

23 Nature conservation and water management

One battle?

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Introduction

Rivers, lakes and coastal waters in good ecological condition support a wide range of habitats and biodiversity. Rivers and their floodplain wetlands are, however, amongst the most vulnerable and threatened ecosystems in Europe, due to the way they have been used and managed over past centuries. Against this background the European Water Framework Directive (Directive 2000/60/EC)¹ has been established to act as umbrella legislation for sustainable and ecologically sound water management treating river basins as a whole.

The Water Framework Directive (WFD) came into force on 22 December 2000, each Member State being required to transpose it into domestic legislation by December 2003. By adopting the WFD the European Union has completely restructured and expanded its water policy. Implementation of the Water Framework Directive and its ‘daughter directives’ on quality standards for groundwater (Directive 2006/118/EC)² and surface water (Directive 2008/105/EC),³

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1 Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy [2000] OJ L371/1; see among others P Chave, *The EU Water Framework Directive. An introduction* (London, IWA Publishing, 2001) 208; H Josselson and L Baaner, ‘The Water Framework Directive – A Directive for the Twenty-First Century?’ (2011) 23–3 *Journal of Environmental Law* 463–486; J-F Neuray (ed), *La directive 2000/60/CE du 23 octobre 2000 établissant un cadre pour une politique communautaire dans le domaine de l’eau. Droit européen, droit interne – droit comparé* (Bruxelles, Bruylant, 2005) 168; HFMW van Rijswick, ‘EC Water Law in Transition: the Challenge of Integration’ in *The Yearbook of European Environmental Law*, Volume 3 (Oxford, OUP, 2003) 249–304.

2 Directive 2006/118/EC of the European Parliament and of the Council of 12 December 2006 on the protection of groundwater against pollution and deterioration [2006] OJ L372/19.

3 Directive 2008/105 of European Parliament and of the Council on environmental quality standards in the field of water policy, amending and subsequently repealing

and its ‘sister directives’ on flood risk management (Directive 2007/60/EC)⁴ and marine protection (Directive 2008/56/EC), will be a challenge as well as an opportunity for all those involved, at the European, national, regional and local level. For a clear understanding of the legal issues raised in this contribution, the main points of the protective regime of the WFD, including the exemptions to this, are described below.

The WFD is a radical improvement on earlier, piecemeal EU water legislation. It expands the scope of water protection to all waters. It aims to ensure that all aquatic ecosystems and, with regard to their water needs, terrestrial ecosystems and wetlands meet ‘good status’ by 2015. This integrated approach calls for a clarification of the links between the WFD and nature conservation law,⁵ especially the Habitats Directive.⁶

There is a large physical overlap between the water bodies that fall under the protective regime of the WFD and the Natura 2000 sites. This applies in particular for the lowlands of the Netherlands and Flanders, where a large part of the surface water and the terrestrial ecosystems dependent on it are designated as Natura 2000 sites. Many of the habitat types in the Netherlands and Flanders that fall under European protection, such as fens, swamps or wetlands, are also fed by (local) groundwater. Strong analogies can also be observed on the level of the objective of protection: the WFD, which maintains an explicit ecological approach with a view to the protection of a healthy aquatic ecosystem, and the Habitats Directive, which also aims for this goal, albeit with a focus on the preservation and protection of habitats and species, in fact aim to protect the same aquatic ecosystem. Naturally, this gives rise to the question of the cumulative application of the protective regime in both directives. This chapter considers in more detail a number of thorny application issues that (could) arise in that context. Attention will be given to the time frames of both directives, the differences in goal- or standard-setting, the regimes for exemptions

Council Directives 82/176/EEC, 83/513/EEC, 84/156/EEC, 84/491/EEC, 86/280/EEC and amending Directive 2000/60/EC [2008] OJ L348/84.

4 Directive 2007/60/EC of the European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks [2007] OJ L288/34.

5 See also on this subject S Bennett and WR Sheate, *The Water Framework Directive, Assessment, Participation and Protected Areas: What are the Relationships?*, Final Report (Ireland, Environmental Protected Agency 2007) 118 (www.epa.ie/downloads/pubs/research/water/ERTDI%2067-WEB2.pdf); European Commission, *Links between the Water Framework Directive and Nature Directives* (December 2011) 31, <http://ec.europa.eu/environment/nature/natura2000/management/docs/FAQ-WFD%20final.pdf>; see also European Commission, *A Blueprint to Safeguard Europe's Water Resources* (2012) 28, http://ec.europa.eu/environment/water/water-framework/pdf/Com-2012_673_final_EN_ACT-cov.pdf; European Commission, *LIFE's Blueprint for water resources* (2012) 80, http://ec.europa.eu/environment/life/publications/lifepublications/lifefocus/documents/blueprint_water.pdf.

6 Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7.

with an elaboration on the concepts of overriding public interest and sustainability, the assessment obligations for activities that may harm the achievement of the goals, mitigation and compensation obligations and opportunities, and the measures including the adaptive planning cycle of the WFD that have to be taken to achieve the goals.

The protection regime of the WFD in relation to the Habitats Directive

General

The WFD gives priority to an ambitious objective framework, which shows that the WFD also supports an integrated water policy and water management.

According to Article 1 of the WFD, the purpose of the directive is to protect water-dependent ecosystems, promote sustainable use of water and help to reduce the pollution of surface water and of groundwater, and to address water quantity problems, such as flooding and drought. Through its broad framework of objectives, the directive affects neighbouring policy fields such as town and country planning, environmental (hygiene) policy, agricultural policy, product policy and also nature conservation. The WFD therefore contains a large number of cross-references to other Community legislation, including the Habitats Directive. Consequently, the implementation of measures under the WFD will generally benefit the objectives of the Habitats Directive, and vice versa, but not always.

As water has a truly transboundary character, its sustainable use and protection has to be carried out on the basis of hydrological boundaries. Therefore, the WFD resolutely opts for coordination of administrative arrangements and for the realization of environmental goals by way of a river basin approach.

The working basis is the water that flows to the sea due to natural processes through the river basins. This means that Member States have to divide their territory into districts of river basins. These are based on surface water catchments, taking into account natural interaction of surface water and groundwater in quantity and quality, covering the whole of a river basin district including estuaries, other transitional waters and coastal waters. Because an important number of Annex I habitat types or Annex II species under the Habitats Directive are water-dependent, the river basin-based water management also includes the management of Natura 2000 sites.

With a view to the realisation of the above-mentioned goal of the WFD, a wide range of instruments are deployed. The highly planned and programmed approach is notable here. It also requires a combined approach to pollution control with control at source and the setting of environmental quality standards. A mechanism is foreseen for phasing out or cessation of discharges, emissions and losses of specific pollutants.

The environmental objectives

The ultimate focus: good water status

The environmental objectives contained in Article 4(1) of the WFD, which are a further development of the general objectives of Article 1, form the core of the protection regime of the WFD. These objectives are laid down at the level of each body of surface water and groundwater and, in principle, must be achieved by 22 December 2015.

The characterisation of the environmental objectives is based on the *standstill* principle, which means that they must at least guarantee a level of protection identical to the level provided by the existing legislation at the time when the WFD entered into force. The envisaged environmental objective is not solely the prevention of deterioration, but the achievement of a *good water status*. This good water status may only be supported by objective scientific arguments; social and economic considerations do not yet play a role in the determination of a good water status. These will be raised later, in the preparation of the river basin management plans.⁷ Contrary, scope has been provided to take account of socio-economic considerations or considerations of a cultural nature in determining the nature conservation objectives in relation to the Habitats Directive.

Conflicts between different protective regimes: 'most stringent requirement'

Other directives might also protect water bodies subject to the provisions of the WFD. The WFD therefore provides for a *concurrence rule*, in which a hierarchy is established between the concurrent objectives. More specifically, in the event of the concurrency of various (conflicting) environmental objectives, the 'most stringent requirement' applies pursuant to Article 4(2) of the WFD. Applied to the concurrency with protection and conservation objectives, as developed in the implementation of the Habitats Directive, the concurrency rule of Article 4(2) of the WFD gives rise to a number of specific application problems, as explained in more detail below.

Ecological status under the WFD and conservation status under the Habitats Directive: two of a kind?

The environmental objectives for surface water relate to the *chemical and ecological* status, and those for groundwater to the *chemical and quantitative* status. Good ecological status need not be achieved for bodies of surface water that can be designated as artificial or heavily modified (such as canals or straightened water

⁷ European Commission, *Common implementation strategy for the Water Framework Directive (2000/60/EC). Guidance Document No 20. Guidance document on exemptions to the environmental objectives (2009)*, (hereinafter abbreviated to Guidance Document No 20).

courses), for which good *ecological potential* will suffice (Art 4(3) in conjunction with Art 4(1a), sub-para iii WFD).

Although the chemical status of all waters as well as the quantitative status of groundwater also determines the status of the habitats and species protected under the Habitats Directive, it is especially through the *ecological environmental objectives*⁸ that a link is made between the WFD and the Habitats Directive. However, the ecological environmental objectives under the WFD and those under the Habitats Directive are not defined in the same or even a comparable way. In contrast to the Habitats Directive, the WFD is not aimed at the protection of specific habitats and species, but does use the presence and the *conservation status* of the habitats and species, or at least some of these, as an indicator for the evaluation of the ecological status of the surface water. However, this does not mean that achieving the good preservation status required by the Habitats Directive means *ipso facto* that a comparable status of the water quality according to the WFD has been achieved, or vice versa.

Protected areas

A special regime applies for *protected areas*. These are protected for their use (such as drinking water or fisheries) or because they have important habitats and species that depend on a good water status.

Protected areas will be managed to achieve the WFD objectives and the objectives of the existing legislation under which the protected areas have been designated. As we have already mentioned, where more than one of the objectives relates to a given body of water, the most stringent will apply (Art 4(2) WFD). For these protected areas the monitoring programmes must be supplemented by those specifications contained in Community legislation under which the individual protected areas have been established (Art 8(1) WFD).

Pursuant to Article 4(1c) of the WFD, the environmental objectives for protected areas must be achieved no later than towards 2015, to the extent that Community legislation creating the relevant protected area does not provide otherwise. To that end, the Member States were also required, pursuant to Article 6(1) of the WFD, to create a *register of the protected areas* located in each river basin district towards 2004, including the special protection zones designated on

8 'Ecological status' is an expression of the quality of the structure and the functioning of aquatic ecosystems associated with surface water, classified in accordance with Annex V of the WFD. Annex V lists several classes of water such as rivers, lakes, coastal waters and transitional waters. Therefore, good ecological status may vary depending on the kind of water. Functional parameters used as indicators for the status of the aquatic ecosystem include nutrient status and growth/production patterns. Structural parameters, however, dominate as indicators, in particular in terms of organisms, which are indicative of trophic structure and diversity of the aquatic ecosystem; four trophic layers are identified: phytoplankton, macroalgae and angiosperms, benthic invertebrate fauna and fish fauna.

the basis of the Birds Directive and the Habitats Directive.⁹ On that basis, the achievement and maintenance of the environmental objectives in the protected areas can be monitored.

Every Special Protection Area (SPA) or Natura 2000 site with water-dependent habitats of species referred to in Annexes 1 and 2 of the Habitats Directive, or with water-dependent bird species referred to in Annex 1 of the Birds Directive and migratory birds to which that directive applies, and for which those areas were designated, must be included in the register. The objectives of the WFD and the Habitats Directive therefore apply cumulatively for these SPAs. This is not insignificant. While the Habitats Directive does not set a term as such within which the favourable conservation status must be achieved,¹⁰ pursuant to Article 4(1c) WFD, those objectives must be achieved towards 2015, subject to the application of permitted exemptions (see below). All water-dependent habitats and species designated by the Habitats Directive are therefore covered by that time period; naturally, the habitats and species that are not water-dependent, and that therefore fall beyond the scope of the WFD, are not.

Furthermore, with a view to the application of the environmental objectives, Annex 4 of the WFD allows areas to be included in the register that are protected according to the national legislation of the Member States for the habitats and species found in them. This is undoubtedly worthwhile, as the Habitats Directive also contains provisions for the protection of habitats and species outside the SPAs. Those provisions, too, must be taken into account in the implementation of the WFD, provided that the protective scope of the WFD is not confined to the SPAs.

However, the regime for protected areas is still not clear. The question of what the ‘most stringent requirement’ (Art 4(2) WFD) refers to is quite unclear. The WFD aims for the most natural ecological status possible for the water, but many ecologically valuable habitat types, such as limestone-rich marshes, may need less

9 The register includes areas identified by the WFD or other European Directives, especially: water bodies used for the abstraction of drinking water; areas designated to protect economically significant aquatic species (areas protected under Freshwater Fish Directive 78/659/EEC; Shellfish Directive 79/923/EEC); recreational water (areas protected under Bathing Water Directives 76/160/EEC and 2006/7/EC); nutrient sensitive areas (areas protected under Nitrates Directive 91/676/EEC; Urban Wastewater Treatment Directive 91/271/EEC); areas designated for the protection of habitats or species where maintenance or improvement of the status of water is an important factor in their protection (Natura 2000 sites under Birds Directive 79/409/EEC and Habitats Directive 92/43/EEC).

10 However, in the Biodiversity Strategy (2011) of the European Commission, a specific deadline was determined, but this strategy contains non-binding policy rules (http://ec.europa.eu/environment/nature/biodiversity/comm2006/pdf/2020/1_EN_ACT_part1_v7%5b1%5d.pdf). See also C Backes and HFMW van Rijswijk, ‘Effective environmental protection: towards a better understanding of environmental quality standards in environmental legislation’ (2013) in L Gipperth and C Zetterberg (eds), *Miljörettsliga perspektiv och tankevärdor, Vänbok till Jan Darpö and Gabriel Michanek*, 19–50.

natural water, for example, because they need limestone-rich water, or water rich in nutrients.¹¹ Conversely, the WFD sometimes sets the bar somewhat lower than is necessary for the preservation of European protected habitats or species. This demonstrates that the ecological environmental objectives of the WFD cannot always be geared to the conservation objectives of the Habitats Directive.¹² Consequently, the question arises of which objective should take priority: the objectives of the WFD, which are aimed at the good ecological status of the surface water, or those of the Habitats Directive, which aims for a good conservation status of the European protected habitats and species, and on the grounds of which arguments. A possible position regarding this issue could be that, in principle, restoration of the ecological water status takes precedence because the entire aquatic ecosystem benefits from this, not only the specific habitats of species found in this.¹³ However, this principle cannot be maintained if the good conservation status of habitats or species of importance to the European community is jeopardised at the level of the biogeographical region. In that hypothesis, the entire (aquatic) ecosystem is at risk and the preference for an ‘ecosystem approach’ over a ‘species approach’ cannot automatically apply. In such conflicts, it appears to be necessary to investigate whether an exemption of or derogation rule can be applied, since these are present in both directives.

Programmes of measures

In order to achieve this good water status, *programmes of measures* must be drawn up, a summary of which must be included in the river basis management plans (Art 11 WFD and Annex VII, para 7 WFD). Furthermore, these programmes must also contain *conservation measures* that are required on the basis of the Habitats Directive in order to achieve or preserve the good conservation status of water-related or water-dependent habitats or species. After all, the programmes must include measures in order to enable compliance with the European regulations for water protection, including the Birds Directive and the Habitats Directive (Art 11(3a) of the WFD and Annex VI, A(ii) and A(x) of the WFD).

The derogation regime

The exemptions

A number of *exemptions* are possible to the obligation in principle to achieve the environmental objectives in 2015, and are developed in Article 4(4) to Article 4(7)

11 See Bennett and Sheate, above n 5, 17, 72–73 (application case of the Fresh Water Mussel *Margaritifera margaritifera*).

12 AM Keessen and HFMW van Rijswijk, ‘Drinkwaterwinning in een Natura 2000 gebied. Het juridisch regime voor beschermde gebieden’ (2008) *M&R* 561.

13 See in this sense European Commission, *Links between the Water Framework Directive and Nature Directives* (December 2011) 13.

of the WFD. First, Member States may extend the *time period* within which the objectives must be met (Art 4(4) of the WFD), although that extension is limited to 2027 at the latest. It is also possible to establish *less stringent environmental objectives* (Art 4(5) of the WFD). This is possible if the water has been impacted by human activity or the natural characteristics of the water are such that achieving the objectives is not feasible or would be unreasonably costly. Article 4(6) of the WFD provides for an exception for a *temporary deterioration* due to force majeure or circumstances arising as a result of natural causes such as flooding or periods of drought, or unforeseen accidents. Finally, Article 4(7) of the WFD provides for the possibility of non-compliance with the objectives in the case of *new modifications to physical characteristics or in the case of new sustainable human development activities*. The latter exemption can be deployed as a specific derogation clause if the implementation of concrete projects (for example, infrastructure or constructing projects) threatens the attainment of the priority environmental objectives of the WFD.

Conditions to derogate

The above-mentioned exceptions may be used only if stringent conditions are met, and if all technically feasible and not unreasonably costly measures have been taken to avoid the invocation of a ground for an exception. Furthermore, if a ground for exception is applied, the reasons for it have to be set out for each water body individually and explained in the river basin management plans.

The use of this derogation regime is also time-limited: its use must be evaluated every six years (this is the case with all new-generation river basin management plans). Consequently, the Member State may avoid their obligation to maintain and improve the aquatic environment on a temporary basis only.

Furthermore, Article 4(8) of the WFD provides for an *absolute lower limit*: the invocation of one of the exceptions may not permanently obstruct or jeopardise the achievement of the objectives in other bodies of water and must be consistent with other obligations under European environmental law. In other words, when applying the exemptions specified in Article 4(3), (4), (5), (6) and (7) WFD, it must be ensured that the application of these exceptions is consistent with the implementation of other Community environmental legislation, such as the Habitats Directive. In addition, in the application of the derogation provisions, at least the same level of protection must be assured as in the existing Community legislation (Art 4(9) of the WFD).

That latter provision could be of importance for Natura 2000 objectives, particularly if the conservation objectives are not met due to the invocation of exception provisions of the WFD. It should be emphasised in that regard that the invocation of an exemption provided for in WFD does not free the Member States from realising the conservation objectives that must be achieved with the application of the Habitats Directive, unless the derogation regime of Article 6 of that Directive can also be applied. In other words, in the event of derogation from

the environmental objectives to be achieved pursuant to the WFD, when there is also a threat of harm to the natural characteristics of a special protection zone, that derogation must be justified not only by the derogation regime of the WFD, but cumulative compliance with the application conditions of the derogation clause in Article 6(4) of the Habitats Directive is also required.

Is the derogation regime of the WFD applicable in SPAs and the other way around?

The question also arises in regard of how the exceptions in the WFD should be treated in *protected areas*.

This question led to a fierce public debate in the Netherlands, via a discussion opened by the environmental society, *Vereniging Natuurmonumenten*, in which the society took the view that the derogation provision for extending the terms could not be invoked within protected areas. The arguments for this were based primarily on the text of the relevant provisions. The most striking of these is Article 4(1c) of the WFD, which explicitly provides that for protected areas ‘Member States shall achieve compliance with any standards and objectives at the latest 15 years after the date of entry into force of this Directive’.¹⁴

Moreover, one could also argue not only that the ground for exception for extension of the term laid down in Article 4(4) of the WFD is ruled out in protected areas, but that this applies for all the exceptions in Article 4 of the WFD. Textual arguments can also be presented for this view. Article 4(1a) and 4(1b) of the WFD (which relate to surface water and groundwater respectively) contain explicit reservations which explicitly refer to the derogation regime of the provisions of Articles 4(4), 4(5), 4(6) and 4(7) WFD. This reservation is not included in Article 4(1c) of the WFD (which concerns the protected areas). In addition, reference must be made here to the jurisprudence of the Court of Justice regarding strict or restrictive interpretation of exceptions to directive obligations. Finally, a connection could also be found for this point of view in the precedence rule contained in the WFD, that is, the ‘most stringent requirement’ of Article 4(2) of the WFD.

However, the relevant guidelines for the application of the WFD show that the European Commission takes the view that the derogation regime of the WFD applies in full to the protected areas, although it should immediately be added that, pursuant to Article 4(9) of the WFD, the invocation of the derogation regime of the WFD cannot be used to derogate from the objectives and obligations laid down in other directives.¹⁵ This opinion has already also been defended in the legal doctrine.¹⁶

14 https://publicwiki.deltares.nl/download/attachments/31719434/Advies+Veltman+KRW+beschermde+gebieden+2015+op+orde_0.doc?version=1&modificationDate=1267177162000.

15 Guidance Document No 20, 11.

16 See Keessen and van Rijswijk, above n 12, 562.

Relationship between the appropriate assessment obligation of the Habitats Directive and the derogation regime of the WFD

The appropriate assessment obligation under Article 6(3) of the Habitats Directive

In contrast to Article 6(2) of the Habitats Directive, which introduces a prohibition on deterioration, Article 6(3) and 6(4) of the Habitats Directive (the ‘appropriate assessment obligation’ or habitat test) applies only in relation to decision-making procedures. The habitat test must first determine whether a (new) plan or project could imply significant harm to a SPA. If a plan or project, individually or in combination with other plans or projects, could have significant impact on a SPA, the determination of which must be based on the precaution principle, the activity in question can only proceed if a phased assessment process is completed.

If a significant impact of a plan or project on a Natura 2000 area is unavoidable, even by taking *mitigating measures*, the plan or project can only take place if the *derogation clause* of Article 6(4) of the Habitats Directive is applied. First, imperative reasons of overriding public interest must be involved here. In addition, an investigation of alternatives must take place, with a view to preventing or limiting the threat of damage to nature, and finally, the necessary compensatory measures must be taken.

The derogation clauses of Article 6(4) of the Habitats Directive and Article 4(7) of the WFD

To some extent, the legal architecture of the derogation clause of Article 6(4) of the Habitats Directive is consistent with the exemption anchored in Article 4(7) of the WFD. This is not without significance, since both derogation provisions must be applied cumulatively if the implementation of a project jeopardises both the environmental objectives of the WFD and the conservation objectives of the Habitats Directive. This hypothesis is in our opinion by no means inconceivable, as there is considerable physical overlap between water bodies protected under the WFD and Natura 2000 sites. Once again, reference should be made in this regard to the obligation that, pursuant to Article 4(9) of the WFD, in any event the same level of protection must be provided as that guaranteed by other community legislation. In other words, the derogation regime provided for in the WFD cannot be used to derogate from the preservation objectives of the Habitats Directive, or vice versa, unless both derogation regimes can be applied simultaneously. For this reason, the differences and similarities between the two derogation regimes are discussed in more detail below.

Firstly, the question arises of *which (type of) projects* can be considered in the application of the derogation regime of Article 4(7) of the WFD. That question determines the scope of application *ratione materiae* of this derogation regulation.

Article 4(7) of the WFD refers in the first place to *new modifications to physical characteristics* of a body of surface water, or to alterations in the status of bodies of

groundwater. 'New modifications to physical characteristics' include, for example, the diversion or straightening of a river or lowering the groundwater table. For these reasons, derogation from the environmental objectives in order to achieve the good ecological status or good ecological potential with regard to bodies of surface water, or not to prevent the deterioration of the status of bodies of surface water or groundwater, is possible. Secondly, in accordance with Article 4(7) of the WFD, derogation from the environmental objectives, more specifically by not preventing deterioration from a very good status to a good status of a body of surface water, is accepted with *new sustainable human development activities*. So, a large number of projects can be placed under the heading of the activities referred to in Article 4(7) of the WFD. Consequently, it can be said that both the WFD and the Habitats Directive institute a derogation regime for *socio-economic reasons*, although some nuances exist in the subsequent (procedural) steps to be taken. As with the Habitats Directive, the scale of the project does not play any role in the application of Article 4(7) of the WFD, as small projects can also have a negative impact on the realisation of the environmental objectives.

A notable difference with the derogation regime of Article 6(4) of the Habitats Directive is that only 'sustainable' activities qualify. No definition of this term is provided in the WFD, but the European Commission assumes that a link must be laid with sustainable development.¹⁷ What this link should then be is not explained. Reference is made to the fact that this is an evolutionary matter. However, the addition of the adjective 'sustainable' potentially leaves a great deal of scope for debate. Furthermore, the question arises of how the requirement that the activity should be 'sustainable' relates to the derogation condition, to be discussed below, as referred to in Article 4(7c) WFD, pursuant to which the derogation regime of Article 4(7) of the WFD can only be applied in the case of an overriding public interest and/or the value of achieving the environmental objectives for the environment and society is outweighed by the value of the project for human health, safety or *sustainable development*. There is little purpose in regarding sustainable development as a separate derogation conditions if this condition must already be met at the level of the activities for which the derogation can be applied. This leads us to conclude that the view of the European Commission, as expressed in its *guidance*, could sometimes be too far-reaching and that the term 'sustainable' should absolutely be interpreted as having its meaning in common parlance, which is durable, or with a long life. Interpreted in that manner, the addition of the adjective is meaningful. Projects of a temporary character (for example, temporary diversion of a river to enable construction work, or lowering the groundwater table by pumping, in relation to construction work) would thus be excluded from the derogation regime. If these temporary works (temporarily) obstruct the realisation of the environmental objectives, it may be possible to apply other derogation possibilities.

It was emphasised earlier in this contribution that the derogation clause of Article 6(4) of the Habitats Directive comes into play only if the injurious effects

17 Guidance Document No 20, 24–25.

on an SPA cannot be prevented through the implementation of *mitigating measures*. Although the text of Article 6 of the Habitats Directive does not explicitly provide for a hierarchical or graduated approach, in which the possibility of avoiding the harmful impact if mitigating measures are applied is considered first, this approach appears logical and, moreover, is consistent with the prevention principle, which concerns a European principle of environmental law. The derogation regime in Article 4(7) WFD does provide formally for such a hierarchical approach, in which less stringent measures must be deployed first, before the derogation regime can be applied. This is shown by Article 4(7)(a), which provides that ‘all practicable steps are taken to mitigate the adverse effects on the status of the body of water’. The question arises of what is meant by practicable steps to ‘mitigate’ the adverse effects: mitigating measures (*stricto sensu*), as well as compensatory measures (measures that are taken in a different body of water, so that in overall or net terms, the status of the water system does not deteriorate). It must be emphasised that it is important to make a distinction in the appropriate assessment imposed by Article 6(3) of the Habitats Directive between ‘mitigating’ and ‘compensating’, since the latter being taken only at a later stage, that is, if the application of the derogation clause of Article 6(4) of the Habitats Directive is at issue.¹⁸ In contrast

18 It is common in many Member States to integrate mitigation measures into a plan or project. By integrating these measures into a plan or project one aims a positive outcome of the appropriate assessment, because there are no negative effects on the Natura 2000 sites ‘balance’. It is however important to make a difference between mitigating measures and compensatory measures, as the latter measures can only be addressed in the application of the derogation clause of Art 6(4) Habitats Directive. In Flanders as well as the Netherlands, the question arose whether the creation of a supplementary nature area, in order to remedy the damage to a SPA by highway construction works, can be qualified as mitigating or should be considered as compensatory. The Belgian Council of State considered that such a measure cannot be considered as mitigating, and thus the strict derogation clause of Art 6(4) Habitats Directive applies (Belgian Council of State, 29 March 2013, No 223.083, www.raadvanstate.nl/uitspraken.html). The Dutch Council of State however posed a preliminary question to the European Court of Justice (Dutch Council of State, 7 November 2012, No 201110075/1/R4 – No 2012201853, www.raadvanstate.nl/uitspraken.html). In its judgment of May 15, 2014 (C-521/22) the Court ruled: ‘Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of a site of Community importance, which has negative implications for a type of natural habitat present thereon and which provides for the creation of an area of equal or greater size of the same natural habitat type within the same site, has an effect on the integrity of that site. Such measures can be categorised as ‘compensatory measures’ within the meaning of Article 6(4) only if the conditions laid down therein are satisfied’. The Court therefore holds a strict, restrained point of view on the use of mitigating measures under the Habitats Directive. See also on this matter: H Schoukens and A Cliquet, ‘Mitigation and compensation under EU Nature Conservation Law in the Flemish Region: Beyond the Deadlock for Development Project’ (2014) *Utrecht Law Review* 194–215, <https://www.utrechtlawreview.org/index.php/ulr/article/view/278>; H Schoukens, ‘België-Nederland voor gevorderden: mitigatie is geen compensatie’ (2014) *TOO* 284–86.

to the Dutch text of the WFD, for example, which offers few leads on this point, the English version explicitly uses the term ‘mitigate’, which creates grounds to argue that in the WFD too, only mitigating measures (*stricto sensu*) are at issue. An additional argument is conceivable, as Article 4(7a) provides that the steps are taken to mitigate the effect on the *water body*, which prevents compensatory measures being implemented to improve the quality status of other water bodies. This is also logical, since the environmental objectives are defined at the level of the individual water bodies, not at the river basin level. For the rest, according to the applicable guidance of the European Commission, a large number of steps are conceivable, which can be taken throughout all phases of the project, such as operating or design conditions, restoration measures or creation of additional habitats. With regard to the latter, one could wonder whether these are still mitigating measures, or whether the limits to the compensation regime have been reached here. Furthermore, not all measures must be taken in this phase, but only the ‘practicable’ ones, which, according to the European Commission’s guidelines, refer to technically feasible and not unreasonably costly measures, which are also involved in Article 4(7d) WFD.¹⁹

If no ‘practicable steps’ (that is, mitigating measures) can be taken, the various derogation regimes must be invoked in order to enable permission for the implementation of the project in question.

The first procedural step in the application of Article 6(4) of the Habitats Directive requires that if a plan or project causes or could cause harm to a Natura 2000 area, the question of whether less harmful *alternatives* are conceivable must be investigated, considering location alternatives, implementing alternatives and the zero option. However, no financial considerations can be taken into account in this assessment of alternatives. In the selection of those alternatives, an environmental impact report drawn up in relation to the work to be performed can prove valuable in cases arising. Article 7(4d) WFD also requires a consideration of alternatives, but this is formulated more specifically, in that the objective served with the human activities cannot be achieved by other means that are significantly better for the environment, due to *technical feasibility* or *disproportionately high costs*. The text of Article 4(7) WFD does show that the WFD envisages alternatives, which must be technically feasible, and that financial considerations are (or may) also be taken into account in the alternatives test. It appears that assessment in the WFD alternatives test is based on the ‘BATNEEC principle’ (Best Available Technique Not Entailing Excessive Cost). The question of what might constitute (dis)proportionate costs in this context has given rise to discussion. This discussion led to the development of a guidance document by the Commission.²⁰ In view of the general interpretation of proportionality in European law, the term ‘disproportionate

19 Guidance Document No 20, 27.

20 European Commission, *Common Implementation Strategy for the Water Framework Directive (2000/60/EC), Guidance Document No 1, Economics and the Environment – The Implementation Challenge of the Water Framework Directive* [2000] 31; see also Guidance Document No 20, 13.

costs' can be interpreted as follows: it must first be determined whether an action is 'appropriate' and 'necessary' in order to achieve the (environmental) objective, and only then whether the costs of the action are in proportion to the objective to be achieved. In other words, if there are alternative possibilities for achieving the objective, the cheapest possibility may be chosen.

If no such alternatives are possible, according to the derogation regulation of Article 4(7) WFD, the proposed project can still be implemented, provided that the reason for this is an overriding public interest and/or the value of realising the derogated environmental objectives for people and the environment is outweighed by the value of the project for human health, the protection of safety or for sustainable development (Art 7(4c) WFD).

Such an assessment of interests can only be conducted properly if full, precise and current scientific information on the water status and the risk associated with deterioration in that status as a result of the proposed project is available and is used for support. In the decision of 11 September 2012 in Case C-43/10 (the Greek case of the *River Achelöös*), the Court of Justice emphasised this need in relation to the derogation regime of Article 6(4) of the Habitats Directive,²¹ but according to the guidelines of the Commission, this applies equally if the derogation regime of Article 4(7) WFD is applied.²² That information can be obtained on the basis of the mandatory monitoring programmes that are drawn up on the basis of Article 8 WFD, and all other information obtained in relation to the relevant project, such as that based on the environmental impact report.

The WFD does not define reasons of 'overriding public interest', but the applicable guidelines of the Commission make reference in that regard to the interpretation of that term in the Directives of the European Commission concerning the management of Natura 2000 and the application of Article 6 of the Habitats Directive.²³ In the above-cited Case C-43/10, the Court of Justice found that drinking water supplies, power generation and even irrigation may qualify as activities of overriding public interest.

Consequently, although some comparison is possible with the 'public interest' requirement of Article 6(4) of the Habitats Directive, there are nevertheless important distinctions. After all, an additional reason for derogation from the environmental objectives applies, even if there is no overriding public interest. For example, Article 4(7) WFD refers to an *assessment of interests*, specifically into the value of achieving the environmental objectives versus the value of the project, in addition to the overriding public interest. However, the value of the project is 'restricted', in that only a limited number of reasons may be submitted: human health or safety and sustainable development. Nevertheless, overall these remain relatively vague reasons, particularly through the reference to 'sustainable

21 See also Case C-304/05 *Commission v Italy* [2007] ECR I-7495.

22 Guidance Document No 20, 29.

23 Guidance Document No 20, 27–28.

development', which is a 'container term' in which a time element also plays a part.²⁴

Once the project meets the above-mentioned conditions, it can proceed. In contrast to the derogation regulation of Article 6(4) of the Habitats Directive, no compensating actions are required to generally preserve the water status at the level of the river basin. However, in cases of derogation from the environmental objectives, a review every six years is required (Article 4(7)(b) of the WFD). This implies that the application of the derogation regulation does not relieve the Member States of their obligation to take measures to remediate the deterioration that has occurred, so that the status of the relevant body of water improves again. In response to that review, other grounds for derogation can be applied in cases arising, providing that the relevant conditions are met, or the protection level of the ecological objectives to be achieved could be set lower if the body of surface water can be designated as an artificial or heavily modified body of surface water, within the meaning of Article 4(3) WFD, as a result of the activities permitted through the application of Article 4(7) WFD.

The reasons for making use of the derogation clause, as referred to in Article 4(7) WFD, must be reported and explained in the *river basin management plans* and, as noted above, an evaluation must be conducted every six years. In response to that update of the river basin management plans, the public will also be consulted. However, the obligation to report and explain the application of the derogation clauses, as laid down in Article 4(7) WFD, in the river basin management plan is purely a *reporting obligation*. In other words, under European law, the Member States are not required to await the publication of the new generation of river basin management plans before being able to start on the project. This appears to be logical, because otherwise major infrastructure projects would necessarily be 'blocked' until the river basin management plans had been reviewed, which requires a lengthy procedure. However, the application conditions of the derogation regime, as laid down in Article 4(7) WFD, do have to be met at the start of the project. This must be shown in the decision-making procedures relating to the project in question and must form the subject of public consultation, including beyond the preparation of the river basin management plans. After all, according to Article 14 WFD, the Member States must encourage the active participation of all parties involved, firstly in the preparation of the river basin management plans, but also in the planning or licensing procedures in connection with the project that, hypothetically, gives rise to the application of Article 4(7) WFD. The Commission's guidelines also refer in that regard to the project environmental impact report, the results of which must be taken into account in the licensing

24 See also European Commission, *Common Implementation Strategy for the Water Framework Directive (2000/60/EC), Guidance Document No 1, Economics and the Environment – The Implementation Challenge of the Water Framework Directive* [2000] 216–17, in which some guidance is given for the concrete implementation of the concept.

procedures.²⁵ To the extent that a plan is drawn up for the project that forms the framework for the licensing of that project, such as a zoning plan, this can be assessed in relation to the environmental impact report for that plan, on the basis of Directive 2001/42/EC.

Concluding remarks

The complexity of the WFD is largely based on the interpretation of the details of the environmental objectives, for which the text of the directive refers to an extensive number of annexes, and the application of the accompanying derogation regime.

The many cross-references to other directives (relevant to water), such as the Habitats Directive, in which the most stringent objective determines the level of protection to be achieved, certainly do not make the interpretation and application any simpler. In view of the physical overlap with the bodies of water protected on the basis of WFD with the Natura 2000 sites protected on the basis of the Habitats Directive, in practice, cumulative application of both directives will prove to be unavoidable. Particularly via the ecological environmental objectives, a link is created between the WFD and the Habitats Directive. The Natura 2000 sites are catalogued as protected areas in the WFD and are assigned a special protection regime. However, the regime for the protected areas is still frequently unclear. This is primarily related to three issues: i) how to deal with the clear time limits of the WFD and the lack of time limits under the Habitats Directive; ii) how should the 'most stringent' requirement be treated and iii) does the derogation regime apply (in full) within these areas? To date, the Court of Justice has not yet handed down a decision on this.

Both the WFD and the Habitats Directive institute a derogation regime on the basis of which derogation is possible from the environmental or preservation objectives, subject to certain conditions. The legal architecture of the derogation clause in Article 4(7) of the WFD shows some similarity to that of Article 6(4) of the Habitats Directive. Nevertheless, there are notable differences. This chapter refers, *inter alia*, to the fact that in the WFD, the alternatives test is linked to technically feasible alternatives and to alternatives that do not entail disproportionately high costs, which plays a smaller or no role in the alternatives test in Article 6(4) of the Habitats Directive.

Furthermore, Article 4(7) of the WFD provides for more reasons for derogation from the environmental objectives: if the project does not serve an overriding public interest, it can still be permitted, providing that the value of the project for human health or safety, or for sustainable development, outweighs the value of attaining the environmental objectives for people and the environment. Once that assessment has taken place and the overriding public interest or greater value is established, derogation from the environmental objectives is possible: in contrast

25 Guidance Document No 20, 29.

to what is the case in Article 6(4) of the Habitats Directive, compensatory measures need not be taken, but there is a 'general safeguard', since Member States must review the derogation every six years. Besides, an important limit for the application of the derogation regime applies in any event. According to Article 4(9) of the WFD, the same level of protection must in any event be assured as that in the existing Community legislation. This implies that in the event of derogation from the environmental objectives to be achieved pursuant to the WFD, which also harms the conservation objectives laid down for the SPA under the Habitats Directive, not only must that derogation be justified on the basis of the derogation regime of the WFD, but also compliance is required with the conditions for application of the derogation clause of Article 6(4) of the Habitats Directive, including the obligation to take compensatory measures.

The river god of the Achelous plays an important role in Greek mythology, partly in the circle of sages around Herakles. Herakles (also known as Hercules) became famous for the 12 difficult tasks that he carried out on the instructions of King Eurystheus. He completed them successfully. Whether the lawyers working on the application of European water law and nature conservation law will win the same mythical fame is very doubtful. Too many questions arising in the application of the WFD and in the combination of this directive with the Habitats Directive still remain unanswered for that.

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