

# Legal Protection of Environmental Soil Quality in the European Union: Specific Reference to Contaminated Soil

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# Legal Protection of Environmental Soil Quality in the European Union: Specific Reference to Contaminated Soil

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# Legal Protection of Environmental Soil Quality in the European Union: Specific Reference to Contaminated Soil

## **I. Brief Introduction to the Topic**

# Legal Protection of Environmental Soil Quality in the European Union: Specific Reference to Contaminated Soil

## I. Introduction

- Soil has not been considered as a natural resource in itself until recently
- There are characteristics that differentiate it from water or atmosphere
- Soil has only been very vaguely protected by International and European Union Law
- Some States have partly protected it by means of National Law

# Legal Protection of Environmental Soil Quality in the European Union: Specific Reference to Contaminated Soil

## I. Introduction

Questions that must be raised:

- What does the word ‘soil’ mean or cover? Should the scientific concept and the legal concept of ‘soil’ be the same?
- Is there a need for an European Union legal framework for the protection of soil?
- If the answer is affirmative, how should it be done?

# Legal Protection of Environmental Soil Quality in the European Union: Specific Reference to Contaminated Soil

## **II. International Legal Framework on Environmental Soil Quality**

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## II. International Legal Framework on Environmental Soil Quality

### International Environmental Legal Instruments:

- Declaration of the United Nations Conference on the Human Environment (Stockholm declaration, UN)
- European Charter for the Protection and Sustainable Management of Soil (Council of Europe)
- The Convention on Wetlands (Ramsar Convention)
- United Nations Convention to Combat Desertification (UN)

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## II. International Legal Framework on Environmental Soil Quality

### 1) **Stockholm Declaration (recommendations 20, 21, 24 mainly):**

- International cooperation for the acquisition of knowledge and transfer of experience on soil capabilities, degradation, conservation and restoration
- Information exchange / Co-operative research
- The Food and Agriculture Organization of the United Nations and other international organizations:
  - World Soil Charter 1981, revised in 2015
  - Soil Map of the World



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II. International Legal Framework on Environmental Soil Quality

**2) European Charter for the Protection and Sustainable Management of Soil (Council of Europe):**

- Fragile natural resource essential to humankind
- Soil can include underground water, the subsoil, the sea bed and river beds (Ramsar Convention and national Law)
- Soil degradation is frequent and rapid, whereas the reconstitution process is as slow as ever, if not impossible
- ‘Polluter pays’ principle
- Inventory

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II. International Legal Framework on Environmental Soil Quality

**3) The Convention on Wetlands (Ramsar Convention):**

- Limited to the wetland surface
- Spanish and Basque legal framework on contaminated soil excludes wetlands expressly (Remember European Charter for the Protection and Sustainable Management of Soil)

**4) United Nations Convention to Combat Desertification:**

- Droughts (mainly Africa)
- The Proposal for a Soil Framework Directive didn't include this phenomenon

# Legal Protection of Environmental Soil Quality in the European Union: Specific Reference to Contaminated Soil

## II. International Legal Framework on Environmental Soil Quality

### Conclusions:

- We are aware of the problems
- There are no international binding regulations
- Soil continues undergoing degradation
- The European Union and the Member States have to take measures if they really want to prevent soil degradation

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## III. European Union Legal Framework on Environmental Soil Quality: Specific Reference to Contaminated Soil

### III.1. European Union Treaties

### III.2. European Union Environment Action Programmes

### III.3. Legal concept of 'soil' in the European Union Law and Jurisprudence

#### III.3.A. Legal concept of 'soil' in the European Union Law

#### III.3.B. Legal concept of 'soil' in the European Union Jurisprudence

### III.4. Proposal for a Soil Framework Directive

### III.5. Soil Protection in Specific Areas of the European Union

# Legal Protection of Environmental Soil Quality in the European Union: Specific Reference to Contaminated Soil

## **III. European Union Legal Framework on Environmental Soil Quality: Specific Reference to Contaminated Soil**

### **III. I. European Union Treaties**

# Legal Protection of Environmental Soil Quality in the European Union: Specific Reference to Contaminated Soil

## III.1. European Union Treaties

Treaty of Lisbon: In line with the previous treaties:

- Shared competence: the environment (art. 2.C.2.e)
- Ordinary legislative procedure
- Exception: Land use, town and country planning (art. 192.2.b Treaty on the Functioning of the European Union)
  - Especial legislative procedure: Unanimity (waste excluded)
  - The Proposal of Directive for the Protection of Soil was being elaborated by the ordinary legislative procedure

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**III.2. European Union Environment Action  
Programmes**

# Legal Protection of Environmental Soil Quality in the European Union: Specific Reference to Contaminated Soil

## III.2. European Union Environment Action Programmes

- Environment Action Programmes:
  - Since 1973, but soil protection since the fifth programme (1993):
    - The EU shall promote soil's sustainable management (but no concretion)
  - Sixth programme:
    - Soil is a finite, non-renewable resource
    - Actions against erosion, contamination, sustainable use, and desertification must be taken
    - Adoption of a thematic strategy covering soil protection



# Legal Protection of Environmental Soil Quality in the European Union: Specific Reference to Contaminated Soil

## III.2. European Union Environment Action Programmes

### **Seventh Environment Action Programme 2015-2020:**

It recognises expressly soil degradation:

- Soil is still suffering from: degradation, fragmentation, desertification, erosion by water, contamination, sealing and unsustainable use
  - More than half a million sites throughout the Union are thought to be contaminated
  - Every year more than 1, 000 km<sup>2</sup> of land are taken for housing, industry, transport or recreational purposes
- All those phenomena compromise soil functions and affect the quality of natural resources (not only soil)
- They also have a negative economic, social and health impact

# Legal Protection of Environmental Soil Quality in the European Union: Specific Reference to Contaminated Soil

## III.2. European Union Environment Action Programmes

### **Seventh Environment Action Programme 2015-2020:**

- Varying levels of progress have been made at Member State level to ensure soil protection
  - Spanish Law no. 22/2011 and Basque Law no. 4/2015
- However, progress with risk-based and other remediation efforts is uneven, and results and Union level reporting are limited
  - Is there a need for a Directive?
- The Commission submitted a proposal for a Directive establishing a framework for the protection of soil and amending Directive 2004/35/EC
  - It was withdrawn in 2015

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III.2. European Union Environment Action Programmes

**Seventh Environment Action Programme 2015-2020:**

Targets: The 7th EAP shall ensure that by 2020:

- Land is managed sustainably in the Union
- Soil is adequately protected
- The remediation of contaminated sites is well underway

# Legal Protection of Environmental Soil Quality in the European Union: Specific Reference to Contaminated Soil

## III.2. European Union Environment Action Programmes

### **Seventh Environment Action Programme 2015-2020:**

By means of increasing efforts to:

- reduce soil erosion
- increase soil organic matter
- remediate contaminated sites
- enhance the integration of land use aspects into coordinated decision-making

Legal Protection of Environmental Soil Quality in the European Union:  
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III.2. European Union Environment Action Programmes

Conclusions:

- The European Union is aware of the situation of soil's quality degradation
- They have set some measures that have to be taken by 2020
- The proposal for a Directive has been withdrawn
- What should be done next?

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**III.3. Legal Concept of ‘Soil’ in the European Union Law and  
Jurisprudence**

### III.3. Legal Concept of ‘Soil’ in the European Union Law and Jurisprudence

## **Legal concept of ‘soil’ in the European Union Law:**

- There is no full definition of ‘soil’
- Some characteristics can be deduced from sectoral legal instruments
  - Directive 2008/98/EC on waste
  - Directive 86/278 - soil protection when sewage sludge is used in agriculture
  - Directive 2010/75/EU 24 November 2010 on industrial emissions

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III.3. Legal Concept of ‘Soil’ in the European Union Law and Jurisprudence

**1) Directive 2008/98/EC on waste (Waste Framework Directive):**

- Uncontaminated excavated soils should be considered in accordance with the definition of waste and the provisions on by-products or provisions on the end of waste status under this Directive
  
- The following shall be excluded from the scope of this Directive [art. 2.1] :
  - b) land (in situ) including unexcavated contaminated soil and buildings permanently connected with land
  - (c) uncontaminated soil and other naturally occurring material excavated in the course of construction activities where it is certain that the material will be used for the purposes of construction in its natural state on the site from which it was excavated



Legal Protection of Environmental Soil Quality in the European Union: Specific  
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III.3. Legal Concept of 'Soil' in the European Union Law and Jurisprudence

**2) Directive 86/278 - soil protection when sewage sludge is used in agriculture:**

- No definition of soil
- It sets rules on how farmers can use sewage sludge as a fertiliser, to prevent it from harming the environment and human health by compromising the quality of the soil or surface and ground water (art. 8)
- Annex II B rules how to proceed with Soil Analysis

III.3. Legal Concept of 'Soil' in the European Union Law and Jurisprudence

**3) Directive 2010/75/EU 24 November 2010 on  
industrial emissions (art. 1.21):**

- 'soil' means the top layer of the Earth's crust situated between the bedrock and the surface
- The soil is composed of mineral particles, organic matter, water, air and living organisms

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III.3. Legal Concept of ‘Soil’ in the European Union Law and Jurisprudence

**III.3.2. Legal Concept of ‘Soil’ in the European Union  
Jurisprudence:**

- No specific ruling on what ‘soil’ is
- C-1/03 - Van de Walle and Others, Judgment of the Court (Second Chamber) of 7 September 2004
  - If the soil is polluted with hydrocarbons it must be legally treated as waste
  - Then: What legal framework applies to it? Legal framework on waste or on contaminated sites (national Law)?
  - After Directive on Waste only **excavated unpolluted soil** can be interpreted that way

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III.3. Legal Concept of 'Soil' in the European Union Law and Jurisprudence

Conclusion:

- There is no real definition of what legally speaking soil is
- The different legal instruments provide no clear definition (even, sometimes, the tips provided are confusing)
- The first thing to be done if we want to protect soil is to provide a legal definition so that everybody can understand what exactly is or not being protected

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**III.4. Proposal for a Soil Framework Directive**

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III.4. Proposal for a Soil Framework Directive

Although it is no longer in force it is interesting to analyse it:

- Why should it be a Directive?
- Main provisions:
  - Definition of soil
  - Anthropogenic and non-anthropogenic pollution
  - Rehabilitation until actual use
  - Long periods to implement the measures Inventory
  - Reports

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III.4. Proposal for a Soil Framework Directive

- Unimportant differences in relation to Basque and Spanish legal framework
  - Non-anthropogenic contamination
- A legal framework would provide a minimum of protection for the whole European Union
  - Some countries have regulated soil protection but only partially
  - Some others don't have
  - Soil degradation, contamination mainly, causes transnational effects (food, water)

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**III.5. Soil Protection in Specific Areas of the European Union**



### III.5. Soil Protection in Specific Areas of the European Union

#### 1) **Alpine Convention of 7 November 1991:**

- A macro-regional strategy for the Alps European Parliament resolution of 23 May 2013 on a macro-regional strategy for the Alps (2013/2549(RSP))

#### 2) Directive 2008/56/EC of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (**Marine Strategy Framework Directive**)

- Seabed and subsoil

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## **IV. Considerations and Conclusions**

## IV. Considerations and Conclusions

- Soil is a natural resource like water or the atmosphere
- Its degradation may have transnational impacts such as on food or on water
- There is a need for providing a legal framework in the EU to protect soil to some extent
- The Directive appears to be the most adequate legal instrument (flexibility)

## IV. Considerations and Conclusions

- The Strategy, the Environmental Impact Assessment and other reports are done, they only need to be updated
- A clear definition of soil should be provided in the Directive to clarify which legal framework applies to each
- The Directive should set regulations to protect soil not only from contamination but also from other phenomena, such as erosion or desertification

# Thank you very much for your attention

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