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Agenda item 7: Technical Guidelines and related Assessments

Legal Advice on the Updated Guidelines on Management of Dredged Material and on Placement for Artificial Reefs

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Explanatory Note by the Secretariat

1. The Contracting Parties to the Barcelona Convention at their 19th meeting in Athens, Greece, in 2016 requested the Secretariat to update the guidelines adopted in the framework of the Dumping Protocol to the Barcelona Convention, taking into account the specificities of the Mediterranean region, the status of the implementation of the Dumping Protocol to the Barcelona Convention as well as the need to ensure a full streamlining of GES and its targets based on the ecosystem approach.
2. In that respect, the Secretariat prepared Updated Guidelines on Management of Dredged Material, and on Placement for Artificial Reefs, which were submitted to and reviewed by the Regional Meeting of Experts to review the Draft Desalination and Dumping Protocol Guidelines, held in Loutraki, Greece, on 4-6 April 2017.
3. The Meeting reviewed the Guidelines, and recommended their submission to the MED POL Focal Points Meeting, with the appropriate changes.
4. It further requested the Secretariat to prepare for submission to the MED POL Focal Points Meeting a legal note, clarifying from a legal perspective two issues raised during the Experts Meeting in April 2017, as follows:
 - (a) whether placement should be subject to permitting; and
 - (b) whether a permit should be issued for confinement and whether it is a placement or a dumping related activity.
5. Therefore, the present note, prepared by the Secretariat, provides a legal view on these aspects and consists of four Sections, as follows:
6. Section 1 provides a legal analysis of the dumping regime under the Dumping Protocol to the Barcelona Convention.
7. Section 2 provides a legal analysis of the placement regime under the Dumping Protocol to the Barcelona Convention.
8. Section 3 provides a legal analysis of whether placement should be subject to permitting.
9. Section 4 provides the legal background for the characterisation of confinement

Introduction

1. This paper addresses the following assignments given to the Secretariat by the Regional Meeting of Experts to review the Draft Desalination and Dumping Protocol Guidelines (Loutraki, Greece, 4-6 April 2017) in its Conclusions and Recommendations:

- (a) Updated Guidelines on Artificial Reefs: “to undertake a legal analysis for further discussion by the MED POL Focal Points meeting in May 2017 whether placement should be subject to permitting and provide advice on the respective legal basis”;
- (b) Updated Guidelines on Dredged Materials: “The meeting agreed with the proposed content of the paragraph on confinement and cleared from the technical point of view. It decided to leave this paragraph in square brackets for further discussion by the MED POL Focal Points meeting in May 2017 following the submission by the Secretariat of a legal analysis whether a permit should be issued for this activity and whether it is a placement or a dumping related activity”.

Legal framework

1. Dumping regime under the Dumping Protocol

2. Article 3.3 of the Protocol for the Prevention and Elimination of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft or Incineration at Sea, 1995 (Dumping Protocol), defines “dumping” as: “(a) any deliberate disposal at sea of wastes or other matter from ships or aircraft, (b) any deliberate disposal at sea of ships or aircraft, (c) any deliberate disposal or storage and burial of wastes or other matter on the seabed or in the marine subsoil from ships or aircraft”.

3. Under Article 4.1 of the Dumping Protocol, the dumping of wastes or other matter is prohibited, with the exception of those listed in paragraph 2 of that Article, i.e. :

- (a) dredged material;
- (b) fish waste or organic materials resulting from the processing of fish and other marine organisms;
- (c) vessels, until 31 December 2000;
- (d) platforms and other man-made structures at sea, provided that material capable of creating floating debris or otherwise contributing to pollution of the marine environment has been removed to the maximum extent, without prejudice to the provisions of the Protocol concerning Pollution Resulting from Exploration and Exploitation of the Continental Shelf, the Seabed and its Subsoil; and
- (e) inert uncontaminated geological materials the chemical constituents of which are unlikely to be released into the marine environment.

4. According to Article 5 of the Dumping Protocol, “The dumping of the wastes or other matter listed in Article 4.2 requires a prior special permit from the competent national authorities”. Under Article 6 of the Protocol, “the permit referred to in Article 5 shall be issued only after careful consideration of the factors set forth in the Annex to this Protocol or the criteria, guidelines and relevant procedures adopted by the meeting of the Contracting Parties (...)”.

5. The factors listed in the Annex to the Protocol refer to: “Characteristics and Composition of the Matter”, “Characteristics of Dumping Site and Method of Deposit” and “General Considerations and Conditions”. As regards the relevant guidelines adopted by the meeting of the Contracting Parties for those wastes or other matter listed in Article 4.2, these are: (1) Guidelines for the management of the dredged material, 1999; (2) Guidelines for the management of fish waste or organic materials

resulting from the processing of fish and other marine organisms, 2001; (3) Guidelines for the dumping of platforms and other man-made structures at sea, 2003; and (4) Guidelines for the dumping of inert uncontaminated geological materials, 2005.

2. Placement regime under the Dumping Protocol

6. “Placement of matter for a purpose other than the mere disposal thereof” is specifically excluded from the definition of “dumping” under Article 3.4(b) of the 1995 Dumping Protocol, “provided that such placement is not contrary to the aims of this Protocol”. This definition restates verbatim the definition of placement under Article 3.4(b) of the Protocol for the Prevention and Elimination of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft, 1972 (1972 Dumping Protocol).

7. Under the 1995 Dumping Protocol the placement of matter is permitted, once the activity, as well as the matter itself, meets the criteria established under Article 3.4(b), i.e.: (1) the placement is for a purpose other than the mere disposal, and (2) the placement is not contrary to the aims of the Protocol.

8. The aims of the 1995 Dumping Protocol are:

- (a) “protecting the marine environment from this danger [the danger posed to the marine environment by the dumping or incineration of wastes or other matter]” (Preamble); and
- (b) “(...) to prevent, abate and eliminate to the fullest extent possible pollution of the Mediterranean Sea caused by dumping from ships and aircraft or incineration at sea” (Article 1).

9. Article 5 of the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, 1995 (Barcelona Convention) follows the same wording as Article 1 of the 1995 Dumping Protocol, by requesting Contracting Parties to take all appropriate measures “to prevent, abate and to the fullest possible extent eliminate pollution of the Mediterranean Sea Area caused by dumping from ships and aircraft or incineration at sea”.

10. Specific obligations under the 1995 Dumping Protocol should be read in conjunction with the General Obligations laid down in Article 4 of the Barcelona Convention. This includes the obligation of the Contracting Parties to:

“take all appropriate measures in accordance with the provisions to this Convention and those Protocols in force to which they are party to prevent, abate, combat and to the fullest possible extent eliminate pollution of the Mediterranean Sea Area and to protect and enhance the marine environment in that Area, so as to contribute towards its sustainable development”.

11. In order to protect the environment and contribute to the sustainable development of the Mediterranean Sea Area, the Contracting Parties are required to apply inter alia the precautionary principle. The Guidelines should draw particular attention to these aims.

3. Development of Guidelines concerning placement of matter for a purpose other than the mere disposal

Analysis

12. Article 5 of the Dumping Protocol deals exclusively with wastes or other matter listed in Article 4.2, i.e. those wastes or other matter the dumping of which is not prohibited under the Dumping Protocol. For the disposal of those wastes or other matter listed in Article 4.2, Article 5 establishes a permit system. There is no such requirement in the Dumping Protocol concerning placement of matter for a purpose other than the mere disposal thereof, which is excluded from the

definition of dumping provided that such placement is not contrary to the aims of the Dumping Protocol (Article 3.4(b)).

13. Against this background, it could be argued that full-fledged Guidelines putting in place a permitting system for placement activities would be beyond the remit of the Dumping Protocol. However, firstly, although placement is excluded from the definition of dumping, it should not be seen outside the context of the Dumping Protocol: the same level of protection of the Mediterranean Sea Area should be achieved both when considering dumping and placement activities.

14. Secondly, in the same line of reasoning, the requirements for placement under Article 3.4(b) could not be less stringent than those for the dumping of wastes or other matter listed in Article 4.2. Whereas the dumping of wastes or other matter listed in Article 4.2 requires a permit, under Article 3.4(b) placement activities might be conducted without a permit. This could lead to the circumvention of the provisions of the Dumping Protocol, by using placement activities as an avenue for the disposal at sea of wastes or other matter without a permit. This situation would be not aligned at all with the aims of the Dumping Protocol.

Conclusion

15. In light of the analysis above and on the basis of Article 3.4(b) of the Dumping Protocol, under which placement of matter for a purpose other than mere disposal thereof is allowed, “provided that such placement is not contrary to the aims of this Protocol”, it is recommended that a permitting system for placement activities is put in place by means of the present draft Guidelines. In doing so, the same level of protection of the Mediterranean Sea Area is established against dumping and placement activities, thus avoiding that placement could be used to circumvent the provisions of the Dumping Protocol, by utilizing placement as a way to dispose at sea wastes or other matter without a permit. This would be in contravention of the aims of the Dumping Protocol. For these reasons, and within the framework of Article 18 of the Barcelona Convention, whereby Meetings of the Contracting Parties have the authority “to consider and undertake any additional action that may be required for the achievement of the purposes of this Convention and the Protocols”, COP 14 decided to establish common standards to regulate the placement activities through the adoption in 2005 of the Placement Guidelines and COP 19 decided on their update in 2016 to streamline GES and targets and take into account the recent development under the London Dumping Protocol.

4. Development of Guidelines concerning dredged material

Analysis

16. The paragraph on confinement of the draft updated Guidelines on Dredged Materials reads as follows:

[Confined disposal means that the dredged material is placed in an engineered containment structure, that is, within dikes or bunds, or in natural or constructed pits, or borrow pits. This isolates the material from surrounding waters or soils during and after disposal. Other terms used in the literature for this type of disposal include “confined disposal facility” (CDF), “diked disposal site” and “containment area”. CDFs may be constructed in open waters (known as island CDFs), at near-shore sites or on land. The function of CDFs is to retain the dredged material solids whilst releasing the carrier water. For facilities receiving contaminated material, an additional objective is to provide the efficient isolation of contaminants from the surrounding area. To achieve this, depending on the degree of intended isolation, CDFs may be equipped with a complex system of control measures such as surface covers and liners, treatment of effluent, surface runoff and leachate.].

17. Confined disposal is one of the options for dredged material management, which is an umbrella term used to describe a variety of handling methods of dredged materials including confinement, as the draft Guidelines specify in its Section II: Definition of Terms.

18. Dredged material has been listed in Article 4.2 of the Dumping Protocol as being permitted to be dumped at sea, as an exception from the general prohibition from dumping in Article 4.1. “Placement of matter for a purpose other than the mere disposal thereof” is specifically excluded from the definition of “dumping” under Article 3.4(b) of the 1995 Dumping Protocol, “provided that such placement is not contrary to the aims of this Protocol”.

19. Should the confinement of dredged material be considered as “dumping”, as defined in Article 3.3 of the Dumping Protocol, this activity would require a permit according to Article 5 of the Protocol. Should the confinement of dredged material be considered as “placement”, this activity would also require a permit, following the reasoning and conclusion in paragraphs 12 to 15 above as regards placement.

20. Furthermore, independently of whether confinement of dredged material is considered as “dumping” or “placement” within the Dumping Protocol (See Article 4 and Article 3.4(b) respectively), confinement is an activity that should be assessed on case-by-case basis in order to ensure that it complies with the objectives of the Barcelona Convention (Article 4) and the Dumping Protocol (Article 1) of protecting the environment and contributing to the sustainable development of the Mediterranean Sea Area. This assessment process should be designed to provide information for permitting purposes, being the permit a fundamental tool for managing confinement of dredged material.

Conclusion

21. When dealing with dredged material management options, being confinement one of the options, the key point to discuss regarding dredged material is whether the “dumping” (as defined in Article 4 of the Dumping Protocol) or “placement”(as defined in Article 3.4(b) of the Dumping Protocol) of dredged material would ensure that the objectives of the Dumping Protocol (Article 1) and the Barcelona Convention (Article 4) are met, thus protecting the environment and contributing to the sustainable development of the Mediterranean Sea Area. This would require a case-by-case assessment, under which the permit is a fundamental tool for managing confinement of dredged material, by setting the terms and conditions under which the confinement may take place as well as providing the framework for assessing and ensuring compliance.