

When the legal, scientific and technical sectors work together

2

Technical aspects involved in dealing with ecological damage

- 34 ■ Introduction
- 36 ■ The role of scientific and technical legal experts in civil and criminal cases
- 38 ■ Differentiating between legal experts, knowledgeable persons and witnesses
- 40 ■ When does an expert take part in a judicial trial?
- 42 ■ Onema and prosecutors, an example of increasingly well defined conditions for cooperation
- 47 ■ Conclusion
- 48 ■ Summary





Introduction

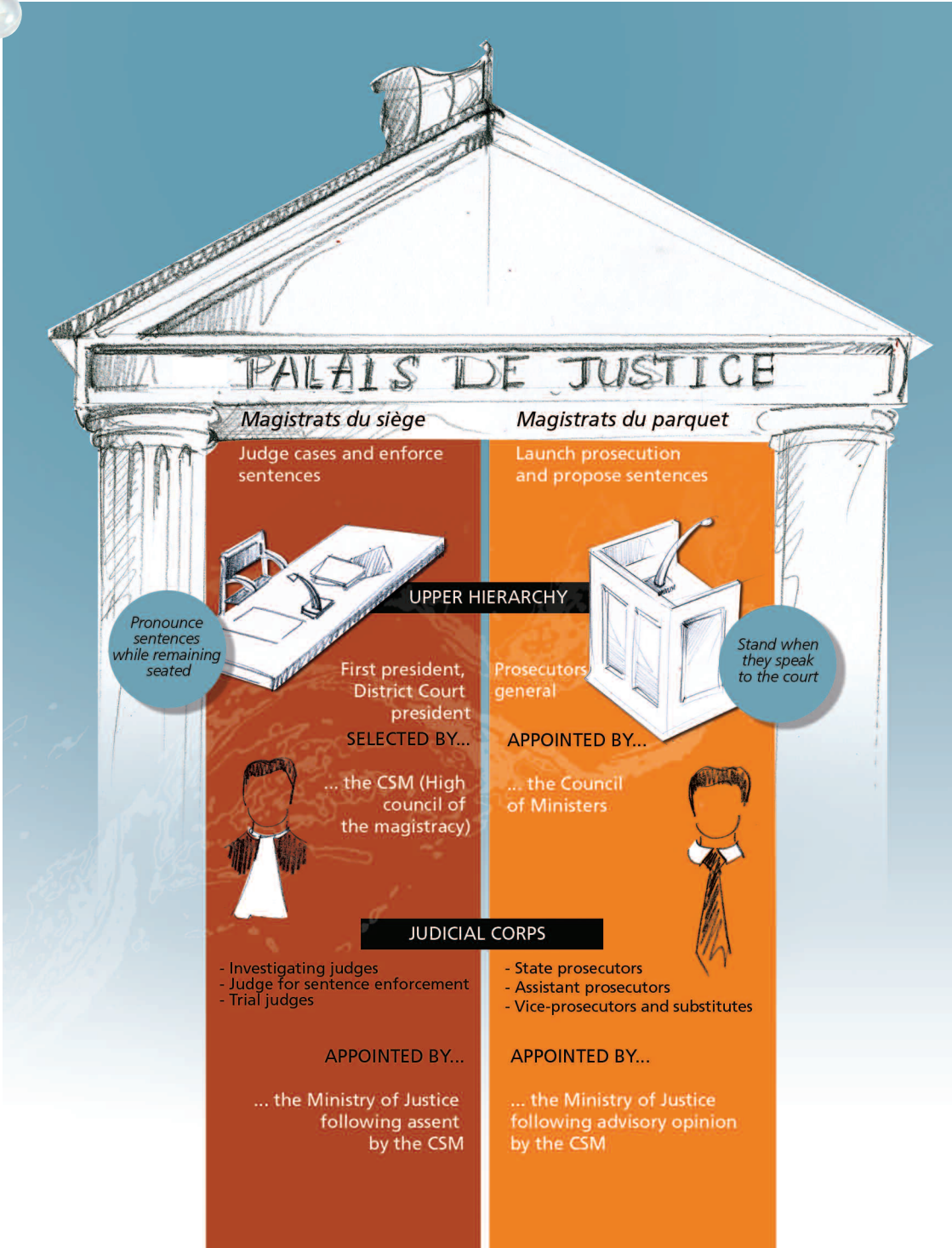
The technicalities inherent in the law on water and aquatic environments means that the legal system must work with the scientific and technical communities, notably when attempting to establish proof of damage, a tort and liability. The *magistrats du siège*, i.e. primarily the civil and criminal judges, whom we will focus on henceforth, are always confronted with the need to justify their legal decisions. Consequently, they attempt to use clear and accepted concepts, facts and methods in order to reinforce their “intimate conviction” and to express this subjective reality that serves to justify their final decision in a manner as eloquent as possible. A judge needs proof of the facts on which to base his decision. A judge also needs to understand the situation and to grasp the ecological, social and economic impacts on society. The above is also true for the *magistrats du parquet*, i.e. the State prosecutors, who need to understand the issues surrounding ecological damage before deciding to prosecute or to close the case without further action. The judges and prosecutors generally have a firm grasp on the social and economic aspects prior to making a decision, but that is not always the case concerning the ecological aspects (see Figure 9 and Box 7). That is why both judges and prosecutors call on scientific and technical experts, often having a wide array of qualifications, at precise moments in a case, according to increasingly well defined conditions for cooperation, as is shown by the guidelines set for prosecutors in the field of environmental damage.

Box 7

What is a magistrate? The *magistrats du siège* and the *magistrats du parquet*

In terms of their statutory position, judges are part of the judicial corps which includes the *magistrats du siège* (judges) and the *magistrats du parquet* (State prosecutors), as well as the magistrates in the central administration of the Ministry of Justice, a fact that is often forgotten. All of them are governed by the provisions of Ordinance 58-1270 (22 December 1958) on the organic law for the judiciary, which refers, for the most part, to the rules governing public services. This means that the *magistrats du siège* and the *magistrats du parquet* all fall under the same judicial status, even though they have radically different roles. The mission of a *magistrat du siège* is to judge impartially and in complete independence. The mission of a *magistrat du parquet* is to enforce public policies. The State prosecutor represents the State before all the jurisdictions that are part of the judicial system (see Figure 9).

Figure 9



What is a magistrate?



The role of scientific and technical legal experts in civil and criminal cases

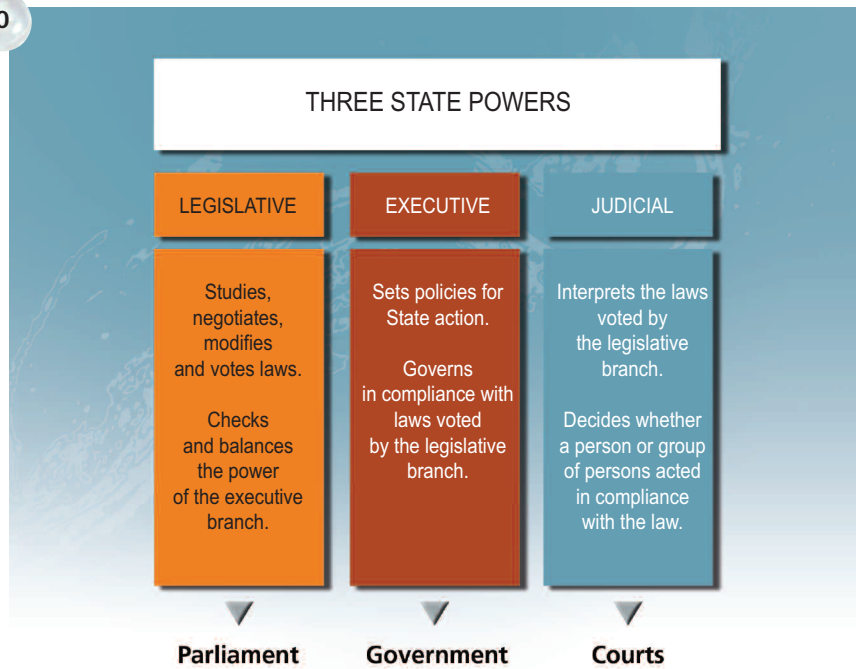
The collaboration between the legal sector and the scientific and technical communities is organised on the basis of **guidelines for methods, procedural rules** enabling the various stakeholders to improve their cooperation, and what is called the **expertise procedure**, a term covering multiple activities that, though complementary, differ significantly. When discussing the links between the legal sector and the scientific and technical communities, it is important to note that the use of expert knowledge may intervene a different times that each correspond to various juridico-political situations that it is important to distinguish.

The use of technical and scientific experts during the drafting or the implementation of a law is organised in the framework of a procedure called **expertise in view of a political decision**, i.e. a procedure intended to inform the authorities in charge of making a political decision (legislators, political decision-makers) (Majone, 1996; Muller, 1995; Granjou, 2003). In this framework, the expert, in light of his particular knowledge (not necessarily scientific) based on his experience (not the same as his length of service), is called on by the competent authority to provide information, in a neutral, independent and impartial manner, in view of a decision. This type of expertise is called on during the formulation, modification and implementation of a law, i.e. to inform the executive or legislative powers in view of making a political decision (see Figure 10). It will not be developed here.

On the other hand, the collaboration between the legal sector and the scientific and technical communities may also serve to inform the judicial authorities according to specific conditions when a judge requires assistance in establishing the proof of ecological damage, of a tort and of a liability. In this case, the judge brings into play a procedure called **expertise in view of a legal decision** (see Box 8). The mission of an expert, who may act in a number of roles that will be examined below, is to assist the judge with technical and/or scientific knowledge in a field where scientific certainty is often lacking. For example, how can a causal link be established between pollution in a river and a nearby farm when the pollution has a nonpoint-source making it difficult to assign liability. The expert, **appointed by the judge**, proceeds with tests, observations and analyses that help the judge in his investigative role and consequently in **forming his “intimate conviction”**.

Expertise in view of a legal decision is therefore a means of overcoming the technicality of the law on water and aquatic environments and consequently a **constituent element in environmental litigation** in both the jurisdictional spheres (see Figure 10 and Box 8). As a means of scientific and technical investigation, it is required by judges in view of making a decision and rendering a verdict.

Figure 10



The separation of powers in France.

Box 8

The major texts concerning judicial expertise

General framework

Law 71-498 (29 June 1971) on judicial experts.

Decree 2004-1463 (23 December 2004) on judicial experts.

Expertise in criminal cases

Code of criminal procedure, articles 156 to 169-1.

Expertise in civil cases (decision, operations, opinions, etc.)

Code of civil procedure, articles 263 to 284-1.

Expertise in administrative cases (designation, operations, report, costs, etc.)

Code of administrative procedure, articles R621-1 to R621-14.

Costs and expenses

Code of administrative procedure, articles R761-1 to R761-5.



Differentiating between legal experts, knowledgeable persons and witnesses

During a criminal case, it is the **exclusive right of the judge** to initiate the expertise procedure as a means of scientific and technical investigation. Consequently, no one else is entitled to do so. This is an option available to French judges due to a specific aspect of French litigation procedure, the **inquisitorial system** whereby the judge plays an active role in conducting the legal investigation. In criminal law, for example, an investigating judge may launch the procedure during the investigation. The investigation is a step in the criminal procedure during which the investigating judge undertakes a number of acts to find information (judicial inquiry). In civil and administrative law, the judge may launch the procedure on his own or at the request of a party in the proceedings to consolidate the available information. A judge is never obliged to have recourse to the procedure, however in the field of environmental litigation, it is very common because the technicality of environmental law means the judge must assess highly diverse sets of facts and information (Clément, 2011). This technicality is such that some countries have even set up special courts for environmental matters, e.g. Finland. **It is also the judge who selects the type of expertise.** He can call on scientific and technical experts that are either judicial experts, knowledgeable persons or witnesses.

■ A **judicial expert** is a particular type of expert used in view of a legal decision (Decree 2004-1463 (23 December 2004) on judicial experts. Judicial experts are named in official lists drawn up following a selection procedure based on the person's demonstrated knowledge. The lists operate according to a "recurrent" principle (Cour de Cassation, 2007). The lists put a judge in a position to work with experts who are familiar with the legal sector and understand the *modus operandi*, thus ensuring compliance with procedures and the independence of the judicial power. A judicial expert is therefore a professional (a researcher, a scientist working in a public agency or service, a technician, etc.) who, temporarily, sets aside the standards applicable in his sector and adopts those specific to the legal procedure. The activity as a judicial expert is not a profession. It is a **status** that requires special knowledge and exceptional intellectual honesty. An expert does not act for personal gain, but with the general interest in mind. **According to the *Cour de Cassation*, the expert receives his "status according to the conditions set by law"** (see Box 8).

In addition to judicial experts and to **ensure correct functioning of the system of justice in a highly technical field**, the Ministry of Justice recommends that representatives of the State services and/or the agents who reported on the environmental violations take part in the criminal proceedings. The agents can provide the court with precise information on the context and the relevant issues concerning the regulations, as well as information on the preventive measures taken. They can also supply information that is essential for complementary penalties and suitable remedial measures.

It is precisely to ensure correct functioning of the system of justice that environmental inspectors assist the court. They act either as knowledgeable persons or as witnesses.

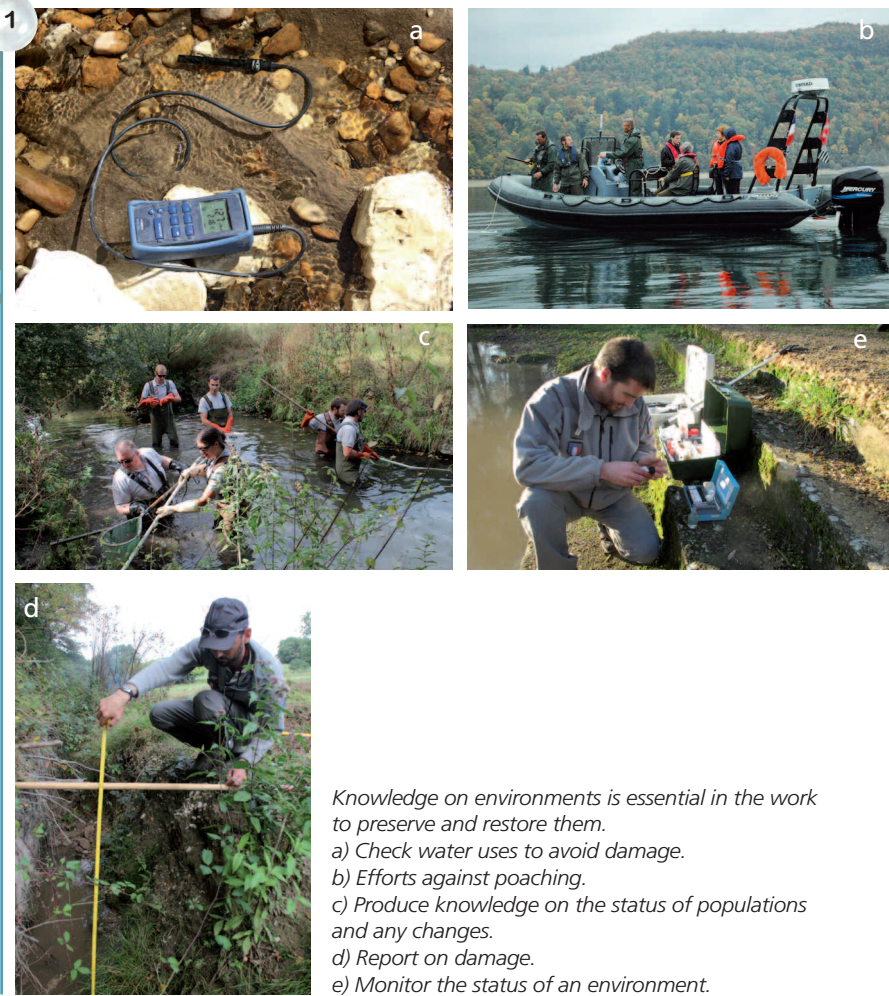
■ A **knowledgeable person** is not a judicial expert. That being said, the person is nonetheless an expert assisting the court prior to its decision. When environmental inspectors are summoned as knowledgeable

persons by prosecutors, they are **simply invited to speak before the court**. Contrary to a witness (see below), an environmental inspector is summoned in his capacity as a **qualified person** (Art. 442-1, CCP). He receives a simple letter containing the **official notice** of the summons. However, this does not mean that he will necessarily speak during the procedure. The prosecutor may wish to have qualified persons in **court**, but he is not required to call on them. Similar to judicial experts, **a knowledgeable person must be fully aware of legal customs and procedures**. A knowledgeable person swears to provide the technical assistance required to fully understand the facts and legal issues, but under no circumstances may he say anything that may in any manner influence the decision on the guilt of the defendants, because that would be sufficient justification to simply annul the trial (see Figure 11).

■ Environmental inspectors may also be called as **witnesses**. In this case, the summons is served by an officer of the judicial police or by a court bailiff. When the inspector is invited to speak, he must swear to say the truth, the whole truth and nothing but the truth prior to beginning. This oath-taking is not a simple detail. It indicates full compliance with the procedural rules of the legal system. In addition, the environmental inspector **may not be in the courtroom** during the initial interrogation of the defendants. This procedure ensures greater objectivity, but is more cumbersome.

In the two latter cases (knowledgeable persons and witnesses), environmental inspectors serve as **persons assisting the court in its work**. They provide the court with non-judicial knowledge, i.e. other means, in addition to judicial techniques, of preparing and justifying the decision of the judge (Dumoulin, 2000). To that end, they reply clearly and simply to the questions in order to enhance the understanding of the judge and assist him in grasping the general context of the public policy that the inspectors participate in enforcing.

Figure 11



© a, d, e, Michel Bramard - AFB
b, Richard Alexandre - AFB
c, Céline Goupil - AFB

Knowledge on environments is essential in the work to preserve and restore them.
a) Check water uses to avoid damage.
b) Efforts against poaching.
c) Produce knowledge on the status of populations and any changes.
d) Report on damage.
e) Monitor the status of an environment.



When does an expert take part in a judicial trial?

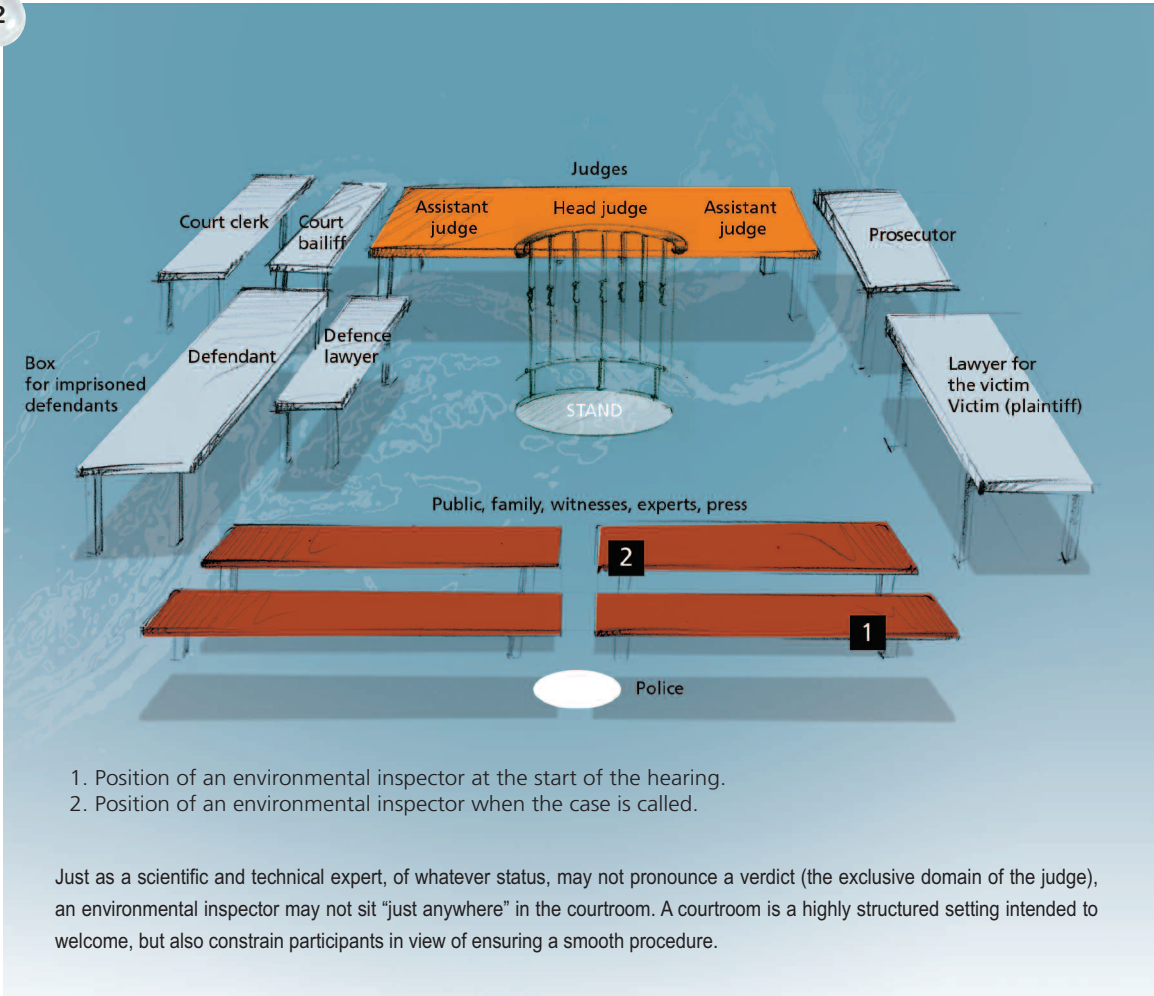
An expert may take part in the trial as a judicial expert, a knowledgeable person or a witness, but in all cases he intervenes at a precise step in the procedure.

In the criminal case that we will use here as an example, the prosecutor must justify the accusation by providing proof, obtained during the investigation, concerning the guilt of the defendant being prosecuted for social disorder and the damage inflicted on the general public interest and on social values. An environmental inspector plays an important role in gathering the evidence used in reporting the violation and in providing essential information on, for example, the impact of pollution and the related issues. The conduct of the expert must be faultless to ensure his neutrality and to that end, the prosecutor invites him to intervene at a precise moment in the procedure (see Figure 12).

■ A criminal case takes place in three steps, the investigation, the contradictory procedure and the conclusion.

1. The **investigation** is the phase during which the facts are presented to the court. The judge questions the defendant at the stand and may also call the victim(s), if present, and the experts to the stand. This is precisely the moment during the trial that the environmental inspectors intervene, either as knowledgeable persons or as witnesses. At the end of this step, the investigation is said to be closed.
2. The **contradictory procedure** begins with the request for remediation by the victim(s) who may or may not have decided to intervene as a plaintiff in the case in order to receive civil damages. It is also at this point that the judge invites the prosecutor to defend the interests of society. The prosecutor stands to present the accusation. Following that, it is the turn of the defence lawyer to take the floor if the defendant decided to call on the services of a lawyer (not mandatory in criminal cases). Finally, the judge offers the defendant a chance to make comments and provide any further information.
3. During the **conclusion**, the judge sets a date for the verdict, which may be immediate or at some later time.

Figure 12



The positions of participants in a trial. See P. Boyer - AFB.

Opposite the public, on the bench, are seated the judge(s) who will render the verdict. To one side are the prosecutor(s) representing the State. On the other is the court clerk who holds the minutes of the case (not including the verdict) and notes any significant events during the case. Depending on the layout of the room, the prosecutor and clerk may find themselves on one side or the other.

In the middle of the bench, the head judge organises the hearing, conducts the debates, asks questions and generally decides on how the case should progress. The lawyers, with or without their clients, are seated at tables between the public and the bench. In general, the defendant and his lawyer are seated to one side and the victim (plaintiff) and his lawyer to the other. Environmental inspectors occupy two spots, the first at the start of the hearing and the second when the case is called.





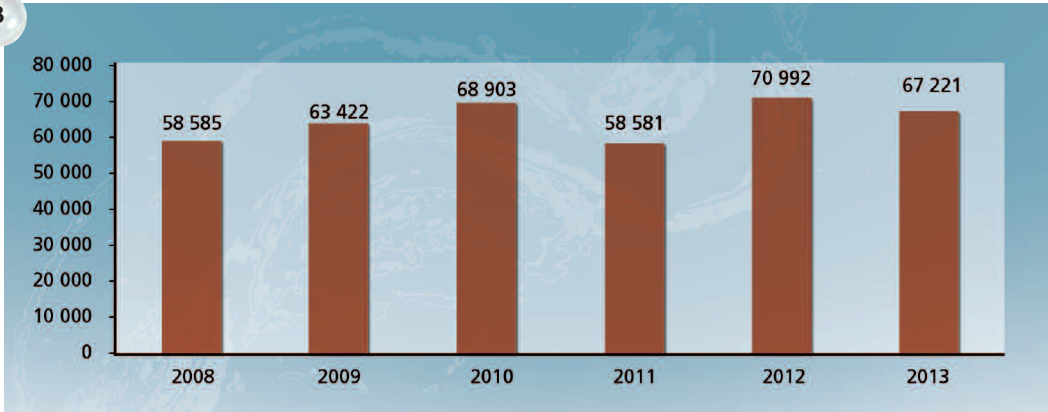
Onema and prosecutors, an example of increasingly well defined conditions for cooperation

It is not always easy for judges and prosecutors to discuss cases with scientific and technical experts. Both judges and prosecutors train in the human and social sciences which bring into play rationales and a terminology that differ significantly from those used by the earth and life sciences (and vice versa). In addition, the theoretical backgrounds and the work methods and environment differ greatly between jurists and scientists, with as a result **different perceptions** of ecological damage. These differing perceptions are due to what are called the **epistemological cultures** of each metier (Haas, 1989; Knorr-Cetina, 1999).

What is more, a judge is involved in a complex procedure that requires the coordination of different variables that cannot depend exclusively on science and its objectivity. For example, the economic situation of the defendant is a factor that the judge takes into account because his verdict must enforce the law, but also be adapted to the perceived social justice. The concept of justice deals essentially with institutions and activities taking into account social justice. It also reflects a philosophical and moral ideal.

As a result, the collaboration between the legal sector and the scientific community is not always easy, fully understood or particularly effective, given the divergent professional cultures and expectations. That is why it is necessary to create common work habits, sites for discussions and institutionalised (or to be institutionalised) behavioural standards. The collaboration between the law, science and technology is growing steadily in step with the increase in the number of offences damaging natural environments and the growing percentage of serious offences (see Figures 13, 14 and 15). The objective now is to make this collaboration more effective in cases of damage to water and aquatic environments, and to the environment in general. A number of measures taken by public authorities all point in this direction.

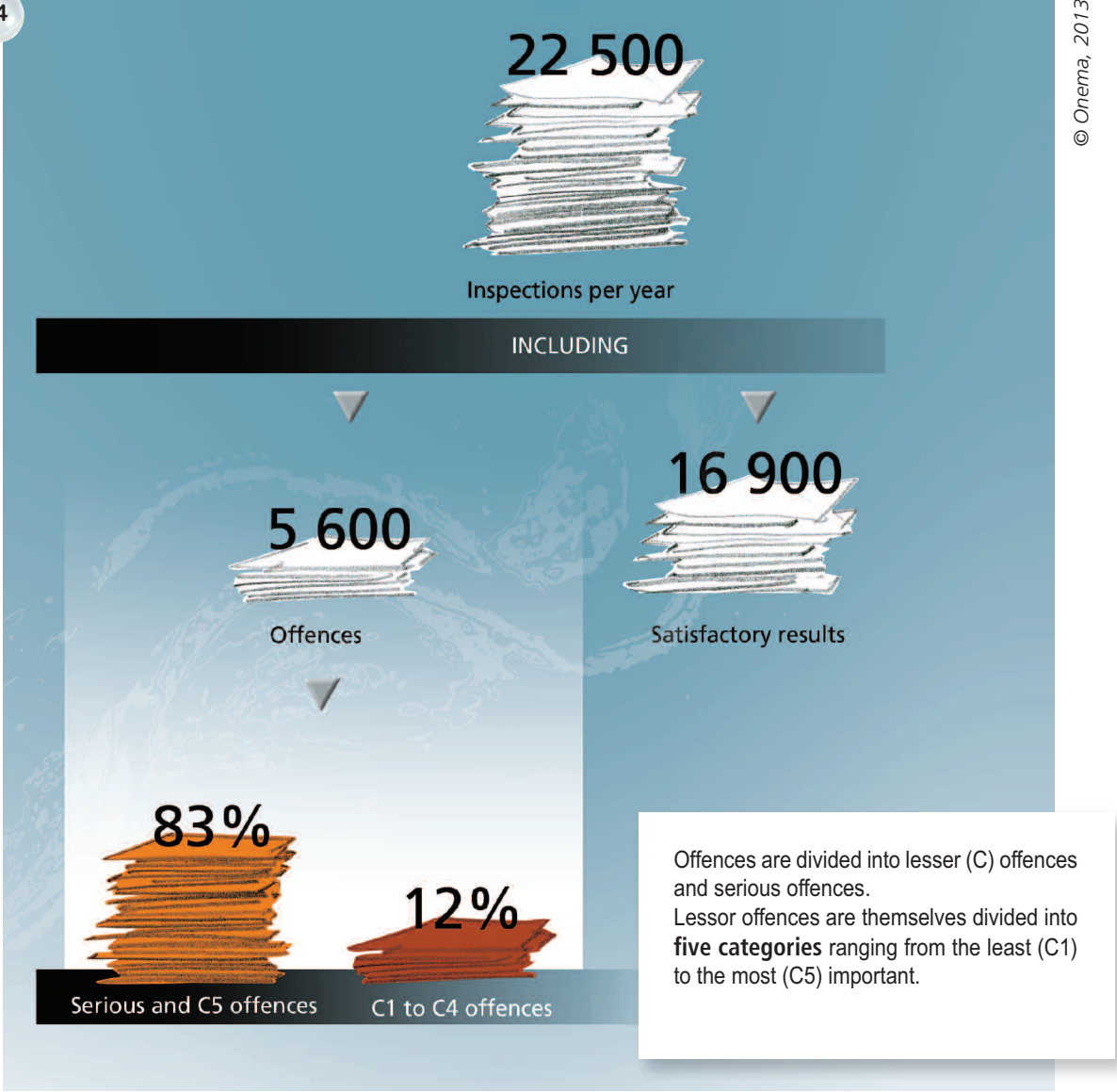
Figure 13



Offences against environmental law reported from 2008 to 2013.

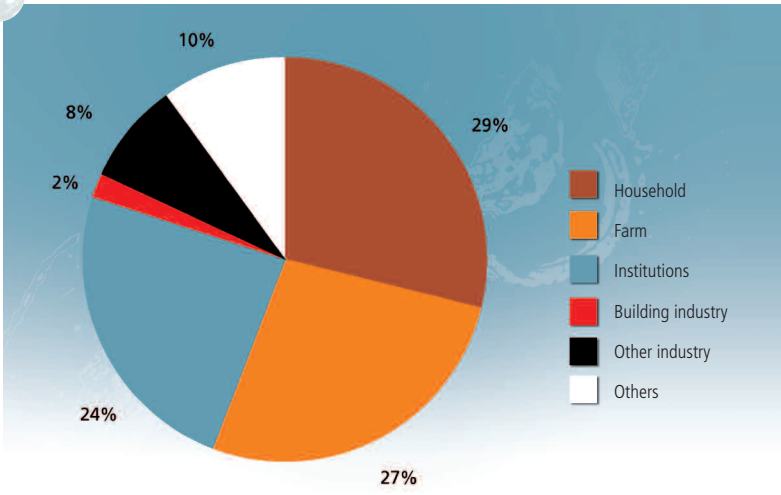
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ONDRP, 2014 report.

Figure 14



Offences against environmental law reported in 2013 (by Onema). Data from a presentation made during a meeting between Onema (DIR 3) and the Prosecutor's office at the Court of Appeals in Reims.

Figure 15



Distribution of offenders in 2013. Data from a presentation made during a meeting between Onema (DIR 3) and the Prosecutor's office at the Court of Appeals in Reims.

The ministerial circular dated 23 May 2005 (updated on 21 April 2015) required that a prosecutor be designated specifically for environmental issues in each office of a State prosecutor or Prosecutor general. Their role is to personally take action against damage to the environment, notably by organising meetings with the local State services, with the agencies in charge of the water police and with the representatives of the environmental non-profits (see Box 9). It is in this framework that the designated prosecutors follow special technical training courses or participate in sessions to learn to “translate” the opinions drafted by experts and the arguments put forward by highly specialised lawyers. Onema contributes to these efforts with its special training session for prosecutors and the fact that it has appointed special contact persons for prosecutors in its local offices.

Box 9

Special contact persons for prosecutors at Onema

Within each local office at Onema (which became AFB as of 1 January 2017) and, where necessary, with assistance from the head of inspections, an environmental inspector (either the local chief inspector or an inspector acting under his responsibility) ensures the technical coordination with the local prosecutor's office for both investigations and the subsequent legal proceedings. **This important job is one of the driving forces behind the inspection work done by the agency and requires both legal and technical skills.**

The special contact person plays a multi-faceted role.

First of all, he **represents the agency**. In this role, he can, for example, present the agency and its missions, the inspection programme for water and natural environments in general and the inspection programme of his local office.

Secondly, he is active in the **operational management of the judicial police** for his department by collecting the contact information of prosecutors and going to meet them, by setting up communication channels and by ensuring good technical coordination between the Gendarmerie and the national police.

A further mission of the contact person is to **raise the awareness of local stakeholders and jurists concerning the water police, a rather special type of police**. To that end, he attempts notably to understand and transmit the specific needs of prosecutors concerning environmental law in view of effective action within the agency to take those needs into consideration.

Finally, the contact person is a key factor in ensuring smooth cooperation between the legal sector and the agency, for example by monitoring the results of legal proceedings initiated by agency reports, representing the agency during hearings and requesting clarifications from the persons involved concerning certain decisions.

To effectively fulfil all of these missions, the contact person must have mastered all the technical aspects of this multi-faceted role, aspects which range well beyond the necessary **ecological technical knowledge** to include the **legal and political context** in which he operates. The training programme for contact persons set up by the agency provides the necessary information on the operations of the environmental police carried out by agency personnel.

That information includes the following points:

- coming to grips with and implementing the Ordinance on unifying criminal procedures (11 January 2012);
- implementing the latest *Statement of objectives* containing guidelines for reinforced inspections and **more effective collaboration with prosecutors to enhance the efficiency of police work;**
- the 2013 and 2016 reports by the Court of Auditors and the resulting action plans oblige the agency to reinforce its inspection system and fill out the reporting methods by setting up indicators on the departmental level to enhance management, analyse results more closely and measure the effectiveness of the inspection system.

In addition to all the above points are the tensions with the farming sector, the new judgement by the European court against France for non-observance of the Nitrates directive, etc.

The purpose of the training programme offered by the Inspections and territorial-action department (Onema) for prosecutors is to reinforce the cooperation between the Prosecutors general, prosecutors and the agency. The training programme targets four main objectives:

- improve observance of environmental regulations through enforcement activities that are instructive, effective, proportional to the offence and dissuasive;
- strengthen the operational links between prosecutors and the agency to improve monitoring of legal procedures;
- create common ground concerning environmental criminal policy between the Prosecutors general, prosecutors and the agency;
- set up a common strategy for post-inspection activities and, after analysing the context and work habits, make concrete proposals for improvements in the sequence of operations in processing citations for offences concerning water and aquatic environments.

Along the same lines, on 3 December 2013, a national symposium was held at the Paraclet national training centre on “managing an environmental crime scene”. Some 30 persons attended, including prosecutors, specialised gendarmes and environmental inspectors. The meeting served to present a number of special, technical capabilities of the Central office for offences harming the environment and public health (OCLAESP), of the Criminal research institute and of the National nuclear, radiological, biological and chemical unit, three units of the *Gendarmerie nationale* based in the Paris region and specialised in complex, judicial investigations. All of the above capabilities can be called on by prosecutors and judges. A number of concrete case studies were presented, dealing on the one hand with “crime scenes and waste” (burial of chemical products and asbestos-based waste) and, on the other, with “crime scenes and water” (water pollution). This type of meeting is a typical example of the work undertaken to collaborate with prosecutors.

Finally, the ministerial circular dated 21 April 2015 notes that prosecutors must participate in preparing criminal policies suited to environmental issues in conjunction with the other partners active in the MISENs (Inter-agency water and nature group) where inspection programmes are established (see Figure 16). It also indicates that prosecutors are encouraged to sign agreements with the Prefects and public agencies in order to coordinate the criminal and administrative action required to prevent or sanction ecological damage.



Figure 16

**CONVENTION RELATIVE À LA COOPÉRATION
DE L'OFFICE NATIONAL DE L'EAU ET DES MILIEUX AQUATIQUES
ET DE L'OFFICE NATIONAL DE LA CHASSE ET DE LA FAUNE SAUVAGE
AVEC LES SERVICES DÉPARTEMENTAUX DE L'ÉTAT
EN MATIÈRE DE POLICE DE L'EAU ET DE LA NATURE
DANS LE DÉPARTEMENT DES ARDENNES**

Entre :

Le préfet du département des Ardennes,

L'Office national de l'eau et des milieux aquatiques (ONEMA) représenté par son directeur général,

L'Office national de la chasse et de la faune sauvage (ONCFS) représenté par son directeur général,

Vu le code de l'environnement, et notamment ses articles L. 172-1, L. 213-2 et R. 213-12-14 ; L. 421-1 et R. 421-14 ;

Vu la loi n° 2003-239 du 18 mars 2003 pour la sécurité intérieure ;

Vu le décret n° 2004-374 du 29 avril 2004, modifié, relatif aux pouvoirs des préfets, à l'organisation et à l'action des services de l'Etat dans les régions et départements ;

Vu l'arrêté du 17 décembre 2007 portant approbation de la convention type relative à la coopération de l'Office national de l'eau et des milieux aquatiques avec les services départementaux de l'Etat, notamment la mission interservices de l'eau et le service de police de l'eau et des milieux aquatiques ;

Vu la circulaire du 26 novembre 2004 relative à la déclinaison de la politique de l'Etat en département dans le domaine de l'eau et à l'organisation de la police de l'eau et des milieux aquatiques ;

Vu le contrat d'objectifs arrêté entre l'ONEMA et ses années 2013 à 2018 ;

Vu le contrat d'objectifs arrêté entre l'ONCFS et ses années 2012 à 2016 ;

Vu la circulaire du 11 février 2013 relative à la déconcentrés dans le domaine de l'eau, de la biodiversité et de la nature en date du 10 juillet 2008 ;

Vu la convention relative à la coopération de l'Office aquatiques avec les services départementaux de l'Etat de la nature en date du 10 juillet 2008.

1

Il est convenu ce qui suit :

Préambule

Afin de répondre aux attentes croissantes des citoyens en matière de développement durable, l'efficacité et la cohérence de la police environnementale ont été renforcées en rapprochant les services départementaux de l'Office national de la chasse et de la faune sauvage (ONCFS) de ceux de l'Office national de l'eau et des milieux aquatiques (ONEMA) et en les plaçant ensemble, pour l'exercice de leurs missions de police sous l'autorité du préfet.

A cet effet, la convention relative à la coopération de l'Office national de l'eau et des milieux aquatiques avec les services départementaux de l'Etat en matière de police de l'eau et de la nature en date du 10 juillet 2008 a permis de coordonner les polices de l'environnement et de réduire la dispersion des moyens d'action pour en augmenter l'efficacité. La convention conclue pour une durée de trois ans étant arrivée à expiration, il convient de poursuivre l'action selon les mêmes modalités.

Article 1^{er} - Objet

La coordination entre les services de l'Etat et de l'ONEMA, sous le pilotage du DDT(M) représentant le préfet, pour l'exercice des missions de police préventive et répressive entrant dans le champ de compétence de l'établissement sera poursuivie selon les mêmes modalités que celles prévues par la convention susvisée en date du 10 juillet 2008. Les services départementaux de l'ONCFS s'associent à cette coordination à compter de la signature de la présente convention.

Article 2 - Durée de la convention

La présente convention prend effet à la date de signature par les parties, pour une durée de trois ans, renouvelable par avenant.

Le préfet,

Frédéric PERISSAT

Pour le directeur général de l'ONEMA et par délégation :
Le délégué interrégional,


Pour le directeur général de l'ONCFS et par délégation :
La déléguée interrégionale,

le 25 Novembre 2015

La Déléguée Régionale Nord-Est

Catherine LHOTE

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Inspection programmes and agreements.



Conclusion

Scientific and technical input is a resource available to judges in order to clarify an issue requiring the knowledge of an expert, however the judge alone decides on whether to call on an expert and whether to follow the expert opinion.

This is because the power to judge is drawn from the sovereign functions of the State and is confided to the judge due to his specific knowledge base. However, in some cases, juridical knowledge is not sufficient and, because a judge must first understand before he can come to a decision, scientific and technical knowledge may be used by the judge during the fact-finding investigation.

In cases specifically concerning water and aquatic environments, the available scientific and technical knowledge, though strictly regulated by the applicable legislation, is often called on by judges in the process of preparing their verdict.

It is often on the basis of this information and notably the assessments of the damage done and the tort incurred that a judge will dismiss a case, order compensation in kind or award financial damages.



Key concept

Scientific and technical knowledge is a collaborative tool involving the legal, scientific and technical sectors, called on and used by a judge in preparing a judicial decision. A judge may make use of it in proving the existence of ecological damage, of a tort and of a liability.

It is a constitutive element in environmental litigation in both the jurisdictional spheres.

Key points in understanding the subject

The expert, appointed by the judge, proceeds with tests, observations and analyses that help the judge in his investigative role and in forming his "intimate conviction".

The expert may play different roles in the procedure. But whether the scientific and technical expert takes part in the trial as a judicial expert, a knowledgeable person or a witness, in all cases he intervenes at a precise step in the procedure.

Key points to remember

There are three different roles for three types of expert knowledge in cases involving damage to water and aquatic environments.

Judicial expert

Judicial experts are named in official lists drawn up following a selection procedure based on the person's demonstrated knowledge. The lists put a judge in a position to work with experts who are familiar with the legal sector and understand the *modus operandi*, thus ensuring compliance with procedures and the independence of the judicial power. A judicial expert is therefore a professional who, temporarily, sets aside the standards applicable in his sector and adopts those specific to the legal procedure. He takes part in all court sessions dealing with the case.

Knowledgeable person

A knowledgeable person is not a judicial expert, but simply a person assisting the court. That being said, the person is nonetheless an expert who provides information to the court prior to its decision. He is summoned by the prosecutor in light of his professional qualifications. He receives a simple invitation to speak before the court. He takes part in all court sessions dealing with the case.

Witness

Similar to a knowledgeable person, a witness is not a judicial expert, but simply a person assisting the court. A witness also provides the court with necessary information. However, for a witness, the summons is served by an officer of the judicial police or by a court bailiff. In addition, the witness may not be in the courtroom during the initial interrogation of the defendants.