

The EU Water Framework Directive in Light of the International and Comparative Law

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A Conversation about Water



The Powers of the European Institutions

- The Single European Act added the environment to the scope of the European Community (1986)
- The Treaty of Maastricht (1992) introduced:
 - A qualified majority rule for decisions by the Council
 - A limited role for the European Parliament
- The Treaty of Amsterdam (1997) addressed decision making on water issues (arts. 174, 175)
- The Treaty of Lisbon (2007) carries these arrangements forward

The Evolution of European Community/European Union Water Policy

- The European Community and the European Union, while technically distinct institutions, overlap and interrelate on many levels
- The European Community began to focus on water policy in the 1970s
- The first phase—Developing water quality standards (1973-1988), *e.g.*:
 - The EC Directive on Drinking Water
 - The EC Directive on Bathing Water
 - The EC Directive on Supporting Fish Life
- The second phase—Developing effluent and treatment standards (1988-1995), *e.g.*:
 - EC directives on specific pollutants (e.g., cadmium, nitrates, etc.)
 - The EC Directive on Integrated Pollution Prevention and Control
 - The EC Directive on Urban Waste Water
- The third phase—moving toward integrated management (2000-present)—The EU Water Framework Directive

The EU Water Framework Directive— Directive 2000/60/EC, 23 October 2000

- Its preamble declares water to be an important facet of all life that is a heritage rather than a commodity
- It sets standards that ensure safe access to the resource
- It commits the European Union member states to achieve a good quality and quantity status for all water bodies (including marine waters up to kilometer from shore) by 2015 through a framework prescribing steps to a common goal rather than specific regulations
- It defines “surface water status” as the general expression of the ecological and chemical status of the waters; to achieve “good surface water status” both the ecological and the chemical status of a surface water body need to be at least “good”
- “Ecological status” refers to the quality of the structure and functioning of the aquatic ecosystems of the surface waters
 - Good ecological status is defined better than a theoretical reference point of pristine conditions, i.e., the absence of human influence
 - Waters that cannot meet the standards of “good ecological status” might be classified as exhibiting “good ecological potential”
- “Chemical status” refers to the level of pollutants in the water necessary to achieve environmental objectives under the directive
 - “Good chemical status” requires that the concentration of pollutants at least not exceed water quality standards set under the directive
 - “Pollution” means the direct or indirect introduction by human activity of substances or heat into air, water or land that may be harmful to human health or the quality of aquatic or related terrestrial ecosystems, that damage to property, or that impair or interfere with amenities and other legitimate uses of the environment
- At a minimum, member states are to prevent further deterioration of waters

Policies of the Water Framework Directive

- Member states are to use a holistic approach to water management issues
 - All waters to be considered conjunctively
 - Water issues to be governed by integrated river basin management
- Planning is at the heart of the Water Framework Directive
 - It requires the production of key documents over six year planning cycles, most importantly “river basin management plans” in 2009, 2015 and 2021, with draft plans published for consultation at least one year earlier
 - Plans and programs must extend throughout the basin if possible
 - If part of a basin is outside the EU, the member states must attempt to create a basin-wide institution for coordinating with non-member states
- Polluters are to pay the costs of remediation
- Member states are to encourage the active involvement of interested parties (the “public”) in the implementation of the directive, assimilating the standards of the Aarhus Convention

More on “Good Status”

- Achieving “good status” includes:
 - Ecological integrity
 - Special protection for specially vulnerable habitats
 - Protection of drinking water supplies
 - Protection of water for recreational uses (“bathing” water)
 - Chemical integrity treated as an aspect of the foregoing concerns
- Exceptions to “good status” for certain “essential” uses
 - Flood control
 - Drinking water withdrawals
 - Navigation and power generation if:
 - No substitutes exist; or
 - Substitutes would be prohibitively expensive; or
 - Substitutes would produce a worse environmental effect

Implementation of the Directive

- Widespread public consultation
- Adoption of the Common Implementation Strategy (along with Norway) (2001):
 - A multi-layered structure:
 - Technical working groups operating nearly continuously
 - A strategic coordination group to supervise the technical working groups and to advise the basin and national water directors
 - Water director meetings twice a year
 - Supplemented by:
 - Strategic plans
 - Work programs
 - Reasons for the common strategy:
 - The program faced (and faces) large technical difficulties
 - Many rivers, lakes, and aquifers are international
 - Little success in enforcing earlier water-related directives
- The European Court of Justice has taken the lead in enforcing water policy against the member states

The New Paradigm of Customary International Law

- The most comprehensive recent expression of customary international law applicable to water is the International Law Association's *Berlin Rules on Water Resources* (2004)
- The New Paradigm (all waters):
 - Participatory management
 - Conjunctive management
 - Integrated management
 - Sustainability
 - Minimization of environmental harm
- The New Paradigm (internationally shared waters):
 - Cooperation
 - Equitable utilization
 - Avoidance of transboundary harm
 - Equitable participation

Environmental Standards in the *Berlin Rules*

- Ecological integrity
 - Ecological flows
 - Alien species
 - Pollution prevention or control
 - Hazardous substances
- Prior assessment of impacts
- Precaution
- Least net environmental harm
- Compensation for injuries ("polluter pays")

Participation Standards in the *Berlin Rules*

- Access to water
- A right to a voice in decisions affecting one's life
- Access to education
- Protection of particularly vulnerable communities
- A right to compensation
- Access to legal remedies

The American Approach to Water Quality Standards

- The (federal) Clean Water Act of 1972 federalized water quality standards
 - Most standards are set by the Environmental Protection Agency and include:
 - Emission standards
 - Water quality standards ("total maximum daily loads")
 - Dredge and fill standards are vested in the US Army Corps of Engineers
 - Enforcement is largely delegated to the states
 - States generally are free to set higher standards than required by the Environmental Protection Agency
 - The Agency can enforce standards directly if a state fails to do so
- The ostensible goal (never achieved) is "no discharge" of pollutants into waters of the United States

Quantity Issues in the United States

- Largely left in state hands
 - Federal law applies to water allocation only for “federal reserved rights”
 - Federal law determines interstate allocations, but allocation within each state remains in state hands
- Given the effect of water abstraction on water quality, federal environmental standards sometimes override state allocations
 - Some states use their enforcement authority over federal quality standards as an indirect means of allocating water
 - The Endangered Species Act has been used by the federal authorities to override state-created water rights, sometimes generating violent resistance

Conclusions

- The Water Framework Directive is well-structured to address environmental concerns
- The Water Framework Directive has considerable room for improvement for public participation
- The Water Framework Directive does little to resolve quantitative disputes