

LEGITIMACY AND EFFECTIVENESS OF WATER QUALITY POLICY

THE STAKEHOLDERS' PERSPECTIVE



To what extent does the change in governing from a government approach to a governance approach as expressed in EU directives on water management, improves the legitimacy and effectiveness of water quality policy from the stakeholders' perspective?



SHIFT FROM GOVERNMENT TO GOVERNANCE

Shift from government to governance can be identified at EU level. Surface water quality is a good example of this shift. Three waves in EU regulation with regard to surface water quality can be identified. The most exemplifying directives with regard to surface water quality are for the first wave, the Dangerous Substances Directive (76/464/EEC), for the second wave the Nitrates Directive (91/676/EEC) and for the third and last wave the Water Framework Directive (WFD; 2000/60/EC). Each directive has or had a specific focus on different substances. The Dangerous Substances Directive focused on priority substances and is now incorporated and repealed by the WFD. The Nitrates Directive focuses on nitrates, now also part of the parameters which are decisive for the ecological quality under the WFD. The WFD integrates and repealed previous directives, but add the component of ecological quality. Ecological quality is determined by three kind of elements, namely biological elements, physical-chemical elements that support the biological elements and hydro-morphological elements that support the biological elements.

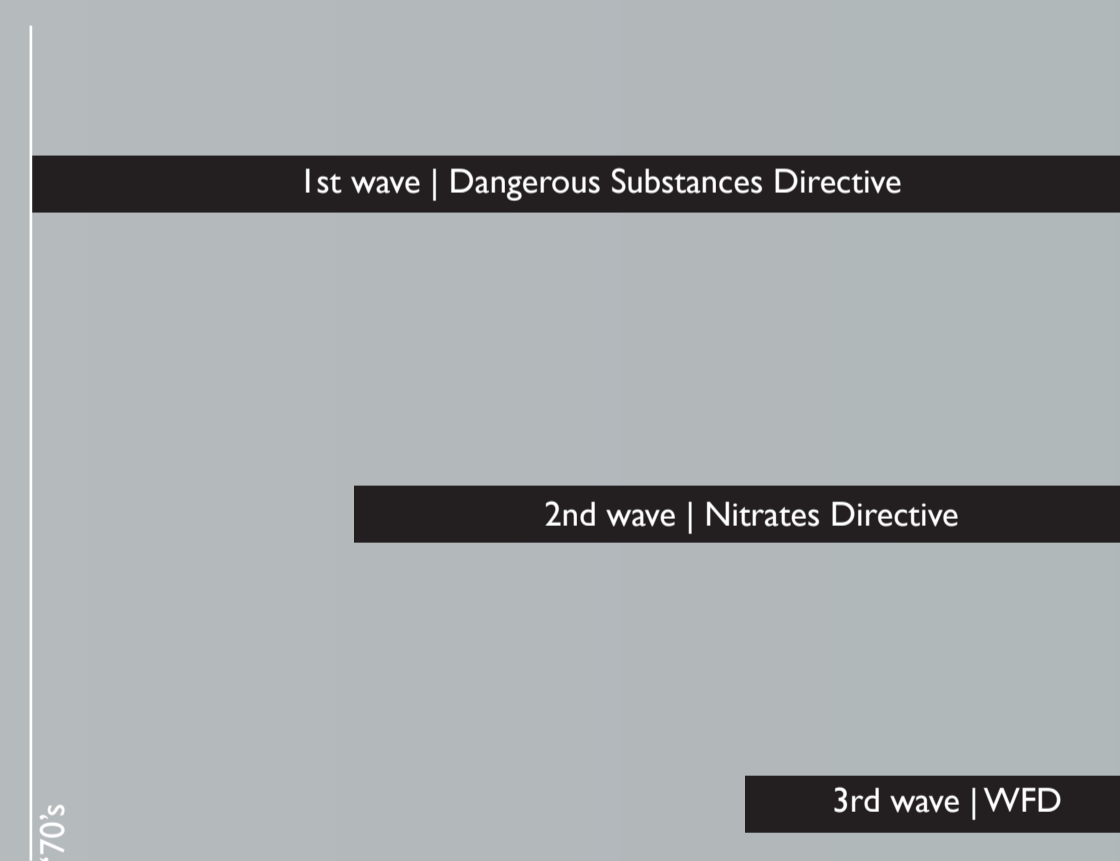
Dangerous Substances Directive = emission control by permits (IED; formerly IPPC) or commonly binding regulation at national level to achieve emission limit values and environmental quality standards set at EU level, formerly in specific 'daughter' directives, currently in the Priority Substances Directive (2008/105/EC) → priority substances

Nitrates Directive = emission control by voluntarily compliance of a code of good agricultural practice (GAP) and within a Nitrate Vulnerable Zone by compulsory compliance of GAP and additional measures. In the Netherlands by commonly binding regulation, consisting of an emission limit value and general exemptions, or individual exemptions and quality standards based upon the WFD → nitrates

WFD = combined approach, but with regard to biological-chemical elements it is up to the Member States to set quality standards. There is no obligation for a licensing system or other specific form of emission control. In the Netherlands there are no emission limit values set, but only quality standards → physical-chemical elements that support the biological elements

GOVERNMENT APPROACH	GOVERNANCE APPROACH
top-down regulation	bottom-up regulation
hard standards	open standards
rule-based regulation	principle-based regulation
substantive rules	procedural rules
little room for MS to deviate/adapt	much room for MS to deviate/adapt
no or little participation	participation is a prerequisite
command and control instruments	arrangements

Characteristics of both approaches



Modes of governance in time as exemplified in different waves of water quality directives

CHARACTERISTICS	Dangerous Substances Directive	Nitrates Directive	Water Framework Directive
bottom-up regulation	-	+/	+
open standards	-	-	+
principle-based regulation	-	+/	++
procedural rules	-	-	++
much room for MS to deviate/adapt	-	-	++
participation is a prerequisite	-	+	++
arrangements	-	+	++

Scoring of the directives on the characteristics of the governance approach based upon the differences in substances

LEGITIMACY \triangleq PARTICIPATION



STRENGTH

Width (the degree to which each member of a community has the opportunity to participate in each phase of the policy process.)

Depth (the degree to which stakeholders have the opportunity to influence the outcome of the policy process.)



ACTUALITY

Can do (knowledge and resources)
Like to (degree of commitment)
Enabled to (opportunity and means)
Asked to (active or passive government)
Responded to (outcome)

EFFECTIVENESS \triangleq COMPLIANCE



STRENGTH

Norm setting
Clear
Precise
Foreseeable
Predictable
Enforceable



MECHANISMS

Instruments
Appropriate instruments
Possibility of using these instruments



ACTUALITY

Can do (knowledge and resources)
Like to (degree of commitment)
Enabled to (opportunity and means)
Responded to (outcome)



ASSESSMENT FRAMEWORK

ENGLAND

THE NETHERLANDS

CASE STUDIES
Two different Member States: the Netherlands and England within the UK; a civil law country, like the EU, in search for the optimal mix between the government approach and the governance approach, and a country rooted in a common law tradition and where the governance approach originates from. Focusing on surface water quality. The implementation of the different modes of governance as exemplified in the different directives is done like a marble game by three different kind of substances. The substances chosen are exemplifying and problematic with regard to surface water quality. Presupposition is that there is more need for participation and compliance by stakeholders. For the Netherlands respectively Mercury, Nitrate, and Zinc are chosen.

With regard to participation and compliance it is necessary to make a distinction between Emission control (regulation on discharges by point and diffuse sources) and achieving Quality Objectives in water bodies, i.e. Quality control.

PRELIMINARY RESULTS FOR THE NETHERLANDS

MERCURY

Policy	Formal legislation	Delegated legislation	Concrete decisions
In line with the DSD, the waterplans only speaks of the termination of discharges for priority substances and thereby of achieving good chemical quality	Prohibition of discharge (6.2 Waterwet). Permit necessary, unless it is allowed under general applicable rules	Use of mercury by industries which do not need a permit, but are allowed under general applicable rules, is prohibited (4.72, 2nd paragraph, Activiteitenbesluit). No M2M instructions possible. If industry wants to use mercury, an environmental permit is needed. According to an order in council (Regelen met betrekking tot grenswaarden voor kwik) an emission limit value has to be included in the environmental permit.	Environmental Quality Standard laid down in Appendix I of BKMW 2009.
Yes, for national level laid down in Waterwet; also a SEA is needed, thus afd. 3.4 Awb; decentral level in decentralised legislation, mostly afd. 3.4 Awb	By parliamentary democracy; informal participation	By parliamentary democracy (voorzang); informal participation	No, EQS set at EU level
Civil judge; Administrative judge by way of exception	Civil judge (restricted); Administrative judge by way of exception	Civil judge (restricted); Administrative judge by way of exception	Civil judge (restricted); Administrative judge by way of exception Administrative judge; Civil judge (restricted)
Discharge of mercury in a non-industrial process is only allowed with a water permit. The water management authority has to set an ELV on its own by testing against water plans. Such a permit is granted for maximum 10 years.	Environmental permit for indirect emission by industries. ELV set in delegated legislation.	Afd. 3.4 Awb	Use of afd. 3.4 Awb not prescribed

NITRATES

Policy	Formal legislation	Delegated legislation	Concrete decisions
Action programme sets out the measures, which consist of legislative measures and other measures	Prohibition of discharge (6.2 Waterwet). Permit necessary, unless it is allowed under general applicable rules	Discharge is allowed, if you comply with 1) application standard (7-13 Meststoffenwet); and 2) the instructions for use as laid down in Besluit gebruik meststoffen and Activiteitenbesluit.	Ministerial derogation for use not in accordance with instructions.
Not specified in law; also a SEA is needed, thus afd. 3.4 Awb, BUT not specified in law	By parliamentary democracy; informal participation	By parliamentary democracy (voorzang); informal participation	No, EQS set at EU level
Civil judge; Administrative judge by way of exception	Civil judge (restricted); Administrative judge by way of exception	Civil judge (restricted); Administrative judge by way of exception	Civil judge (restricted); Administrative judge by way of exception Administrative judge; Civil judge (restricted).

ZINC

Policy	Formal legislation	Delegated legislation	Concrete decisions
In line with the WFD, the waterplans speaks of achieving good ecological quality or potential. Unless an exemption, the EQS has to be met at 22-12-2015.	Prohibition of discharge (6.2 Waterwet). Permit necessary, unless it is allowed under general applicable rules	Discharging is under conditions allowed (2.2 Activiteitenbesluit); competent authority has in some cases possibility for M2M instructions (specific ones; duty of care).	Environmental Quality Standard laid down in Appendix of RMKW.
Yes, for national level laid down in Waterwet; also a SEA is needed, thus afd. 3.4 Awb; decentral level in decentralised legislation, mostly afd. 3.4 Awb	By parliamentary democracy; informal participation	By parliamentary democracy; informal participation	Informal participation
Civil judge; Administrative judge by way of exception	Civil judge (restricted); Administrative judge by way of exception	Civil judge (restricted); Administrative judge by way of exception	Civil judge (restricted); Administrative judge by way of exception Administrative judge; Civil judge (restricted)
Discharge of zinc, if not allowed under general applicable rules, is only allowed with a water permit. The water management authority has to set an ELV on its own by testing against water plans.	Environmental permit for indirect emission by industries. ELV set in accordance with BBT by authority.	M2M instructions are possible to prevent breach of duty of care	Afd. 3.4 Awb
Use of afd. 3.4 Awb in principle not prescribed (2.2, 6th paragraph, Activiteitenbesluit)			Use of afd. 3.4 Awb not prescribed