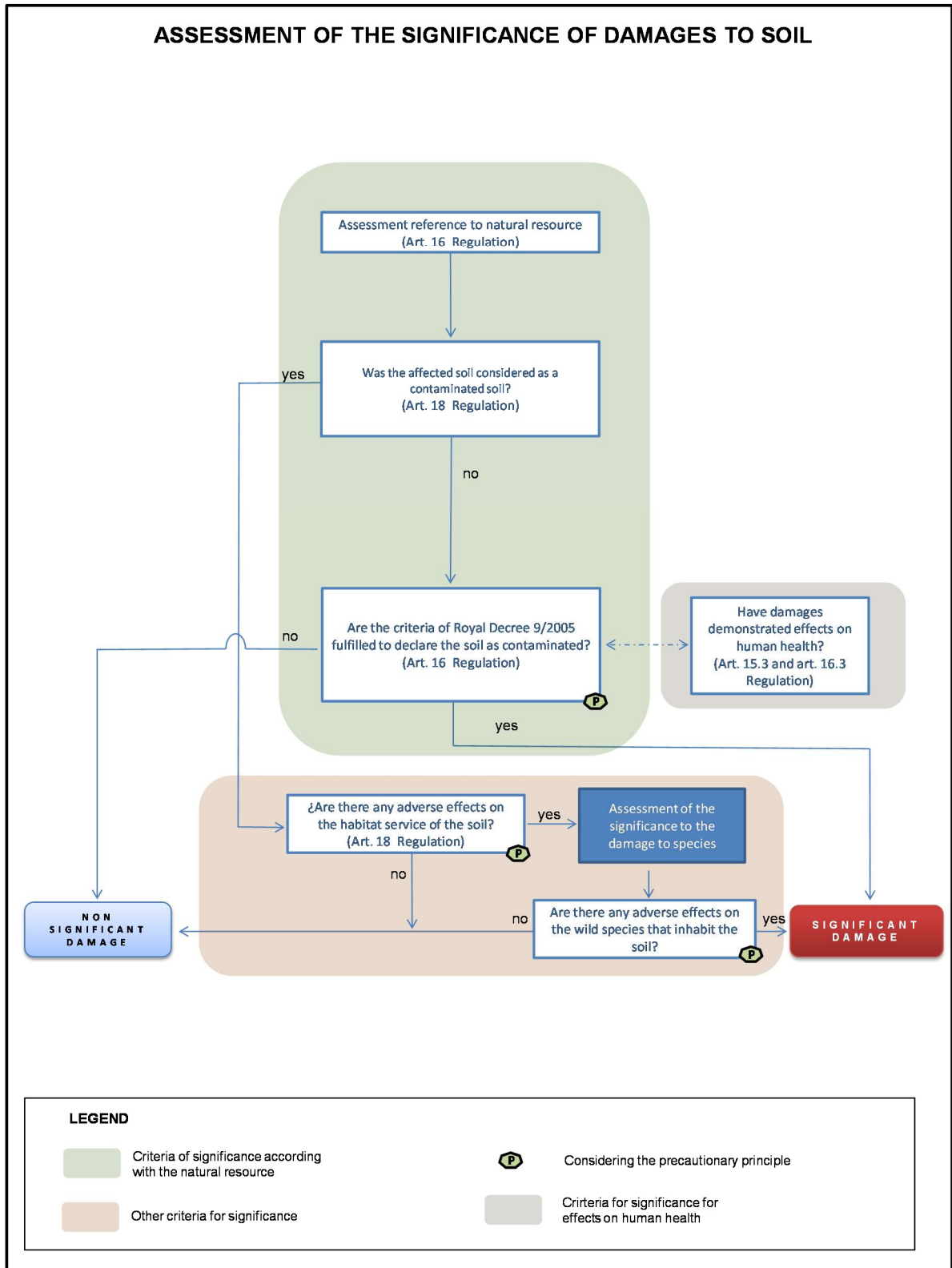


Figure 4. Flow chart of the criteria for the assessment of the significance of soil damage.

## 5.1 SIGNIFICANCE OF THE DAMAGE BY REFERENCE TO THE NATURAL RESOURCE

Royal Decree 9/2005, of January 14, which establishes the list of potentially polluting activities of the soil and the criteria and standards for the declaration of contaminated soils, establishes specific criteria to consider a soil as contaminated due to its effect on human health or the environment.

In particular, it indicates in the annex III the criteria for the consideration of a soil as contaminated, as it carries unacceptable risks for the protection of human health or, where appropriate, of ecosystems, due to the presence of the polluting substances listed in annexes IV and V. The consideration of a soil as contaminated must be based on a risk analysis, which must contain the elements of Annex VII of the Royal Decree.

Additionally, in certain circumstances in which the corresponding risk assessment is not available, for those cases in which the protection of ecosystems is considered a priority, the competent authorities may declare the soil as contaminated if:

- a) Lethal concentration or effective concentration, LC(E)50, for soil organisms obtained in toxicity tests OECD 208 (Emergency test and seed growth in land plants), OECD 207 (Acute earthworm toxicity test), OECD 216 (Soil nitrogen mineralization test), OECD 217 (Soil nitrogen mineralization test in soil) or in those others that are considered equivalent for that purpose by the Ministry of the Ecological Transition and the Demographic Challenge, is less than 10 mg of contaminated soil / g of soil.
- b) Lethal concentration or effective concentration, LC(E)50, for aquatic organisms obtained in toxicity tests OECD 201 (Algae growth inhibition test), OECD 202 (Daphnia magna mobility inhibition test), OECD 203 (Acute toxicity test on fish), or in those others that are considered equivalent for that purpose by the Ministry of the Ecological Transition and the Demographic Challenge, carried out with the leachates obtained by the standard procedure DIN-38414, it is less than 10 ml of leachate / l of water.

In the case of determining the environmental damage to the soil, it is also necessary to take into account the provisions of article 18 of the Regulation for partial of Law 26/2007.

This article establishes that when it is not possible to determine the significance of the damage according to the criteria established in article 16 of the Regulation, or a soil is classified as contaminated, the significant of the damage may be established analysing the affection that the damage has caused to the hosting or habitat service that such resource provide to wild species.

To this end, it will be presumed that soil damage is significant when the damage experienced by the species that inhabit the resource can be classified as significant.

## **5.2 ASSESSMENT OF THE SIGNIFICANCE BY DEMONSTRATED EFFECTS ON HUMAN HEALTH**

This document does not describe the procedure for evaluating whether the damage has demonstrated effects on human health, which shall be carried out by the health authorities.

Nevertheless, in the case of the soil, Royal Decree 9/2005, of January 14, establishes specific criteria to consider a soil as contaminated due to its affection on human health.

This should be based on the risk analysis mentioned above. Additionally, in certain circumstances in which the corresponding risk assessment is not available, for those cases in which the protection of human health is considered a priority, the soil will also be declared contaminated if:

- a) The concentration in the soil of any of the substances listed in Annex V of Royal Decree 9/2005, exceeds 100 or more times the generic reference levels established in it for the protection of human health, according to their use.
- b) The concentration in the soil of any chemical pollutant not included in Annex V of Royal Decree 9/2005 for that soil, exceeds 100 or more times the generic reference level calculated in accordance with the criteria established in Annex VII.

## **6. CRITERIA FOR THE DEFINITION OF DAMAGE TO SEASHORE AND ESTUARIES AND ITS EVALUATION AS SIGNIFICANT**

Article 16.4 of the Regulation, refers the significance of the damage to the seashore and the estuaries to the significance of the rest of the natural resources contemplated by Law 26/2007, of October 23:

*“The damage caused to the seashore and the estuaries will be significant insofar as they are the damage experienced by the waters, by the soil or by wild species and habitats, in accordance with the provisions of the previous sections.”*

Law 22/1998, of July 28, of Coasts includes the seashore and estuaries as one of resources component of the state maritime-land public domain.

In short, and consistent with the definition of the seashore and the estuaries shown in the coastal legislation, which includes both land areas and beaches, as well as flooded areas such as marshes and lagoons, the Regulation for the partial development of Law 26/2007, considers the resource of the seashore and estuaries as a sum of the rest of the resources considered by the environmental responsibility regulations.

Therefore, a damage caused to the seashore and the estuaries will be significant if the damage to the waters, the soil, the species and/or the habitats is significant, using the criteria defined for determine it in each of these natural resources.



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