



Imagine together the future of the European Water Law

Nathalie Hervé-Fournereau

Research Director CNRS - European Law
Vice-president of the French society for Environmental Law

Institute Law & Europe IODE UMR 6262 CNRS
University of Rennes 1 France



INTRODUCTORY REMARKS

1- ***“We all need water to survive”***

- Vital need for living beings
- Cultural heritage & plurality of cosmologies
- Natural resource unequally distributed across the planet
- Diversity of ecosystems & species, ecological functions & ecosystems services
- Multiple natural interdependencies et socio-economics uses
“Water is not a commercial product like other” Water Framework Directive



2- High protection of water remains a major challenge

- Multiple existing and new pressures (pollutions, biodiversity decline, hydromorphological alterations (...))
- Natural & socio & health vulnerabilities
- Exacerbated by climate change
- Exceeding planetary boundaries is at stake

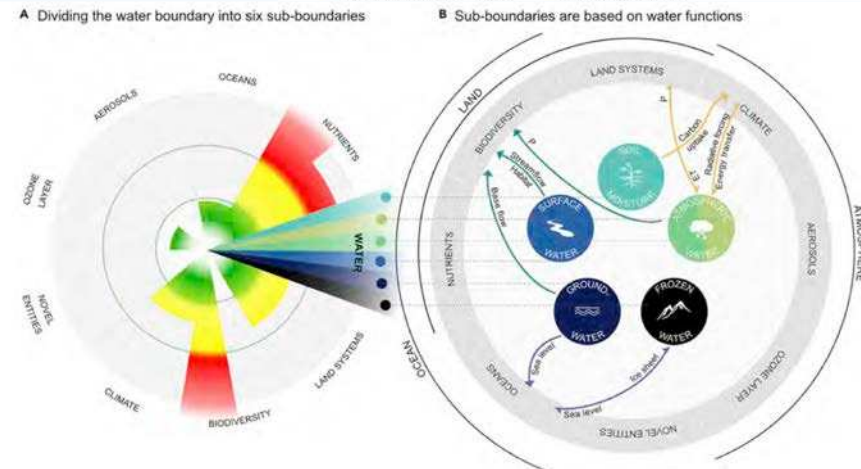
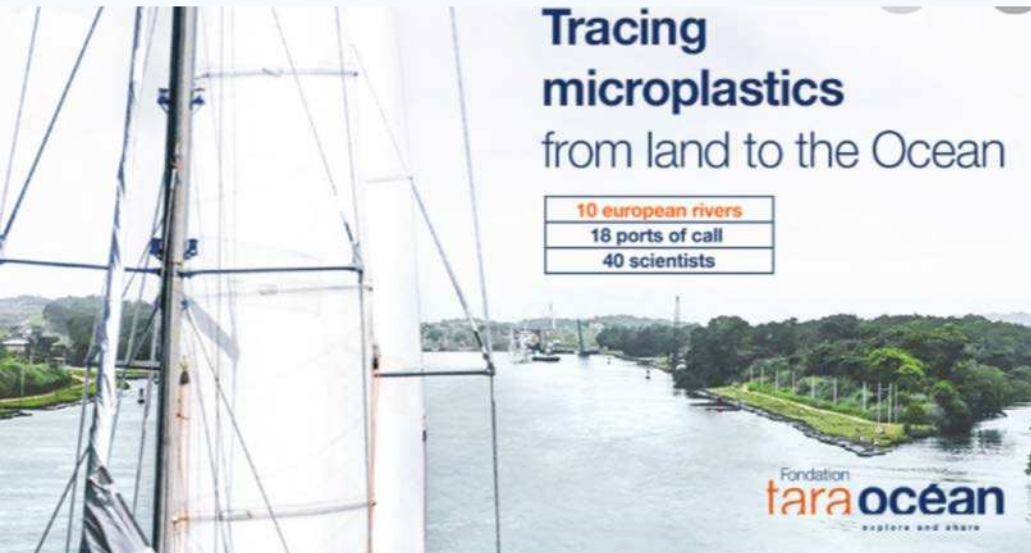
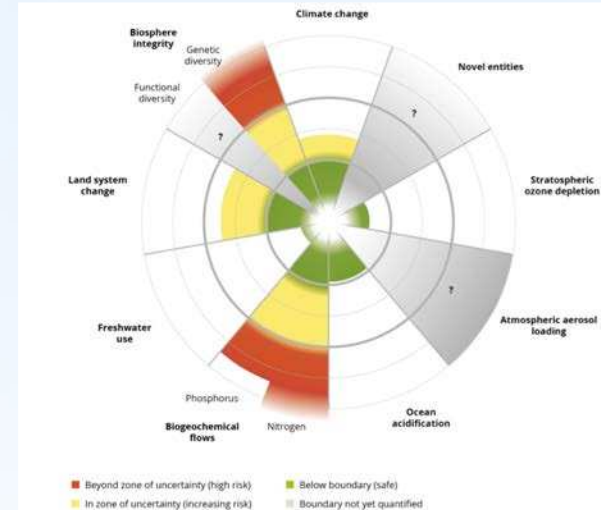


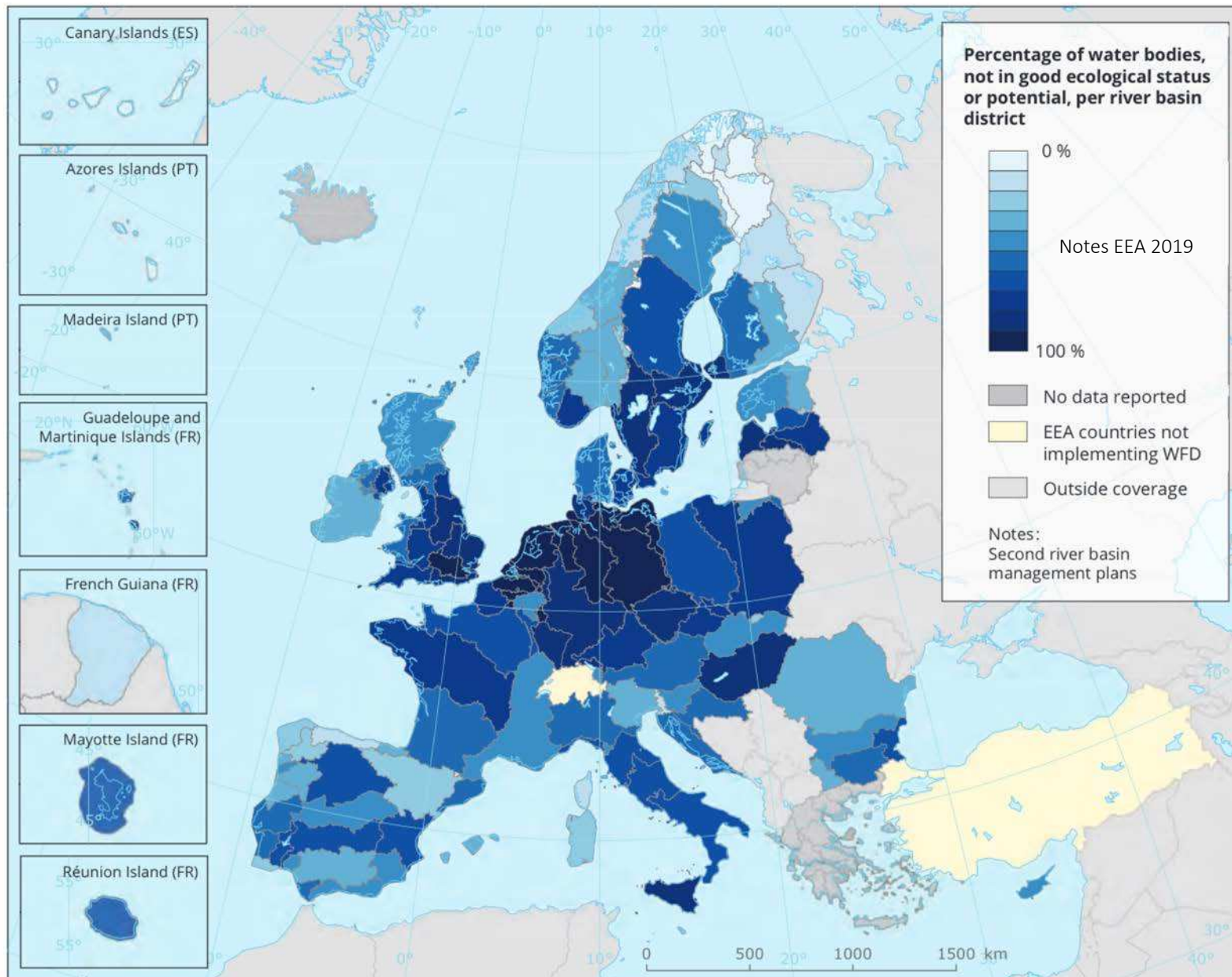
Figure 4. Revising the Water Planetary Boundary to Include Six Potential Water Planetary Sub-boundaries (A) Overview of a possible future planetary boundary with the six divided water stores. (B) Defining water planetary sub-boundaries based on the functional relationship between water stores and Earth System components; same as Figure 1C with only the functions used to define the sub-boundaries shown. Modified from Gleeson et al.,² see source for more information.

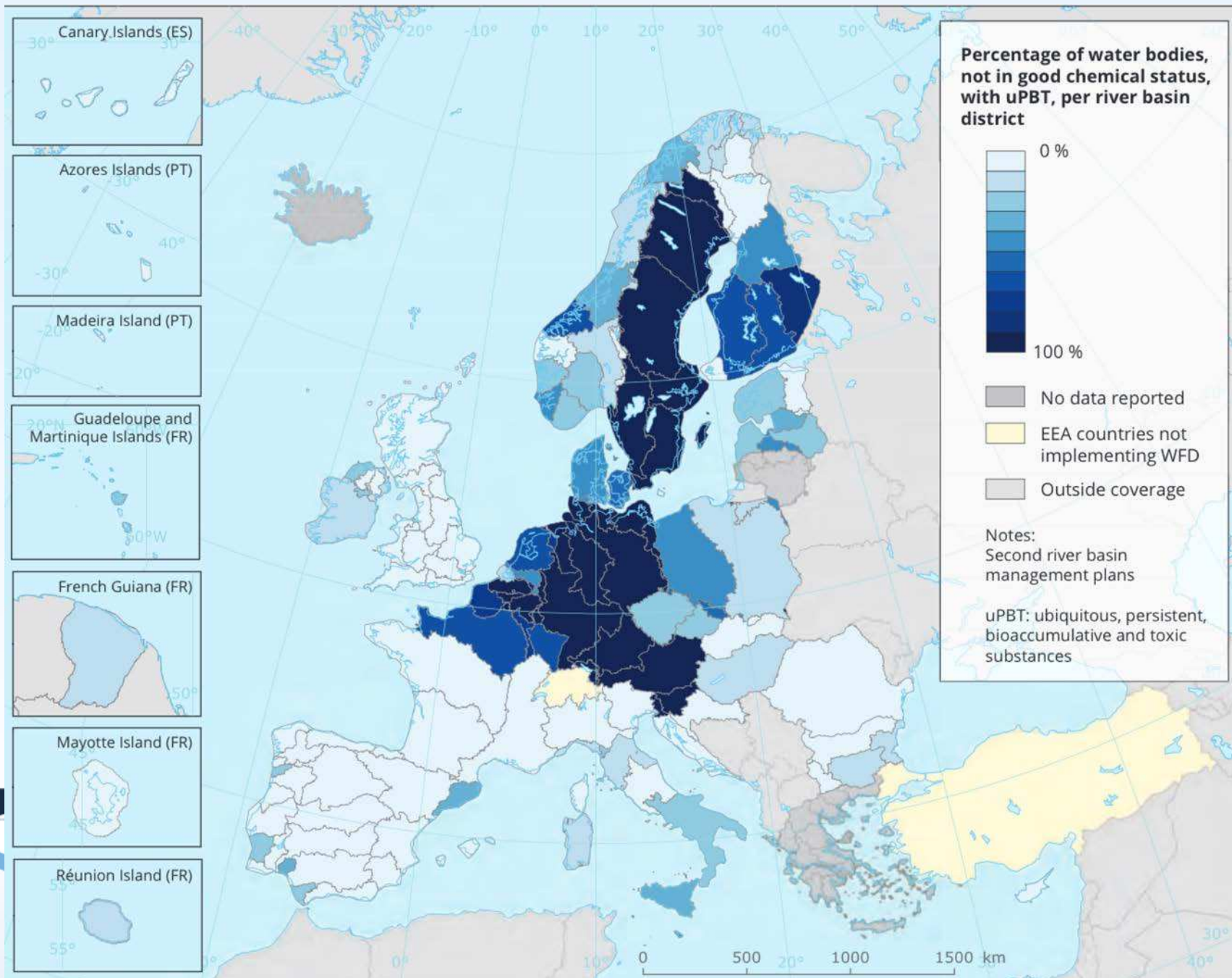
3- The implementation of the European Water Law in question

- ❖ The deadline for meeting the objective (“*good status of water bodies*” of the WFD) was in 2015...or in 2020 :
 - More than half of all European water bodies are under exemptions
 - The main pressures on waters bodies : hydromorphological pressures (40%), diffuse pollution (38%) and water abstraction
 - Only 44 % of surface waters achieve a good or high ecological status
 - 38% of surface waters bodies had good chemical status & 16% are unknown
 - 75% of European groundwater areas has a good chemical status



MAP 4.1 Country comparison — results of assessment under the Water Framework Directive of ecological status or potential shown by river basin district (Period 2016/2017)

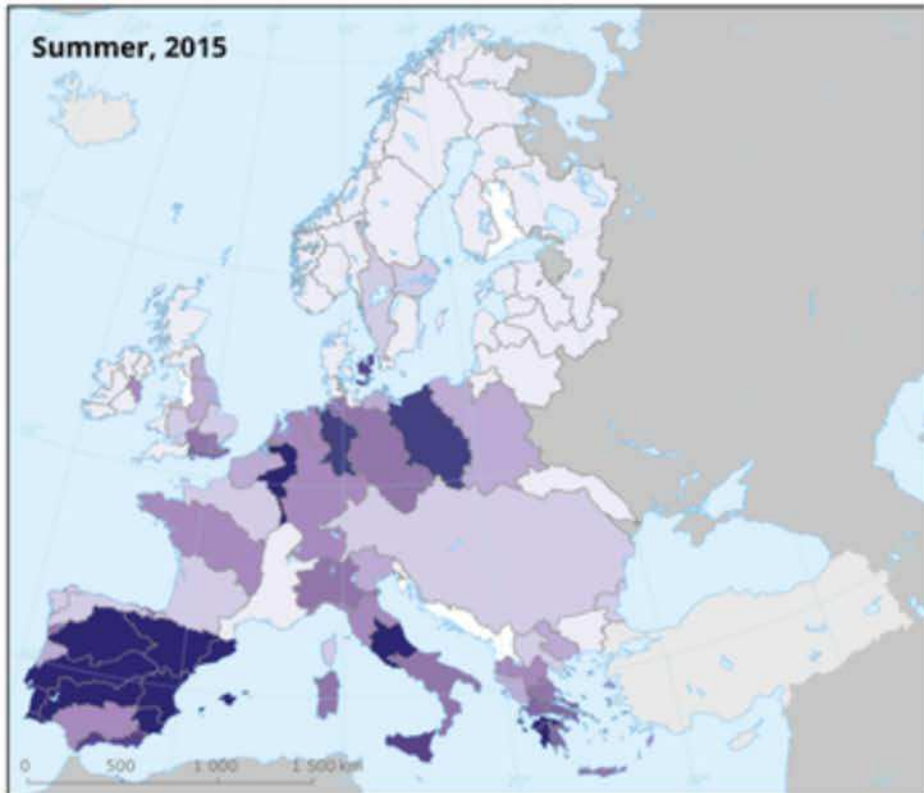
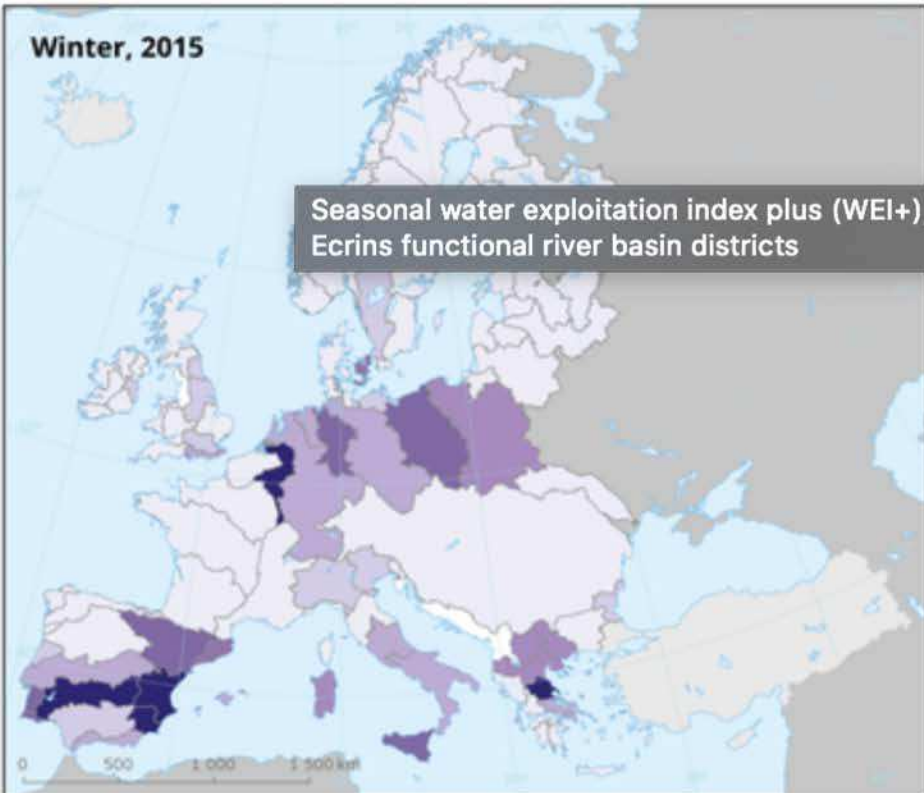




Winter, 2015

Seasonal water exploitation index plus (WEI+),
Ecrins functional river basin districts

Summer, 2015



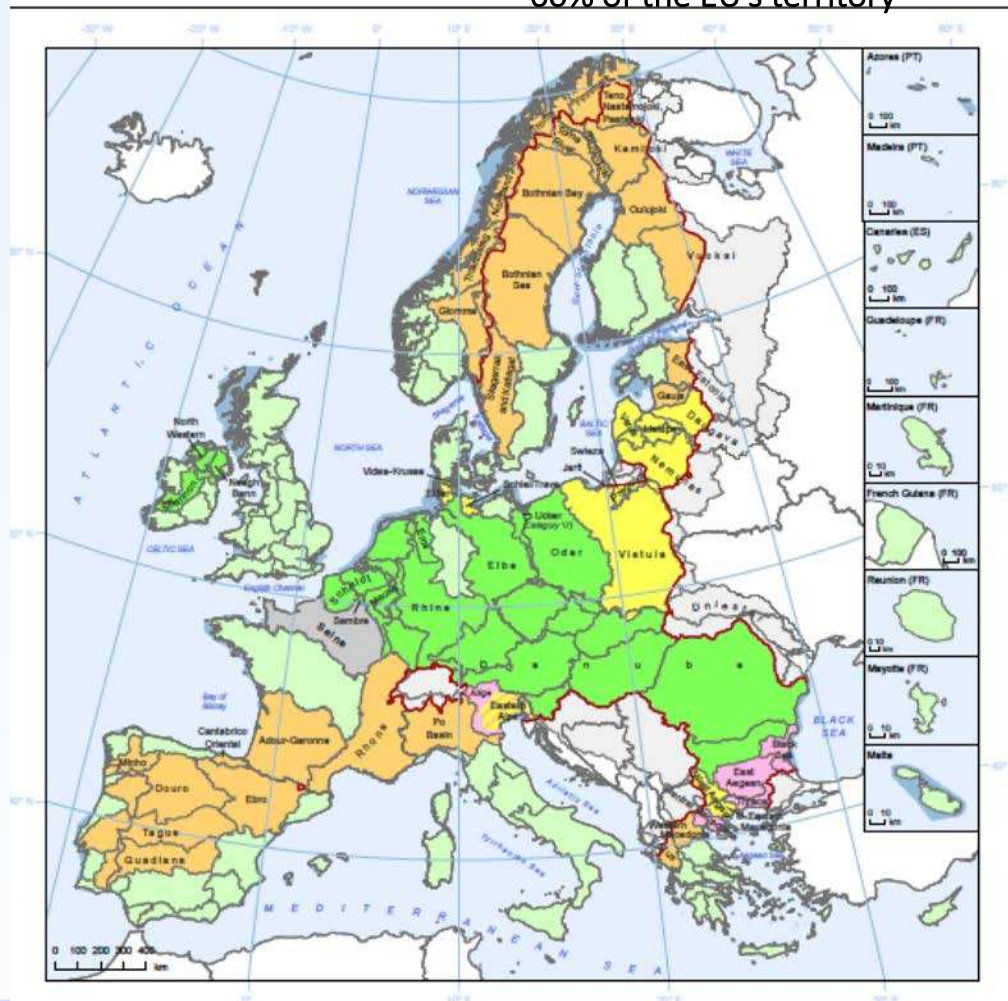
Seasonal water exploitation index plus (WEI+), Ecrins functional river basin districts, 2015



Map of EU River Basin Districts indicating transboundary co-operation

Version 29 October 2012

60% of the EU's territory



EU River Basin Districts indicating transboundary co-operation

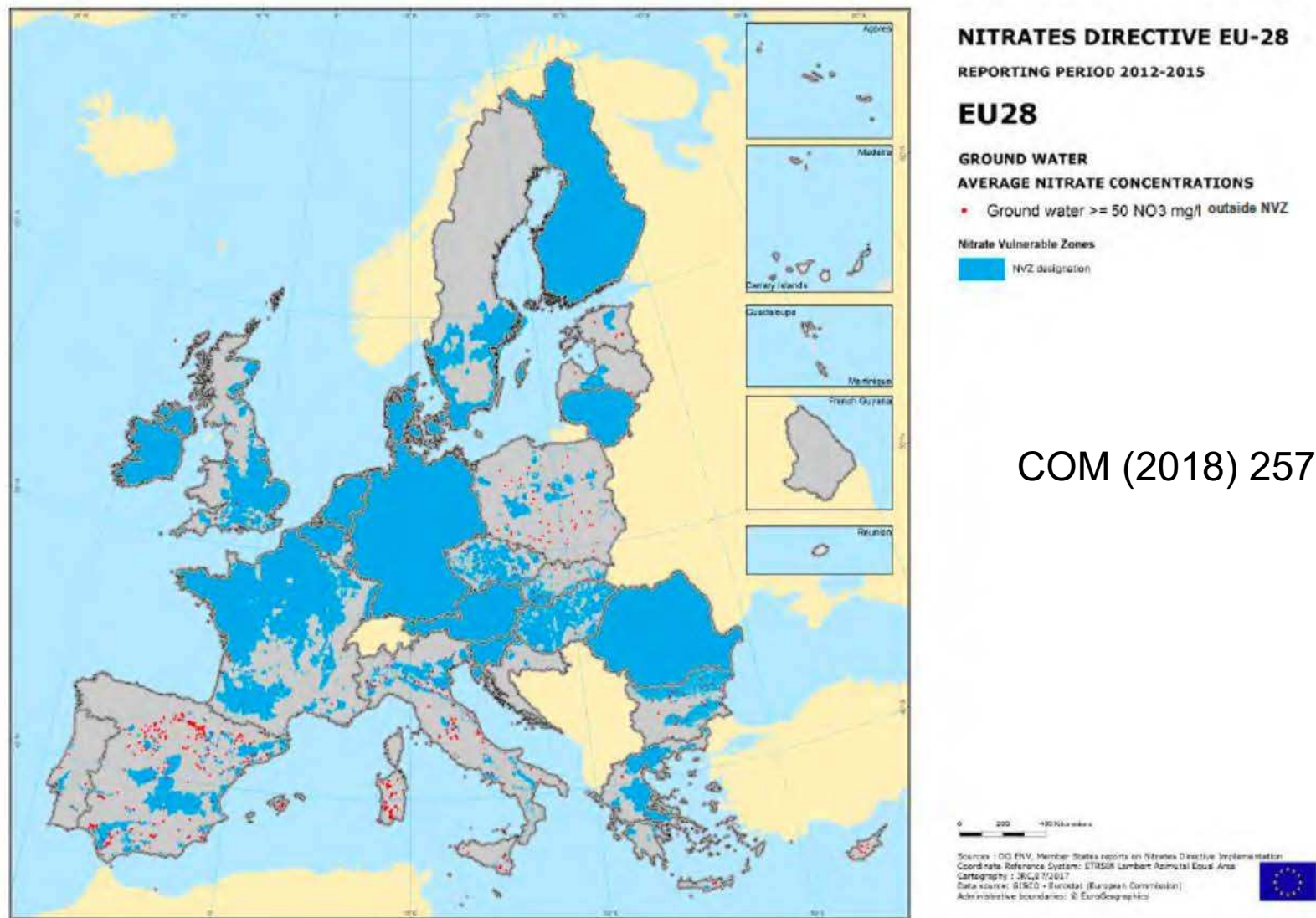
- Category 1: Co-operation agreement, co-operation body and International RBMP in place
- Category 2: Co-operation agreement and co-operation body in place, but no International RBMP in place
- Category 3: Co-operation agreement in place but no co-operation body or International RBMP in place
- Category 2/3: Not clear whether both co-operation agreement and co-operation body in place
- Category 4: No co-operation formalised
- Uncategorised

- National River Basin Districts (within the EU)
- International River Basin Districts (outside the EU)
- Coastal waters
- Country borders
- EU27 extent

❖ Others data related other EU Water & Biodiversity Directives

- 80% of population was connected to public urban waste water treatment systems
- 70-90 % of Europe's floodplain area is ecologically degraded (50-60 % of its terrestrial Natura 2000 sites)
- 61% of the agricultural land of the EU are Nitrate vulnerable zones
- 95% of bathing sites had good & excellent bathing quality water
- 51% of habitats related to wetlands have unfavourable ecological status



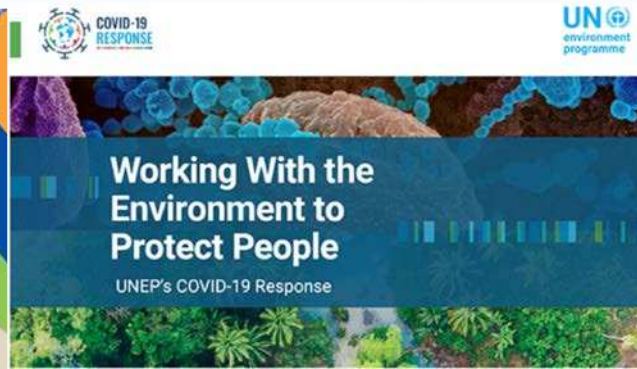


Map A. Area designated as Nitrates Vulnerable Zone and groundwater monitoring stations with average nitrates concentrations above 50mg/L outside NVZ, period 2012-2015⁴⁴.

4- Fitness Check of the WFD and FD Directive & Beyond

❖ The singular context of the Fitness Check launched in 2018

- Publication of reports by the EEA & European Commission
 - Reports EEA European Waters Status & Pressions 2018 & the European Environment State 2020
 - Report on the implementation of the WFD & the Flood D COM (2019) 95
- Public consultation in relation to the Fitness Check 2018/2019
 - The campaign Protect Water “*Europe’s strong water Law*”
 - More 370 000 responses to the public consultation
- European Parliament elections & Green Deal
- The current COVID 19 global Pandemic
- The inception impact assessment oct 2020 (revision list of pollutants)

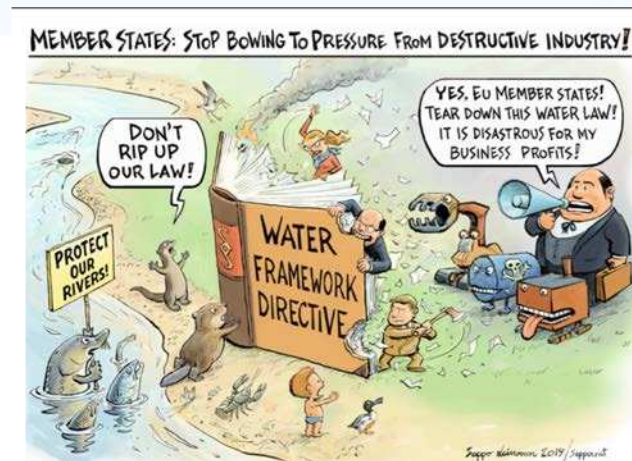
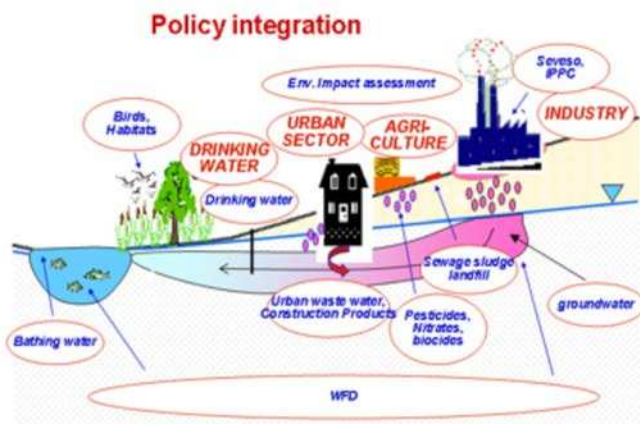
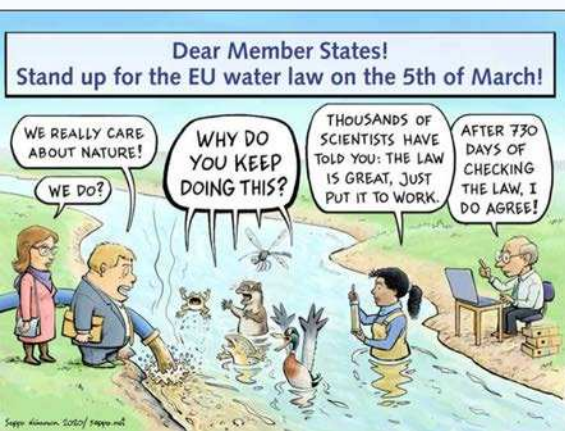


❖ The objective of a Fitness Check and its evaluation criteria

- Evaluates “whether the directive are fit the purpose by examining their performance against
- 5 criteria”: Effectiveness, efficiency, coherence, relevance and EU added value

❖ The result of the Fitness Check : “WFD & FL are well fit with some scope to reinforce in particular” (European Commission) :

- the implementation by the member states
- the integration of water protection requirements in others EU policies
- the investments and funding support



❖ **Let's go Beyond and imagine together the future of Water EU Law**

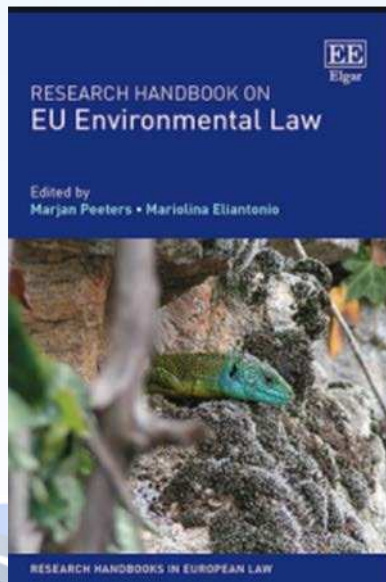
- Keeping in mind the objective of WFD “reach a good ecological & chemical status” (2015, exemptions 2020, 2027)
 - ✓ Prevent further deterioration, protect and enhance the status of aquatic ecosystems
 - ✓ Promote sustainable water use based on long-term protection of available water resources
 - ✓ Prevent deterioration of the status of all surface waters and protect, enhance & restore these bodies

- **Diversity of legal questioning**

Complexity of the structure of EU Water Law, Lack of implementation & enforcement, Over-use of exemptions, costs recovery & PPP, Lack of consistency of EU policies (including Environmental Law), Compliance with Court decisions (...)



- **Focus on the legal evolutions even the transformations of two funding pillars of WFD**
- ✓ Its inclusive water governance beyond a classic Human rights approach
- ✓ Its integrated water protection and management approach towards a more ecosystem integrity dynamic



PART V SUBSTANTIVE APPROACHES

- | | |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| 17. EU Nature Conservation Law: Fit for Purpose
<i>An Cliquet</i> | 265 |
| 18. Beyond the 2019 Fitness Check of the Water Framework Directive:
Designing the Future of European Water Law
<i>Nathalie Hervé-Fournereau</i> | 280 |
| 19. EU Air Pollution Law: Comprehensive but Insufficient
<i>Kendro Pedrosa and Bernard Vanheusden</i> | 296 |
| 20. Integrated Pollution Prevention and Control: A Critical Legal
Perspective on All-inclusive Integration
<i>Lolke S. Braaksma and Hanna D. Tolsma</i> | 313 |
| 21. The Waste Framework Directive and the Circular Economy
<i>Chris Backes</i> | 328 |

I- Strengthening inclusive governance beyond a classic human rights approach

A- Deepening the participatory approach for a democratic & responsible Water Stewardship

«The success of this directive relies on close cooperation and coherent action at Community, Member States and local level as well as on information, consultation and involvement of the public, including users »

○ The necessity to reinforce the public's consultation & involvement

- ✓ Binding public 's consultation for each river basin district (Art. 14 WFD)
- ✓ Binding obligation for MS to encourage all parties to participate in the implementation of the WFD (CJEU C 664/15- 2017)
- ✓ European Guidance document on public participation for the WFD (2003)



- ✓ The importance of the public's information & participation : confidence at stake
 - Water information system for Europe WISE launched in 2007
 - A right to information & participation (Aarhus Convention & UE)
 - The growing importance of the role of environmental NGOs throughout the life cycle of legal norms

 - **The necessity to strongly improve the implementation of EU environmental Law by the MS**
 - ✓ The common implementation strategy (2001)
- Co-production of non binding guidance documents & best practices exchanges
- ✓ **The duty of MS** to implement the obligations at time and effectively monitor and sanction
 - ✓ **The duty of the European Commission** to not forget its mission of “guardian of the treaty“
 - ✓ **The vigilance of the NGO's** and their problematic access to justice



WISE - Water Information System for Europe is the European information gateway to water issues



B- For & beyond European recognition of the Human right to Water

The growing dynamic of rights-based approach

○ Towards a European recognition ?

- ✓ The right to healthy environment (including right to water) is not expressively recognised by EU Law
- ✓ The claim of the organisers of the successful European Citizen initiative Right2Water in 2013
- ✓ The European Commission's unsurprising response 2014
 - Already a component of EU human rights guaranteed by the European Charter of fundamental rights (in particular right to life and human dignity)
 - Without express recognition of Human right to water
- ✓ Revision's process of the Drinking water Directive 2017 (Council's position October 2020)
 - New provision (art. 16) providing that the MS ensure access to a minimum water supply for everyone, particular for vulnerable and marginalised groups, in line with UN SDG 6.



○ The urgent EU compliance with the obligations of the Aarhus's Convention

- ✓ Keep in mind the conclusions of the compliance Committee of the Aarhus Convention related the non-respect of article 9 by EU in 2017
- ✓ Keep in mind the importance of the environmental procedural rights including in the field of water EU Law (information, participation, access to justice)
- ✓ The ambivalent position of the CJEU and its interpretation of EU Law, in particular its rigor with regard to national Court to ensure the effectiveness of EU environmental Law : see case law C 664/15
- ✓ Towards a new proposal on access to justice in environmental matters and new legal evolutions related this right under the EU Law



At the core of the Austrian case was a water permit to abstract water for making snow for a ski resort. A snow cannon treats a ski slope at Nassfeld, Austria. Photo by Fxp42 under Creative Commons CC-BY-SA 3.0 license.



○ **Let's imagine new steps beyond classic Human rights**

- ✓ Take into consideration the collective dimension of Human rights to a healthy environment & to water
- ✓ - Elaborate an European status for environmental NGOs and reinforce their rights as Guardians
- ✓ - Promote new forms of democratic representation and compare the added value of different ways to go to the national judges (class action, Actio Popularis (...))
- ✓ - Evaluate the potential recognition of rights of nature and elements of nature (rivers, lakes..) in EU.

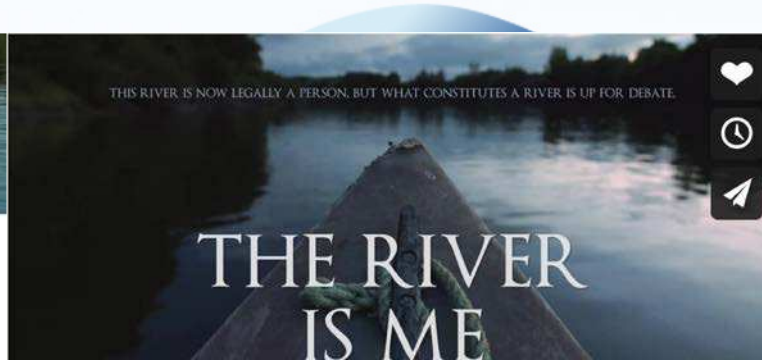
See cycle of conferences launched by the European deputy Marie Toussaint regarding this topic <https://www.facebook.com/greensefa/videos/2634224890225335>



ÉCOLOGIE / PROSPECTIVE / ANTICIPATION / POLITIQUE / VAL DE LOIRE

VERS UNE PERSONNALITÉ JURIDIQUE DE LA LOIRE

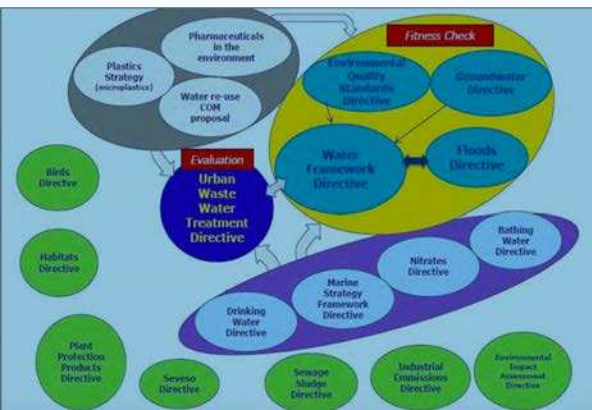
VERS UN PARLEMENT DU FLEUVE



II- Strengthen the integrated approach promoted by WFD through an ecosystem integrity dynamic

A- For a more integrated approach through a new balancing of interests and needs

- The dual dynamics of the integrated water protection & management approach
 - ✓ Further integration of protection & sustainable management of water into all EU actions, including trade & investments policies (art. 11 FTEU & art. 37 Charter of fundamental rights of EU)
 - ✓ Further consistency and interlinkages between EU Water directives & the others environmental EU Law (Biodiversity, climate change, chemical pollution, industrial plants (...))

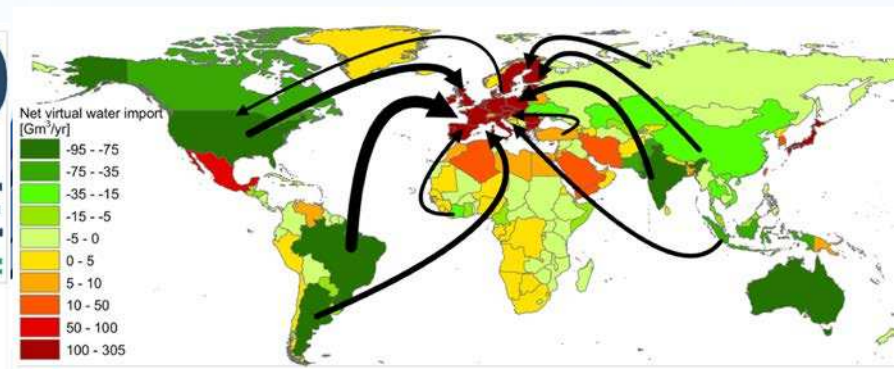


STOP
GLYPHOSATE
ECI

Stop Glyphosate European Citizens' Initiative (ECI)

We call on the European Commission to propose to member states a ban on glyphosate, because we want a future without toxic pesticides.

STOPGLYPHOSATE.ORG



○ **For a new balancing of interests & needs**

- ✓ Respectful of vital Human rights for present & future generations and the water ecosystem's needs
- ✓ Overcoming new conflicts between : water protection vs. renewable energy production; inland navigation
- ✓ Improvement of integration mechanisms both ex ante & ex post
- ✓ Promoting a new interpretation of the principle of proportionality in the light of the high level of environmental protection & non regression principle

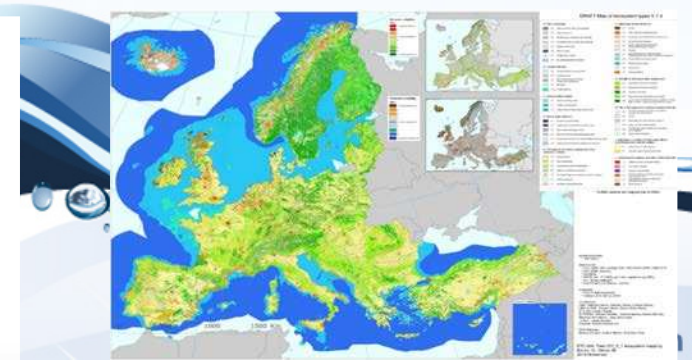
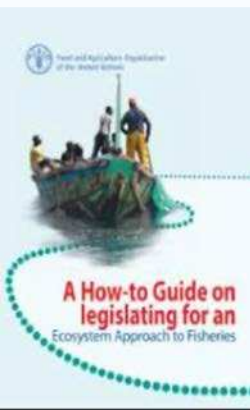
See the case C 461/13 CJEU relating the interpretation of the obligation to prevent deterioration of surface water (art. 41 WFD)

TOP 8 DES PAYS D'EUROPE							
Puissance hydroélectrique installée (MW) <small>Source : IHA, hydropower status report 2017</small>							
1	2	3	4	5	6	7	8
NORVEGE	FRANCE	ITALIE	ESPAGNE	SUISSE	SUEDE	AUTRICHE	ALLEMAGNE
31 626	25 405	21 884	20 354	16 657	16 419	13 177	11 258
Part moyenne de l'hydroélectricité dans la production énergétique du pays <small>Source : Perspective monde</small>							
1	2	3	4	5	6	7	8
NORVEGE	ISLANDE	CROATIE	AUTRICHE	SUISSE	SUEDE	LETONIE	ROUMANIE
96%	73%	67%	60%	58%	46,6	38,8	28,84
(2015)	(2015)	(2014)	(2015)	(2015)	(2015)	(2014)	(2014)



B- A further step forward for the EU Water Law through an ecosystem integrity dynamic

- WFD In the spirit of the proposal of directive on the ecological quality of water (COM 1993(680)): the paradigm Shift
 - ✓ **Ecosystem approach** on the basis of river basin & holistic vision of the entire cycle water cycle
 - ✓ **Ecological status** “expression of the quality of the structure and functioning of aquatic ecosystems associated with surface waters
 - ✓ Extensive interpretation of **the non-deterioration of the status** of surface water bodies by the CJEU : an **acquis** to be consolidated and extended to all water bodies : one out, all out
 - ✓ New steps to promote and integrate **new understanding of the dynamics** of water resources, water-related ecosystem, others ecosystems & species and interdependencies with human activities



○ The legal potential of the concept of ecological integrity

✓ A concept promoted by the Habitat Directive

Art. 6 Habitat Directive & Guidance document “managing Natura 2000 sites; the provisions of article 6” (updated in 2019)

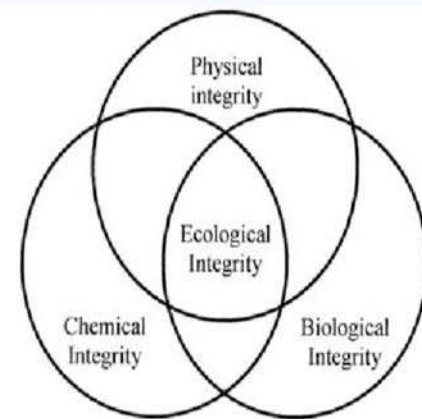
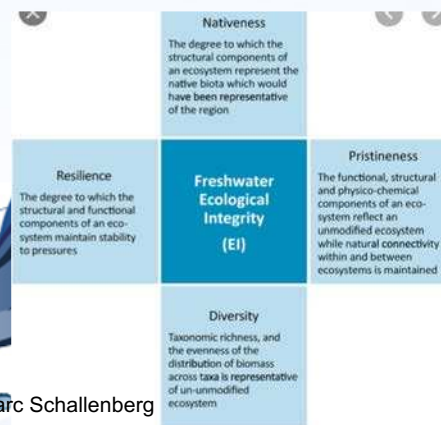
- “Quality of condition of being whole or complete”

- High degree of integrity of a site : “where the inherent potential for meeting site conservation objectives is realised, the capacity for self-renewal under dynamic conditions is maintained and a minimum of external management support is required”

✓ A useful concept for the stronger interpretation of WFD

- Bringing new ways of interpreting the obligations of the WFD by reinforcing the interlinkage between Water Law and Biodiversity Law in the context of climate change

- Promoting new scientific research related the functioning and interdependencies of different ecosystems & species



○ The legal framework under construction on ecosystem services et nature solutions based : opportunities & risks

✓ The growing mediatization of the controversial concept of Ecosystem service

- Services provided by ecosystem for human well-being MEA 2005
- The 4 categories of Ecosystem services Millennium Ecosystem Assessment
- Anthropocentric and economical bias and drifts
- Mapping & assessment of ecosystems & ecosystems services in EU

✓ The recent promotion of the concept of Nature's contribution to people

- Crucial contribution of healthy ecosystem for safe water supplies (...)
- A less anthropocentric approach including plural environmental ethic visions

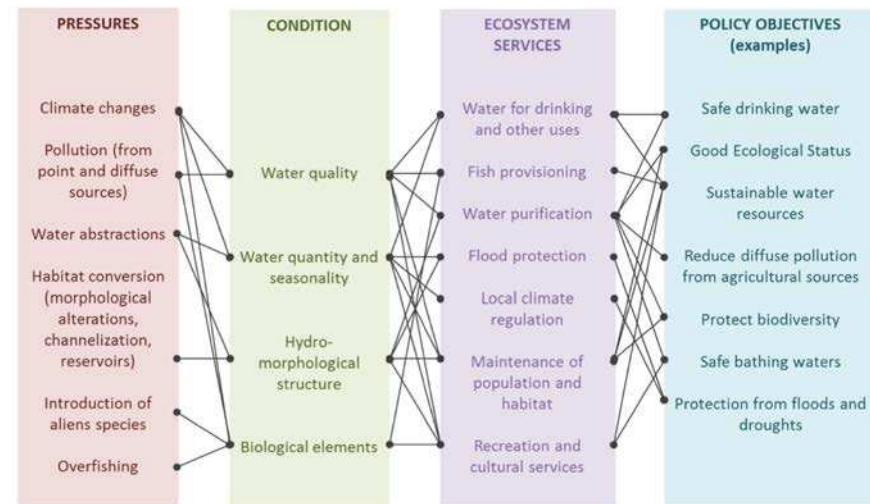


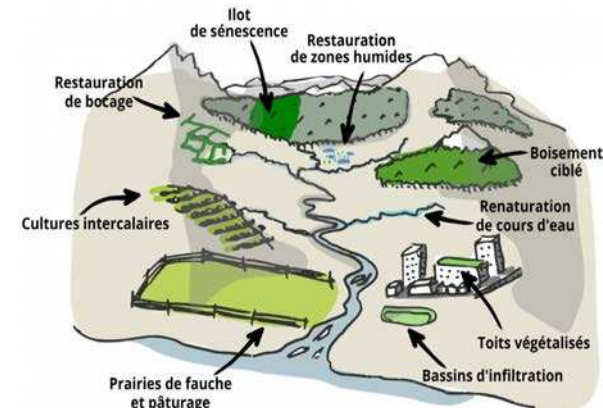
Figure 4.5a. Links between pressures, condition and ecosystem services in freshwater ecosystems (adapted from Grizzetti et al., 2016). The links are not exhaustive.

✓ The trend in favour the use of ecosystem-based solutions EBS

- *Defined as “Actions to protect, sustainably manage, and restore natural or modified ecosystems, that address societal challenges effectively and adaptively, simultaneously providing human well-being and biodiversity benefits » IUCN – see : Recent UN Report on EBS for water 2018*
- *The EU Strategy for green infrastructure 2013 « network of natural & semi-natural areas with others environmental features designed & managed to deliver a wide of ecosystem services »*
- *Promotion of EBS in Investment & Structural Funds of EU and EU research programmes for protection & restorations actions in the field of environmental concerns*
- *European Natural Water Retention Measures Platform*
- *The necessity of assess the opportunities & the risks of such EBS*



Water supply for New York City



Many thanks for your attention

Let's continue to imagine & act together



Yann Fournereau Brehat

nathalie.herve-fournereau@univ-rennes1.fr

