

PSSA: "Not the letter, but the spirit"

Advice to the Minister of Agriculture, Nature Management and Fisheries and the State Secretary of Transport and Public Works in response to the designation of the Wadden Sea as a Particularly Sensitive Sea Area (PSSA)

Advice 2003/02

15 April 2003

RAAD VOOR DE WADDEN



The Wadden Sea Council Act came into force at the end of 2002. The Wadden Sea Council was instituted on 7 April 2003 by virtue of that Act. The Council can be regarded as the successor to the Wadden Advisory Council, which was originally instituted in 1982. Like the Wadden Advisory Council, the remit of the new Council is to advise the public authorities and the Dutch Parliament on the Netherlands' most important nature area: the Wadden area.

The Wadden Sea Council advises on matters that are of general importance to the Wadden area.

The key principle of all recommendations is the retention and sustainable development of the Wadden area, as laid down in the Wadden Sea Policy Document.

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WADDEN SEA COUNCIL, Leeuwarden, 2003

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Summary

In October 2002, on the request of the Netherlands, Germany and Denmark, the Wadden Sea was designated by the International Maritime Organisation as a Particularly Sensitive Sea Area. However, the safety of the Wadden Sea is hanging in the balance owing to various developments. Examples include the increasing risk of a disaster involving a poorly-maintained single-hulled tanker in the North Sea, the danger of economies on materials that are needed to combat a disaster and economies on the sea lane marking in the North Sea, which will result in a less clear and, accordingly, less safe sea lane. Moreover, the compulsory pilotage in the Wadden Sea itself has been relaxed without being replaced by navigational support.

This discrepancy between the recognition of the vulnerability of the area on the one hand and a number of developments that reduce the protection of the area on the other has prompted the Council to publish this unsolicited advisory document.

The Council is making the following recommendations:

- The environmental component of the training programme for mariners must be increased.
- In any event, information material must be made available in the Dutch harbours in the Wadden area, explaining the vulnerability of the area and its status as a PSSA.
- Vessels must discharge their waste in the harbours as efficiently as possibly without having to remit immediate payment and without the process involving a large administrative burden.
- Research must be focussed more on the prevention of spills and on the reduction of spills in case of incidents.
- The research programme into combating oil and other environmentally-harmful substances must be completed sooner than in 2010.
- Not only the North Sea directorate but also the Northern Netherlands directorate of the Directorate General for Public Works and Water Management must be involved in this research programme.
- The Directorate General for Public Works and Water Management must gear its oil combating organisation to a larger discharge than the 30,000 cubic metres of oil which currently form its starting point.
- Incentives must be created to quickly phase out single-hulled tankers at European level (on the short term) and at IMO level (at a longer term).
- Russia should be involved in the phasing out of single-hulled tankers.
- Smaller passing tankers and carriers in the North Sea must be obliged to take the northern sea lane.
- The shipping lanes in the North Sea must continue to be shown on both sides.
- The Netherlands must refer other European countries to their obligation to inspect 25% of the vessels that put into the harbours.
- The percentage of 25% inspections must also apply individually to the northern harbours and not only to the whole of the Netherlands, and the inspections must concentrate mainly on vessels with a high risk factor. A risk analysis must therefore be drawn up for each harbour.
- Better protocols must be drawn up for harbour inspections and their implementation must be supervised.
- The minimum European criteria for the environmental inspections must be implemented in Dutch maritime legislation as soon as possible.
- The Shipping Inspectorate must make firm agreements with the Public Prosecutions Department regarding the active investigation and prosecution of those violating maritime legislation, such as putting to sea with poorly-maintained ships and those committing illegal discharges.

- It is necessary to establish how checks on illegal discharges can be made more intensive and cover a larger area.
- At least the AIS monitoring system, or preferably VTS systems must be used for the entirety of the sea lanes to the north of the Wadden islands.
- It is necessary to look into the question of whether all lighthouses on the Wadden islands can once again be manned.
- The need for and the possibility of navigational support in the Wadden Sea must be looked into.
- The effects of relaxing the compulsory pilotage in the Wadden Sea a few years ago must be looked into.
- In the event of a disaster occurring, there are many different regulations that can be applicable. These regulations must be geared more closely to each other.
- The disaster plans for the land, for the North Sea and for the Wadden Sea, must be geared more closely to each other on short notice. There must be clarity regarding who is responsible for what.
- In the event of vessels foundering in the North Sea, the Minister for Public Works and Water Management can designate a harbour to which the vessel must be towed. The same would have to apply to foundering vessels in the Wadden Sea.
- The possibility of economies affecting the vessels of the sea lane marking department, which can also clean up oil, must be compensated for by purchasing other equipment that can be used to clean up oil.
- It is necessary to establish whether and how agreements can be made with private fishers regarding the use of their vessels in combating disasters.
- The co-operation between managers in the event of a disaster must be practised more frequently.
- The agreements with Germany and Denmark concerning disasters must be more clearly explained.
- The possibility of making insurance for tankers in the North Sea compulsory must be looked into.
- The European Environmental Liability Directive and the ecological annex must also be taken on board.
- The European COPE fund, from which the costs of an oil fund can be covered if the existing international oil pollution fund dating back to 1971 provides insufficient cover, must be instituted as soon as possible.
- The question of whether the clean-up capacity is adequate must be looked into.
- Possible economies on the vessels of the sea lane marking service must not be permitted to result in poorer marking of the sea lanes nor in a loss of oil fighting capacity.
- Finally, research must be conducted into the risks of terrorist attacks, piracy, smuggling and illegal trade in and around the Wadden Sea.

1 Introduction

The background to this advice

During the 48th meeting of the *Marine Environment Protection Committee* (MEPC) of the International Maritime Organisation (IMO), which was held from 7 to 11 October 2002, the Wadden Sea became the world's fifth sea area to be designated as a Particularly Sensitive Sea Area (PSSA). The Wadden Sea was nominated for this status in view of its vulnerability by Denmark, Germany and the Netherlands on 28 June 2002, following a decision to that effect being taken in the Danish Esbjerg.¹

The Wadden Sea's status as a PSSA will henceforth be indicated in nautical charts. The three nominating states have decided against making use of the option to propose additional IMO protection measures with the nomination because the Wadden Sea is already adequately protected by IMO, EU and national legislation. In view of a number of national and international developments, the question remains of whether the decision not to put forward any additional IMO measures was the right one. In concrete terms, this relates to the following developments which have increased the need for additional measures:

- a number of recent disasters and accidents in European waters have demonstrated that the chance of a disaster taking place in or close to the Wadden Sea is by no means inconceivable. The islanders are also very concerned about this threat, not least in view of the conclusions of the conference 'Zwart Getij', or 'black tide', which was held on the 13th and 14th of March 2003 on the Dutch island of Terschelling.
- furthermore, poorly-maintained tankers are being loaded with oil and diesel in the Russian sector of the Baltic Sea, which then steam to their destinations via the North Sea.²
- cargoes such as oil or chemicals from poorly maintained vessels can be pumped over to a well-maintained vessel close the destination so that a poorly-maintained tanker or carrier can get around the port authority inspections performed by the public authorities;
- there is a decreasing curve in the number of marine officers under training, so that it is becoming increasingly necessary to sail with foreign crews, which, unfortunately, are not all as well trained as those in the Netherlands;
- the pilotage obligation in the Wadden Sea was relaxed in 2001, so that fewer ships are obliged to use the services of a pilot;
- owing to the lack of Dutch crew members, foreigners are often employed, also from countries in which the training is not of the level that is considered desirable in the Netherlands and in which insufficient attention is paid to the environmental threats;
- The Directorate-General for Public Works and Water Management and the Coastguard are facing economies that are achieved at the expense of safety;
- The Directorate-General for Public Works and Water Management is looking into the question of whether the Waterway Marking Service can work more efficiently. A measure of this nature could mean that less damage control equipment is available in the event of a disaster occurring.

¹ See points 63 to 66 of the Esbjerg Declaration, which was agreed at the 9th Trilateral Governmental Summit on the Protection of the Wadden Sea on 31 October 2001 in Esbjerg.

² See conclusion 8 of the conference Zwart Getij, held on 13 and 14 March 2003 on Terschelling, which can be found on www.zwartgetij.nl. See also the Bericht zur aktuellen Probleme der maritimen Sicherheit auf der Ostsee vorgelegt vom Landtag Mecklenburg-Vorpommern im Auftrag des Ständigen Ausschusses der Ostseeparlamentarierkonferenz, Landtag Mecklenburg-Vorpommern - 3. Wahlperiode, Wortprotokoll der 45. Sitzung des Umweltausschusses, Schwerin 25 april 2001. See also K. Magnusson, Oil handling in the Baltic Sea Area 1996-2001, Helsinki Commission SSPA Report 7935-2, Helsinki 1998.

The Council has identified a discrepancy between the developments referred to above on the one hand, which together have a negative effect on safety, and the recognition of the Wadden Sea's vulnerability that is implicit in the designation of the area as a PSSA on the other.

This discrepancy has prompted the Council to publish an unsolicited recommendation on safety in the Wadden Sea and the protection of people and the environment in the Wadden area.

The concept of safety

It is important to first address the concept of safety. Safety – at sea and in the ports – is, after all, a broad theme. It covers both preventative protection against and the combating of incidents (*safety*) and protection against deliberately harmful human acts, such as piracy, illegal trade and terrorist attacks (*security*). In this recommendation, safety is approached from the perspective of the first definition given above. The safety level that was agreed by the Netherlands with Denmark and Germany – in a trilateral context – in the Esbjerg Declaration can be operated as the testing framework for what can be regarded as an adequate level of safety.

The protection of the ports and shipping against crime – i.e. safety from a *security* perspective – will also be briefly addressed.

Safety can never be absolute. Absolute safety could only be achieved by barring all human activities in the Wadden Sea and bordering coastal belts and the bordering part of the North Sea. This cannot be the intention. The point is to make sure that safety in the Wadden area is optimal without having an adverse effect on the desired economic and social activities in the area. In other words, living and working in the Wadden area must be able to carry on at the level agreed in Esbjerg, and the aim must be to achieve the agreed level of safety within that precondition.

Scope of the advice

This advice relates both to the Wadden Sea and to the North Sea, especially the area directly to the north of the Wadden islands. In terms of international law, the Wadden Sea is regarded as an inland waterway. It therefore makes sense that, given the designation of the Wadden Sea as a PSSA, the shipping traffic in the North Sea is regarded as a potential threat to the eco system of the Wadden Sea, so that measures relating to the shipping traffic in the North Sea must be taken to protect the Wadden Sea.

To the extent that it relates to the Wadden Sea itself, the advice can be implemented at national level, or preferably at trilateral level. The measures that have been recommended regarding the shipping traffic in the North Sea will have to be taken in an EU or IMO context. The designation of the Wadden Sea as a PSSA must be an argument that the Netherlands can use to gain support for these proposals at European or international level.

Information and education

It is also important to emphasise the importance of information and education. Knowledge of the applicable rules among stakeholders should go hand-in-hand with knowledge about the vulnerability of the region. Sufficient attention should therefore be paid to both of these components when training seamen and when informing crews that travel in the shipping routes in the North Sea and in the Wadden Sea.

The Council advises increasing the environmental component of the Dutch training programme for seamen. The Council also advises calling in an international context for an increase in the environmental component of foreign training programmes for seamen. The Council advises in any event making information material available at the Dutch ports in the Wadden area, in which the vulnerability of the area and the status of the area as a PSSA are explained.

Reading guide

Paragraph 2 sets out which additional IMO measures have been taken in the nomination of the four other PSSAs worldwide. Paragraph 3 forms the core of the advice, in which the protection level of the Wadden Sea is tested against the ambition level of the Esbjerg Declaration. Paragraph 4 addresses the measures that are needed to prevent terrorist attacks and other threats to safety from a *security* perspective.

2 Additional IMO measures in the five PSSAs worldwide

The Wadden Sea is the world's fifth sea area to be designated as a Particularly Sensitive Sea Area. When the Wadden sea was granted PSSA status, it was decided upon the recommendation of the three countries that no additional IMO measures would be set for the Wadden Sea.

An important reason *for* proposing additional protection measures at IMO level in the nomination for an area as a PSSA is that it is often not possible to take these measures at national level. Protective measures thus often result in a certain infringement of the right to free transit in international waters, as laid down in articles 38 – 44 of the UN Treaty governing Maritime Law (UNCLOS). Protective measures can then only be taken at international (i.e. IMO) level.

It is notable that an inland waterway such as the Wadden Sea has been designated as a PSSA. This indicates that there can be threats from the sea – or: the shipping routes in the North Sea – to the Wadden Sea. In the designation of the Wadden Sea as a PSSA, additional IMO measures could have been designated for the North Sea, but this was not done.

In the nomination of the four other PSSAs, additional IMO measures were however proposed by the states in question and taken by the IMO. This concerns very different sea areas, for which different types of measures were therefore proposed and accepted. By way of illustration, given below is an overview of the types of additional measures that have been taken for the various PSSAs worldwide:

Great Barrier Reef, designated in 1990

The right of free transit is applicable to an important part of the Great Barrier Reef. A number of measures that Australia considered necessary were therefore taken at IMO level. This relates to the following (types of) measures:

- extra restrictions on ships' discharges
- compulsory pilotage in certain parts of the PSSA
- new routing measures
- the introduction of vessel traffic management systems (VTS)

The Sabana-Camaguey Archipelago in Cuba, designated in 1997

The area has been designated in an IMO context as 'an area to be avoided'. The area around a number of uninhabited islands was suffering from the effects of over-fishing. The IMO designated the area because many (illegal) fishers were sailing around without lighting and therefore represented a threat to safety in the area. Illegal fishing cannot in itself be an argument for an additional measure for a PSSA because a PSSA is instituted in order to protect an area against the dangers of shipping.

The sea area around Florida Keys in the United States, designated in 2002

Additional IMO measures have also been taken in the sea area around Florida Keys, in which a lot of coral reef is situated. This relates to:

- an anchor ban in parts of the area in which coral is located
- parts of the sea area have been designated as 'areas to be avoided'.

The island of Malpelo on the coast of Columbia, designated in 2002

The area around the island has been designated as 'an area to be avoided'. In this case, too, one of the aims was to prevent illegal fishing and the measure was justified by the argument that many fishing boats were sailing without lighting.

The Wadden Sea

The Wadden Sea stands out from the other designated PSSAs because in terms of international law it is an inland waterway. The right of free transit as laid down in articles 38-44 of the UN Treaty governing Maritime Law (UNCLOS) is therefore not applicable to the Wadden Sea itself. This means that the measures that have been taken for the other four PSSAs at IMO level can be taken for the Wadden Sea itself at national level and, if required, at trilateral level. In this respect, justification must also be sought for the fact that no additional IMO measures were proposed for the Wadden Sea itself. It must be borne in mind that some measures that would have to be taken in the North Sea outside of the territorial waters for the protection of the Wadden Sea will perhaps have to be taken at IMO level because the right of free transit is applicable outside of the territorial waters.

3 The level of protection for the Wadden Sea

It is not the intention in this advice to set a sufficient level of safety for the Wadden Sea. As mentioned above, the level that was agreed by the Netherlands with Denmark and Germany in the Esbjerg Declaration on (the safety of) shipping is being operated as the criterion for an adequate level of protection. The order of the subjects covered therefore follows that of the Esbjerg Declaration. First of all, these are the port reception facilities (3.1), followed by the technical improvements in shipping, especially for tankers (3.2), then the problem of the illegal discharges (3.3), the navigational support and the pilotage (3.4) and disaster recovery and ships in distress (3.5). Finally, paragraph 4 sets out some considerations on safety as *security*.

3.1 Port reception facilities

Esbjerg Declaration:

54. To take cognisance of the trilateral inventory pertaining to the availability and accessibility of the port reception facilities.

55. The acceptance of EU Directive 2000/59/EC pertaining to evoking recollection of port reception facilities.

56. Urging the competent authorities to take the measures needed to meet the requirements of EU Directive 2000/59/EC pertaining to port reception facilities for ships' waste, especially regarding the no-special-fee system in all ports, and regarding cargo residues.

At present the northern ports already have port reception facilities (PRFs). The waste is collected in Den Helder, Den Oever, Harlingen, Lauwersoog, Eemshaven and Delfzijl. Yachts are able to turn in their bilge water at the northern yachting marinas. Despite the existence of port reception facilities – also in other European countries – the amount of use that is made of them is still low,³ so that it is feared that large quantities of waste are still disappearing into the sea. It can therefore be said that the system is not yet functioning sufficiently. A number of problems are being identified.

Financing the waste collection system

In the northern ports – like in the other Dutch ports – the waste is currently collected by a private company. That is not in itself a problem. What is however a problem is that a captain has to pay to submit his waste. This forms a threshold for the submission of ship's waste and can lead to captains choosing to take the waste out to sea and discharge it there. This threshold should be removed in accordance with point 56 of the Esbjerg Declaration.

The Council recommends introducing the no-special-fee system for the port reception facilities in the ports as soon as possible.

This does not mean that the costs of the systems should be borne by the government. The systems can be financed by means of a general levy, which could for instance be incorporated in the port dues and – in due course – in the fuel prices.

Efficiency of the waste submission system

Another reason for captains not submitting waste could be found in the possibility of losing time when submitting the waste. The faster a ship can be rid

³ The following is stated in the report Maintaining the submission of shipping waste substances, from weak link to strong hand, the North Sea Foundation, Utrecht 2002, p.3.: "It is generally known that only between 5 and 7% of all vessels arriving in Rotterdam make use of the collection facilities."

of its waste, the less delay will be suffered by the ship and the more a captain will be inclined to submit his waste. The submission of waste will always take a certain amount of time, but it is important to ensure that the time involved is kept to a minimum.

The Council advises ensuring that the waste submission system is made and kept as easy as possible (efficient) and is accompanied by as few administrative burdens as possible.

Ships that keep properly to the rules could be given priority on the next occasion so that their good behaviour is encouraged.

Detecting and punishing illegal discharges as the bottom line.

No extra fees will therefore have to be demanded from those submitting the waste and the waste collection will have to take place efficiently. As the bottom line of the ambition to drastically reduce the number of discharges into the sea, the ban on dumping waste⁴ in the sea will have to be effectively enforced. This means first and foremost that illegal discharges will actually have to be detected and punished. This point is discussed below under 3.3.

3.2 Marine safety

Esbjerg Declaration:

57. To carefully evoke the memory of the ship disaster with MS Pallas (1998) and to welcome the initiatives that have been taken to evaluate the disaster, the initiatives to look into ways of improving the safety of ships and the control of emergency situations and for the introduction of the first new measures in this area.

58. To welcome the activities at IMO, EU and national level to improve the safety of shipping, such as the accelerated phasing out of single-hull tankers, further improvement of the port authority inspection and the stricter control of classification offices (...).

Since the disaster with the Pallas in the Danish-German border area in the Wadden it has been clear that disasters of this nature are not incidental. In recent years there have been various accidents involving oil tankers in the North Sea. The disaster with the Maltese tanker Erika off the coast of Brittany in December of 1999 prompted the European Commission to set up a programme to improve shipping safety. The pressing need for a programme of this nature was demonstrated in November 2002, when the single-hull oil tanker Prestige sank off the Spanish coast. One of the results of this was a large quantity of oil on the Spanish coast. The collision on 25 January 2003 between the Dutch freighter Assi Eurolink with the Swedish ship Seawheel Rhine at a distance of about forty miles to the North of Terschelling – the Dutch section of the North Sea – emphasised the fact that the Netherlands is not spared from shipping disasters either. It also has to be borne in mind that even a relatively 'small' disaster – in terms of the discharge – can cause major environmental harm. Oil from the Tricolor, which has been situated off the coast of Belgium since December 2002 and has already been collided with on several occasions, has washed up on the coast of France, Belgium and the southwest of the Netherlands, even though 'only' 170 tons of oil were discharged from the ship. These examples clearly show that (oil) disasters form a permanent threat to the Dutch coast, and also to the Wadden Sea. The biggest threat to the ecosystem of the Wadden Sea appears to be a major shipping disaster in the North Sea in the vicinity of the Wadden Sea. A disaster such as that with the Prestige could also take place in the deep water lane in the North Sea, which runs to the north of the Wadden islands. This was confirmed several times at the 'Zwart Getij'

⁴ The dumping of food remnants is exempted from this ban.

conference that was held on 13 and 14 March 2003 on Terschelling. For this reason, a number of recommendations were made concerning the safety of shipping in the North Sea with the aim of raising the protection of the PSSA area to an adequate level.

Prevention of pollution and discharge limitation

Preventing (oil) pollution and limiting the discharge of oil is very important. It is not possible to clean up the pollution if the wind force is greater than five Beaufort and the waves are higher than two metres. A wind force exceeding five Beaufort was measured on 28% of the days in the period from 1 April 2001 to 1 April 2002, and waves higher than two metres on 23% of the days in that period.⁵ It is, then, often the case that it is not possible to perform clean-up operations at all. Combating the discharged environmentally-harmful substances, as provided for in the Combating Environmentally-harmful Substances North Sea 2000-2010 Bill, is important; but the prevention and limitation of the discharge of (oil) pollution are much more important and should be given a more prominent position in the research programme of the Directorate-General for Public Works and Water Management.

The Council advises performing more research into the prevention of the pollution and into the limitation of the discharge when incidents occur.

Research into combating options

In the Combating Environmentally-harmful Substances North Sea 2000-2010 Bill and the Implementing programme Combating Environmentally-harmful Substances North Sea 2000-2010, the North Sea directorate of the Directorate-General for Public Works and Water Management addresses a better way of detecting and combating oil and other environmentally-harmful substances. The net environmental gain and the economic advantage of the various combating methods must be determinative in the choice of the best way of combating an actual case of pollution.

In view of the great importance of having sufficient combating capacity available, it should be noted that the lead-time of the programme is on the long side.

The Council believes that the lead-time of the research programme – up to 2010 – must be reduced.

The research programme was set up by the North Sea directorate of the Directorate-General for Public Works and Water Management. In view of the danger of an influx of oil or other environmentally-harmful substances from the North Sea into the Wadden Sea, it is important that the ways of preventing such an influx on the one hand and the combating options in the Wadden Sea itself on the other are included in the research. Combating hazardous substances in the Wadden Sea, is, after all, much more complicated than in the North Sea. It is essential in this regard that the division of the Directorate-General for Public Works and Water Management under which the Wadden Sea comes – the Northern Netherlands directorate – is involved in the research programme. The Northern Netherlands directorate can also be expected to participate in the research programme.

The Council further advises involving the Northern Netherlands directorate of the Directorate-General for Public Works and Water

⁵ See www.zwartgetij.nl, presentation on combating oil pollution in the North Sea and the Wadden Sea of Mr D. Knoester, Directorate-General for Public Works and Water Management.

Management, which is responsible for the Wadden Sea, much more closely in the research programme.

In the bills referred to above, a normative scenario of a discharge of 30,000 cubic metres of oil is operated. Oil tankers often have a much larger quantity of oil on board. This is therefore not so much about illegal discharges, but mainly about the risk of a discharge following a disaster. It is therefore advisable to draw up a disaster recovery plan for a larger discharge than 30,000 cubic metres of oil.

Account must also be taken of the discharge of substances other than oil. Incidents with all types of substances cannot of course be foreseen, but it is important to perform an investigation into the most common chemical substances and the best recovery method, as provided for in the implementing programme Combating Environmentally-harmful Substances North Sea 2001-2010, and into ways of gearing the disaster recovery organisation to it.

The Council advises taking a larger normative scenario than a discharge of 30,000 cubic metres as the starting point.

Tanker traffic north of the Wadden Sea

First of all, attention must be drawn to the tanker traffic using the shipping lanes to the north of the Wadden islands. Tankers that are in poor condition cannot at present be banned from the Dutch part of the continental shelf of the North Sea because the right of free transit applies in that area. In any event, IMO measures will have to be put in place in this area. In particular, poorly maintained tankers come from the Russian sector of the Baltic Sea and pass through the North Sea on their way to other destinations. It is therefore desirable to intensify the port authority inspections on a European and global scale. During the next few years this problem is sooner likely to increase than decrease because there are plans in Russia to transport more oil by ship and less through pipelines.⁶

The Netherlands has only limited alternatives for improving this situation unilaterally. Fortunately, work is being done in a European Union context on phasing-out single-hull tankers,⁷ which are relatively more dangerous and relatively more often poorly maintained than double-hull tankers, sooner than the previously agreed 2007 or 2010. Apart from that, there is only any point in phasing out single-hull tankers if other measures are also taken worldwide, such as improving the training level of crews and improving the inspections performed on the technical condition of vessels.

The Dutch government is advised to call for and approve the accelerated phasing-out of single-hull tankers in the Council of the European Union.

Only shipping traffic heading for one of the North Sea countries or one of the Baltic Sea countries travel over the shipping lanes to the north of the Wadden islands. It is therefore necessary that not only the ports in the countries of the European Union refuse entry to phased-out ships, but that the other North Sea and Baltic Sea countries do so too. In particular, reference must be made to the importance of involving Russia in the phasing-out of single-hull tankers.

⁶ See conclusion 8 of the Zwart Getij conference, which was held on 13 and 14 March 2003 on Terschelling. The conclusions are given on www.zwartgetij.nl

⁷ It should be emphasised that not all single-hull tankers are poorly maintained and that there are also poorly maintained double-hull tankers. The categories 'poorly maintained tankers' and 'single-hull tankers' are certainly not entirely synonymous.

The Council advises the Dutch government to urge, in a European context, for Russia to be involved in the phasing-out of single-hull tankers.

Although the phasing out of single-hull tankers in Europe could make the North Sea and the Wadden Sea safer, this would involve bearing the risk that single-hull tankers, which are relatively more often older and less well-maintained than double-hull tankers, will divert to other parts of the world and form a threat to the safety of the ecosystem in those areas. Phasing out single-hull tankers on a global scale will be a long and laborious process, but this process should none the less be started. The single-hull tankers will have to be phased out in Europe in the short term and on a global scale in the longer term.

The Council advises the government to call for the worldwide phasing-out of single-hull tankers, also in an IMO context.

Shipping lanes north of the Wadden Sea

Small tankers and carriers are permitted to sail in the south shipping lane to the north of the Wadden islands. Larger tankers are only permitted to sail in the northern shipping lanes, which are situated farther away from the Wadden Sea. Even a relatively small discharge of oil or chemicals could form an ecological disaster in the Wadden Sea.

Calculations show that an oil spill in the northern shipping lane at a distance of about 75 km from the coast, with a north-westerly wind at force 5 Beaufort, will arrive at the North Sea coast of the Wadden islands and in the Wadden Sea after approximately 72 hours. If the oil spill takes place in the southern shipping lane at 15 or 25 km from the coast, then with a north-westerly wind of force 5 Beaufort, the oil will reach the coast in 20 or 36 hours. In view of the mobilisation time of the disaster recovery ships, an oil spill with those wind conditions could only be effectively combated if it took place in the northern shipping lane.⁸

The Council advises that the smaller ongoing tankers and carriers in the North Sea should also be obliged to take the northern shipping lane.

Shipping lanes marking in the Wadden Sea

Another point of concern is formed by the plans of the Directorate-General for Public Works and Water Management to introduce economies on the buoys in the shipping lanes in the North Sea, and in particular the plan to restrict the buoys to the 'central reservation'. In view of the human inclination to set a course by the visible elements, and therefore to continue sailing as close as possible to the buoys, this measure could increase the chance of collisions. Navigation remains human work and a shipping lane that is indicated as clearly as possible limits the chances of errors being made by seamen.

The Council advises proceeding with the positioning of buoys on both sides of the shipping lanes in the North Sea.

Port authority inspections

It has been agreed in a European context to inspect 25% of the ships that put into a port. These 'port authority inspections' are necessary because some flag states are negligent in inspecting the ships that sail under their flag. The Netherlands – unfortunately as one of the few European countries – attains this percentage.

⁸ See www.zwartgetij.nl, presentation on combating oil pollution in the North Sea and the Wadden Sea of Mr D. Knoester, Directorate-General for Public Works and Water Management.

The Council advises the Dutch government to call in a European context for other countries to achieve that percentage of 25%.

There is however an additional comment that can be made in this regard. In view of the huge number of ships that put into the port of Rotterdam in relation to the other Dutch ports, it could be tempting to set out to achieve the target percentage for all Dutch ports by intensifying the port inspections in Rotterdam. To give an example, the General Court of Auditors established that in 1999 and in 2000 virtually no port inspections were carried out in Eemshaven and in Delfzijl.⁹ Be that as it may, it is desirable to focus the port authority inspections mainly on ships with an increased risk factor.

The Council advises ensuring that 25% of the ships are also inspected in the northern ports, with the inspections focusing primarily on ships with an increased risk factor. For this purpose, a problem analysis will have to be made for each port.

The government is responsible for ensuring that the supervision of compliance with marine legislation is properly organized. In principle, the Minister of Transport and Public Works bears initial responsibility. In many cases, the port authority inspections are not carried out by the Shipping Inspectorate (Inspectorate for Transport and Public Works, Shipping division) itself, but are outsourced to private classification offices. The General Court of Auditors has expressed its concern about the fact that these offices often have the shipping companies whose ships they inspect as clients for other work. This could result in the emphasis being placed too much on advice and too little being done about enforcement and prosecution because not many files are passed on the Shipping Inspectorate.¹⁰ This is not to say that these classification offices should or must not be engaged, but that outsourcing inspection tasks to private classification offices can only be considered if the correct performance of the inspections is guaranteed. It is very important in this regard that the classification office organisationally separates its supervisory task from its advisory task. It is also desirable that classification offices are asked to draw up a supervision plan for all Dutch ports that they supervise, indicating the way in which the supervision of compliance with the applicable laws is carried out. This can be arranged by include such requirements in the protocols to which the classification offices are bound.

The Council advises guaranteeing inspections more effectively on the basis of accredited protocols and ensuring that those protocols are correctly implemented.

The European recommendation "minimum criteria for environmental inspections" is applicable to the implementation of the supervision, including the port authority inspections. This recommendation has been taken over by the Netherlands in the draft Order in Council quality criteria for the enforcement of environment law, ratified by the Minister of Housing, Spatial Planning and the Environment on 1 November 2002.

The Council advises implementing these quality criteria in marine legislation as soon as possible.

⁹ See General Court of Auditors, report Environmental pollution by ocean-going vessels of 20 September 2001, p. 20, incorporated in LOWER HOUSE 2001-2002, 28040, no. 2.

¹⁰ General Court of Auditors, report Environmental pollution by ocean-going ships, p. 18-19.

Finally, it is essential that if a port authority inspection reveals serious violations the supervising office does not make do with making recommendations to the shipping company but also reports the violation to the Shipping Inspectorate, which in turn must refer the case to the Public Prosecutions Department.

Firm agreements must be made with the Public Prosecutions Department about actively investigating and, if necessary, prosecuting those who violate marine legislation.

3.3 Approach to illegal discharges

Esbjerg Declaration:

59. To emphasise that illegal discharges of both oil and chemicals from ships continue to cause pollution problems along the coast and that these problems call for continuous attention and to underline the fact that effective supervision, including better-coordinated supervision from the air, and strict prosecution are of great importance to further reducing the problem.

Checks on illegal discharges

An aircraft stationed at Schiphol is currently used to check illegal discharges. Consideration is being given to stationing another two aircraft at De Kooy airport. The way in which checks and investigations can be carried out covering as large an area as possible will have to be looked into. The alternatives offered by making more intensive use of satellite images could also be included in this.

The Council advises looking into ways in which checks on illegal discharges can be carried out more intensively and covering a larger area, and also to seek in a European context ways of further digitising enforcement in this area.

The approach to violators

Regarding the criminal prosecution of violators of the discharge ban, the General Court of Auditors¹¹ established in 2001 that at that time the Shipping Inspectorate was referring relatively few files to the Public Prosecutions Department. According to the General Court of Auditors, the remit of the Shipping Inspector focuses too narrowly on advising the shipping industry and does not focus sufficiently on enforcing the regulations. This is despite the fact that the inspectors of the Shipping Inspectorate are special investigation officers for the Prevention of Pollution (Shipping) Act.

The Council advises making firm agreements with the Public Prosecutions Department about the investigation and prosecution of violators of the discharge ban.

3.4 Navigational support and pilotage

Esbjerg Declaration:

60. Setting up a shore-based national AIS monitoring system for ships, in accordance with the relevant IMO and EU legislation. Aim to achieve a complete network for the entire collaboration region within the GMDSS-A1 areas by 1 July 2005 at the latest, and to consider setting up a joint monitoring system based on all national AIS monitoring systems for the Wadden Sea and bordering coastal areas.

¹¹ General Court of Auditors, report Environmental pollution by ocean-going ships of 20 September 2001, p. 17-22, incorporated in LOWER HOUSE 2001-2002, 28040, no. 2.

61. Welcoming the EU initiative to set up a community monitoring and information system for shipping traffic in the collaboration region, taking account of the introduction of shore-based AIS monitoring systems.

Navigational support in the North Sea

The shipping traffic in the Dutch part of the North Sea is intensive. In view of the large number of ships, there is a real risk of a collision, and also a considerable chance that the Wadden Sea will be confronted with the consequences of a collision in the North Sea. It is advisable to introduce AIS¹² monitoring systems not only in the Trilateral Collaboration Area, but also in both shipping lanes to the north of the Wadden islands in the North Sea, i.e. both the southern route and the deep water route, or – even better – vessel traffic management systems (VTS). If necessary, these measures can be taken in an IMO context, for which the Netherlands could put forward the argument that such measures are necessary to protect the nearby PSSA Wadden Sea. Furthermore, it is advisable to once again man the lighthouses on the Wadden islands because these lighthouses provide a clear view of the area, so that the rescue teams on the islands can be called up quickly and effectively.

The Council advises looking into the question of whether vessel traffic management systems (VTS) can be used in the entirety of the shipping lanes to the north of the Wadden islands. These measures can be raised in an IMO context with the argument that the nearby Wadden Sea is a PSSA.

Alternatively, AIS monitoring systems should in any event be completely introduced to both shipping lanes to the north of the Wadden islands as soon as possible.

Manning of lighthouses

It recently turned out that a Norwegian yacht was saved from the breakers because the 24/7 manned coastguard station in the lighthouse of Schiermonnikoog noticed the ship in distress. This once again demonstrated the usefulness of manning the lighthouses.

The Council advises looking into ways of again manning the currently unmanned lighthouses on the Wadden islands.

Mandatory pilotage and navigational support in the Wadden Sea

Mandatory pilotage in the shipping approach lanes to the ports in the Wadden Sea was relaxed a few years ago. This means that ships are less often obliged to take a pilot on board. This has not been replaced by any extra navigational support in the Wadden Sea.

In the light of the designation of the Wadden Sea as a PSSA, the Council advises looking into the need and the alternatives for navigational support in the Wadden Sea and carrying out the promised monitoring of the safety implications of relaxing the mandatory pilotage rule.

3.5 Disaster prevention and ships in distress

Esbjerg Declaration:

62. To invite the competent authorities of Germany and Denmark to discuss mutual assistance in emergency situations, especially cases involving towing ships in distress.

¹² Automatic identification System.

This recommendation of the Esbjerg Declaration is emphatically not directed towards the Netherlands, which is explained by the fact that it is a response to the incident involving the Pallas in 1998 in the Danish-German border region, in which both countries refused to take responsibility for towing the ship away. None the less, this advice addresses three points regarding the towing and salvaging of ships. First of all, this concerns the arrangement of the disaster recovery organisation in the Netherlands. Secondly, it concerns the collaboration with Germany and Denmark. And finally, it appears that the problems in later being able to recover the costs of disaster recovery sometimes get in the way of being able to act quickly and effectively.

Arrangement of the disaster recovery organisation

It was concluded at the 'Zwart Getij' conference on the 13th and 14th of March on Terschelling that the disaster recovery organisation in the Netherlands, or in any event in the Wadden Sea and the part of the North Sea north of the Wadden islands, is insufficiently coordinated. A study commissioned by the Regional Wadden Sea Coordination Board, in which the risks and the disaster recovery organisation for the Wadden Sea were examined, also concluded that the disaster recovery organization for the Dutch part of the Wadden Sea is not well-organised.¹³ The current Collaboration Agreement on Combating Accidents Wadden Sea is only intended for accidents, not disasters. The scaling up that is required in the case of disasters is not well-organised. Furthermore, potential conflicts have been identified at the territorial borders (e.g. municipal borders) and along functional borders (for example: is the mayor the competent authority, or the Directorate-General for Public Works and Water Management). There are also too many regulations for secondary aspects that overlap but do not match up properly. Examples include the Disasters and Serious Accidents Act and the Municipal Act for disaster recovery ashore, the Act governing the combating of accidents in the North Sea for disaster recovery in the North Sea, the Collaboration Agreement for Combating Accidents in the Wadden Sea, the SAR arrangement, the Nethger plan in which the collaboration with Germany emergency services is provided for and the Bonn treaty.

Good coordination between the disaster recovery organisation on and from the land and at sea is of great importance. The same applies to the coordination between the disaster recovery in the North Sea and in the Wadden Sea. Regarding the latter point, because the Wadden Sea is an inland waterway and is also classified provincially and municipally, there are differences in governmental responsibility for the Wadden Sea and for the North Sea. This means that the disaster recovery plans have to be set up in such a way that these differences do not get in the way of effective collaboration.

As mentioned above, there are also coordination problems regarding the disaster recovery organization ashore and that in the Wadden Sea. In the Wadden Sea, for example, there is a complex division of authority between the mayor (e.g. where public order is concerned), the Queen's Commissioner, the Coastguard, the Directorate-General for Public Works and Water Management (e.g. the discharge of environmentally-harmful substances), but also the SAR (search-and-rescue organization). The situation is different ashore: the Directorate-General for Public Works and Water Management and the Coastguard are not authorised. There is therefore a risk that in the event of a disaster occurring, there will be a lack of clarity about how the authority and responsibilities are divided in the Wadden Sea.

The Council advises examining the question of whether the regulations referred to above (the Disasters and Serious Accidents Act, the

¹³ Engineering/advice agency SAVE, Analyses for the risks and the disaster recovery organisation for the Wadden Sea, February 2003. This report can be downloaded from www.waddenzee.nl

Municipal Act, the Act governing the combating of accidents in the North Sea, the Collaboration Agreement for Combating Accidents in the Wadden Sea, the SAR arrangement, the Netherger plan and the Bonn treaty) can be better geared to each other and involving the recommendations made to the Regional Wadden Sea Coordination Board such as an 'administrative and operational coordination plan' in this.

Improving the coordination of regulations is a lengthy process. In view of the fact that the threat of a disaster is continuously present, action must also be taken in the shorter term in order to improve the coordination of disaster recovery.

The Council advises gearing the disaster recovery plans for the land (the coastal strip), those for the North Sea and those for the Wadden Sea to each other by 1 July 2004 at the latest, and clearly communicating how the authority and responsibilities are arranged.

Following the accident with the Prestige, the ship was towed out to sea on the orders of the Spanish authorities, whereas the damage would have been more effectively limited by towing the ship into port. This could also happen in the Netherlands. Mayors have the authority to refuse entry to ships and can find themselves facing public pressure to forbid the ship from being towed into 'their' port or to 'their' coast. The Act for combating accidents in the North Sea already provides for the Minister of Transport and Public Works being able to designate a port that is obliged to admit the shipwreck. The refusal of mayors cannot prevent a shipwreck from being towed in. There is no equivalent authority for the Wadden Sea.

The Council advises giving the Minister of Transport and Public Works the legal authority also to designate a port into which a shipwreck located in the Wadden Sea must be towed.

Work is being done in the European Union to designate locations to which shipwrecks can be towed. These places must be designated in advance rather than when a disaster has already taken place.

Availability of equipment

Regarding the operational level, reference should be made to the need to have sufficient equipment available. In addition to the specific (oil) combating vessels, the ships of the shipping lane marking service could also be deployed to combat oil disasters.

Possible economies on the vessels of the shipping lane marking service must be compensated for by increasing the other equipment available for combating disasters.

Private vessels could also be adapted and made available for disaster recovery organisations. Cockle fishers, for example, have flat-bottomed vessels that can operate in parts of the Wadden Sea that other vessels cannot reach. These agreements must be made in advance rather than on an ad hoc basis if a disaster occurs. It must be emphasised that the government remains responsible and must not hide behind private citizens.

The Council advises charting the extent to which more use can be made of the deployment of private vessels, such as fishing boats, in combating a disaster.

Exercises

The availability of sufficient equipment is very important, but it is just as important that the people involved know how to use it. It is essential that the people who are involved in the actual combating of a disaster have been sufficiently trained to do so and that regular exercises are held. Because disaster recovery in the Wadden Sea must take place within a tide of a disaster, it is essential that the speed of the operation also be practised. It must be noted regarding the administrative coordination of the disaster recovery that communication exercises can be held without equipment actually being deployed, so that exercises at this level can easily be held several times a year.

The Council advises holding exercises for the administrative cooperation aspect of the disaster recovery operation several times a year.

Trilateral cooperation for disaster recovery

The question remains of whether the cooperation between the Netherlands and Germany is better organised than that between Denmark and Germany. Should a disaster occur on or close to the Dutch border with Germany (or even in the disputed area between the two countries), in the North sea or in the Eems estuary, it is questionable whether the cooperation (especially at operational level) will run smoothly, not least in view of the finding that the coordination within the Netherlands is less than optimal.

The Council advises once again closely examining the administrative and operational coordination of disaster recovery operations with Germany in particular, but also with Denmark.

Cost recovery

When combating a disaster and, for instance, when salvaging a shipwreck, there are times when action is not taken promptly because there is a lack of clarity about who will (has to) meet the costs. This is all the more serious if oil or chemicals can leak out of a shipwreck or if the ship could be collided with by other ships, as recently happened with the Tricolor, which was shipwrecked off the Belgium coast and was collided with by three other ships. A lack of clarity about the costs or responsibilities must not result in delays being caused to the combating of a calamity or the salvaging of a dangerously situated ship. If necessary, consideration will have to be given to making it compulsory for all ships that sail in the Dutch part of the North Sea to be covered by adequate insurance. Also, when the Assi Eurolink sank after colliding with the Seawheel Rhine on 25 January 2003, it took a few days before the shipowner had relinquished the ship and (preparations for) the salvage operation could be started. It was not until March that the calls for tenders were sent to the ship owners, and in view of the poor financial situation of the Ministry of Transport and Public Works, and the Directorate-General for Public Works and Water Management in particular, it still remains to be seen whether the Assi Eurolink will be salvaged in the short term. This is despite the undertaking given by the Minister to the Lower House that the salvage operation would be given priority and would be completed before the autumn of 2003.¹⁴ And while this is going on, the ship is situated in the shipping lane, and in view of the limited depth there is a danger of collision for vessels with deep drafts, such as tankers.

It must be borne in mind that this case concerns a Dutch owner, but it is not inconceivable that the next time something similar happens it will concern a shipowner who is in a poorly-accessible place abroad or is less willing to relinquish his rights and will want to simply leave the ship where it is. In that case, it is highly probably that (the preparation of) the salvage will be even more

¹⁴ See LOWER HOUSE 2002-2003, 28 600 XII, no. 100.

laborious. This has demonstrated that the fast financial settlement of a salvage or combating operation must be guaranteed by means of compulsory insurance and/or the creation of a special fund.

The Council advises looking into the possibilities of making insurance compulsory for ship owners and/or to look for other ways of preventing delays to disaster recovery and salvage operations.

Cost recovery also for environmental damage

The new European Directive on Environmental Liability that is currently being drafted,¹⁵ will offer ways of recovering not only the clearance costs but also the costs of the environmental damage. In its draft form, this directive also regards damage to the ecosystem as environmental damage. The directive contains a separate ecological annex (annex II, recovery of environmental damage) about how eco system damage should be recovered. In principle, this is done on the basis of the 'service to service and goods to goods' approach. What this means is that the damage to services and goods produced by the eco system at the location or elsewhere must be repaired or that the services and goods that the ecosystem can no longer produce can be produced elsewhere. If it proves impossible to repair the damage or to recover the loss elsewhere, the loss of ecosystem benefits can also be recovered from the party that caused the damage.¹⁶ This latter point is of great importance to ecosystems such as the Wadden Sea because it will often be difficult to repair damage caused there and the ecotopes and communities will often be irreplaceable. A sea grass bed, for example, cannot simply be developed elsewhere.

The Council advises ensuring that the ecological annex to the Environmental Liability Directive is retained and ensuring that damages caused by the loss of ecosystem benefits can be recovered by means of this directive, also when repair or replacement elsewhere is not viably possible elsewhere.

Funds for combating oil spills

Because recovering costs from the owner of the ship proves by no means to be always possible in practice, it is of great importance that there are funds from which the clearance costs can be financed. The European Commission therefore made a proposal to the Council of the European Union in December 2000 for the institution of a fund (the COPE fund) in order to cover these costs up to 1 billion euros, to the extent that they are not already covered by the international Oil Pollution Fund 1971 (this fund goes up to approximately 148 million euros). The Council of the European Union has not yet approved this proposal, putting forward the argument that measures of this nature should be taken at IMO level. In view of the slow pace at which decisions are made by the IMO, it would be worth setting up a European fund that could if necessary be cancelled as soon as an adequate measure can be put in place at IMO level.

The Council advises calling within the Council of the European Union for the expeditious institution of the COPE fund.

¹⁵ Proposal of the Commission of the European Communities for a directive of the European Parliament and the Commission pertaining to environmental liability relating to the prevention and recovery of environmental damage, Brussels 13 January 2002, COM (2002) 17.

¹⁶ The loss of ecosystem benefits is not the same as the costs of compensation measures or replacement projects, because no repair or replacement was possible. The loss of ecosystem benefits can be determined by applying various economic valuation techniques to the functions that the ecosystem fulfilled.

Operational structure

As well as having good disaster recovery plans in place, it is of great importance to make sure that the operational structure is as it should be. To achieve this, there must be sufficient equipment available at operational level. It is alarming to note in this regard that it may not be possible to avoid economies on this point. The Directorate-General for Public Works and Water Management, North Sea Directorate, for instance, has indicated that it will be looking into the question of whether the buoys in the North Sea and North Sea can be more efficiently maintained (which means: carrying out maintenance less frequently and reducing the number of buoys). Efficiency is of course in itself a good thing, but it must not result in insufficient buoys being in place. In practice, ships do not only sail by radar but also by using the buoys. The reduction of the number of buoys therefore forms a threat to safety. Another effect of this operation could be that one or two buoy-laying vessels are taken out of service. The fact that these vessels could also be used to combat a disaster means that the loss of buoy-laying capacity also represents a loss of capacity available for disaster recovery purposes.

The Council advises charting the extent of the disaster recovery capacity and extending it where necessary.

The Council also advises – before taking the buoy-laying vessels out of service – to establish whether this will result in a deterioration of the shipping lane markings. The Council further advises compensating for the possible loss of disaster recovery capacity caused by a reduction in the number of buoy-laying vessels by purchasing extra vessels for disaster recovery purposes.

4 Security

As mentioned in the introduction, this advice is dictated primarily by the feeling that there are number of developments which, taken together, place the safety of the Wadden Sea under threat. It is therefore mainly about the risk of human error, i.e. safety as opposed to security.

It must however be borne in mind that safety can also be placed under threat by deliberate, destructive, human intervention. This, then, is more about security as opposed to safety. Since the attacks in the United States on 11 September 2001 on targets such as the World Trade Centre in New York, extra attention has rightly been paid to the risk of terrorist attacks in our country and also in the ports. The Esbjerg Declaration, however, does not address the threat of terrorism and the countermeasures to be taken in that regard. This attention is however paid in an IMO context. At the meeting of the IMO on 9-13 December 2002, for example, the participating governments adopted the *International Ship and Port Facility Security Code*. This code must also be implemented by the Netherlands at national level. A taskforce of the Ministry of Transport and Public Works is responsible for that implementation. This will involve drawing up risk assessments, safety plans and placing special security officers on board ships and in the ports. At first sight, the Wadden Sea and the northern ports do not seem to be the most obvious targets for terrorist attacks. It should however be borne in mind that terrorist attacks could target precisely the places where they can most easily be carried out – where security and alertness are at their lowest – so that it is also important to prepared for possible attacks in the Wadden area. This also applies to other security risks, such as piracy, smuggling and illegal trade.

The Council therefore recommends looking into the risks in and around the Wadden Sea where security issues are involved.