



Content downloaded/printed from

[HeinOnline](#)

Tue Oct 22 10:50:40 2019

Citations:

Bluebook 20th ed.

Marleen Van Rijswick; Andrea Keesen, The Implementation of the First Generation River Basin Management Plans in Dutch Water Law: Lessons from the Past, Lessons for the Future, 2011 Romanian J. Env'tl. L. 262 (2011).

ALWD 6th ed.

Marleen Van Rijswick; Andrea Keesen, The Implementation of the First Generation River Basin Management Plans in Dutch Water Law: Lessons from the Past, Lessons for the Future, 2011 Romanian J. Env'tl. L. 262 (2011).

APA 6th ed.

Van Rijswick, M.; Keesen, A. (2011). The implementation of the first generation river basin management plans in dutch water law: Lessons from the past, lessons for the future. Romanian Journal of Environmental Law, 2011(Supplement Issue), 262-273.

Chicago 7th ed.

Marleen Van Rijswick; Andrea Keesen, "The Implementation of the First Generation River Basin Management Plans in Dutch Water Law: Lessons from the Past, Lessons for the Future," Romanian Journal of Environmental Law 2011, no. Supplement Issue (2011): 262-273

McGill Guide 9th ed.

Marleen Van Rijswick & Andrea Keesen, "The Implementation of the First Generation River Basin Management Plans in Dutch Water Law: Lessons from the Past, Lessons for the Future" [2011] 2011:Supplement Issue Romanian J of Environmental L 262.

MLA 8th ed.

Van Rijswick, Marleen, and Andrea Keesen. "The Implementation of the First Generation River Basin Management Plans in Dutch Water Law: Lessons from the Past, Lessons for the Future." Romanian Journal of Environmental Law, vol. 2011, no. Supplement Issue, 2011, p. 262-273. HeinOnline.

OSCOLA 4th ed.

Marleen Van Rijswick and Andrea Keesen, 'The Implementation of the First Generation River Basin Management Plans in Dutch Water Law: Lessons from the Past, Lessons for the Future' (2011) 2011 Romanian J Env'tl L 262

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at

<https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your license, please use:

[Copyright Information](#)

Use QR Code reader to send PDF to your smartphone or tablet device

DUTCH REPORT

THE IMPLEMENTATION OF THE FIRST GENERATION RIVER BASIN MANAGEMENT PLANS IN DUTCH WATER LAW: LESSONS FROM THE PAST, LESSONS FOR THE FUTURE

MARLEEN VAN RIJSWICK

Professor of European and Dutch Water Law, Utrecht School of Law

ANDREA KEESSEN

Assistant professor of environmental law, Utrecht School of Law

*Something old,
something new,
something borrowed,
something blue...*

1. Introduction

The Netherlands is a delta lying at the end of four transnational river basins, being the Rhine, the Meuse, the Scheldt and the Ems. It is a very small, intensely populated country where water management is crucial to survive. Some 16,515,057 residents live on a surface of 41,526 km², 18% is surface water. The population density is 397.7 inhabitants per square kilometer. Two-thirds of the population live in an area with serious flood risks. More than 50% of the country is threatened by floods (from rivers or the North Sea). To avoid flooding there are 3,291 kilometers of dikes and dams; 268 kilometers of dunes, and 808 artificial water works to protect against flooding. To make the country habitable over 3,000 polders must be drained. When we look at the actual information on water quality we can conclude that the quality of drinking water is good, but the chemical and ecological status are not sufficient. The greatest challenge to comply with the Water Framework Directive (WFD) will be the improvement of the ecological status.

Looking at the actual water problems in the Netherlands we can conclude that they are the same as in many other countries, although attention to flood risks is traditionally of great importance. Because of the current land use, the artificial water works to protect the country against flooding, intensive livestock farming, industry and a large population combined with the effects of transboundary pollution each new problem is immediately urgent and requires adaptive and strong solutions. Water status can only be solved by an integrated approach with land use planning, environmental

law, agriculture, nature conservation, and economic development. Because of the above-mentioned factual situation the Netherlands has a long tradition in the field of water management and water law. Regulating protection against flooding and water quantity management dates from the early 12th century. Major waste water collection systems have been constructed since the beginning of the 20th century, when vast numbers of those who lived in larger cities were threatened by diseases because of unpurified discharges of domestic waste water in open channels. The protection of water quality became urgent in the 1970s, when water quality was extremely poor due to industrial emissions. The dry summer of 1976 also made it clear that in a country with so much surface water, a fair and sustainable use of groundwater had to be regulated. These developments in water management resulted in a very fragmented sectoral system of water laws, each dealing with a specific water problem. Although since 1985 Dutch water policy and practical management were based on an integral approach to water system management, the legislation remained sectoral until 22 December 2009, when a new integrated Water Act came into force. This date will seem familiar: it is the day a large part of the Water Framework Directive had to be implemented in the national laws of the Member States. One of the reasons for the integration of Dutch water legislation was to improve the implementation of European water directives. However, the fact that the Dutch Water Act came into force at the end of 2009 also means that many elements of the Water Framework Directive that had to be implemented in national law before 2009 were implemented under the old water legislation.¹ The date of 22 December 2009 was the deadline for implementing the river basin management plans in the national legislation of the Member States.

Just as in the Netherlands, also EU water law was developed as a result of many individual water problems. The focus was on the protection and improvement of water quality, as part of European environmental law. When we look at the characteristics of the older water directives we see a top-down approach with strong regulation and standard setting at the level of the European Union. Regulation was based on command and control instruments like obligatory licensing systems with emission standards, environmental quality standards for priority substances, which could overall be qualified as obligations of result. Some provisions provided for some policy discretion for the Member States within certain boundaries. From the early beginning, European water law – just as Dutch water law – used plans and programmes as an important legal instrument. It can be argued that the described means of regulation is fairly easy to implement for the Member States and quite easy to enforce by the Commission and individuals and NGOs before the national courts.

With the coming into force of the Water Framework Directive a new approach was introduced in EU water law. Most important new element was the river basin management approach with shared responsibilities for all member States sharing a

¹ See for an overview of Dutch water law: H.F.M.W. van Rijswijk and H.J.M. Havekes, *European and Dutch Water Law*, Europa Law Publishing, 2012 (forthcoming).

transnational river basin. Water policy and management is nowadays regulated at the international level; the EU level; the Member State level; and the regional and local level. This requires cooperation not only between the EU and the Member States, but also between Member States and non-member states, between regional authorities, authorities in different policy fields and governmental authorities and non-governmental organisations, stakeholders and the public.

Developing water quality management based on chemical pollution into an ecological approach with attention being given to ecology, including hydromorphology, will change the focus from the European level towards the national and river basin level to formulate goals and standards and to choose the necessary accompanying instruments.

Furthermore, it was recognised that there was a need for further integration with other policy fields, like the environment, nature conservation, land use, agriculture and product policy. The general protection of water as an ecosystem instead of designated protected areas was also a new element. Also the scope of water management became broader, not only the protection of water quality, but also protection against flooding, protection and sustainable use of the marine environment, and a sustainable use of water resources fundamentally changed the scope of European water law. Not only the substantive content of EU water law changed, also the instrument of framework directives, offering more flexibility and policy discretion for the Member States and a greater focus on proceduralization and public participation (multi-level and multi-actor governance), has brought about a new era in water management and law.

The necessary cooperation between all the above-mentioned parties includes the implementation of the WFD obligations when it comes to defining goals and standards (Common Implementation Strategy), the development and determination of river basin management plans and the programmes of measures, but also the use of exemptions and, in the executive phase, the taking of measures.

In this contribution we focus on the implementation of the obligation in article 13 WFD, the river basin management plans in the national legislation of the Netherlands. The aim is twofold: firstly, to provide for a comparison between the implementation in the Netherlands with the implementation in other Member States to see if the same approach is used all over the EU and especially in shared transboundary river basins and, secondly, to assess whether the commitment of the Netherlands towards the realization of the water objectives of the WFD through the river basin management plans, also with the aim of comparing this commitment with that of the other Member States. One should keep in mind that during the last few years Dutch water law has changed enormously with the coming into force of the Water Act. Most elements of the implementation process described below were based on older water legislation that is no longer in force.

2. Organization of water management and planning in Dutch Water Law

2.1. The establishment of plans and programmes of measures

The organizational structuring of the implementation process is based upon the former Implementation Act (2005; see section 2.1.1) and the National Administrative Agreement on Water Management (*Nationaal Bestuursakkoord Water*; 2003).

In the Netherlands, the implementation of the WFD is managed by the national government. The Minister of Infrastructure and the Environment (the former Minister of Traffic, Public Works and Water Management) is the competent authority for the river districts in which the Dutch take part. Issues that need to be addressed on a national level range from basic monitoring principles, the criteria for denominating the various types of water bodies to the final decision on the river basin management plan and its programme of measures. To ensure that the goals and measures fit within the overall picture for the river basin involved, those who are responsible consult closely with the international river commissions for the Meuse, Scheldt and Ems. The WFD is also a prominent issue in the international discussions between Rhine Water Directors. As far as possible, however, decisions are made in close cooperation with other relevant ministries, provinces, water boards and municipalities.

The system of decision making can be described in general as follows: the state secretary (*staatssecretaris I&E*) determines the river basin plans and prepares the national policy documents, the so-called December Memorandums. The river basin plans are integrated parts of – and are collected from – an existing structure of planning documents at all different levels of government: the national water management plans (*Nationaal Waterplan (the former Nota Waterhuishouding)*), the provincial water plans, the management plans of the regional water authorities – the so-called water boards – and, finally, the planning of waste water collection at the local level by the municipalities.

To accompany this process of decision making ‘soft structures’ were created, in between – and representing – the existing governmental authorities. At the national level a directing group, consisting of a national administrative committee (LBOW), an ‘agenda committee’ and different staff working groups (e.g. Communication), consults the Ministry and the state secretary. On the river basin level, a basin area coordinator (*gebiedscoördinator*) has been appointed to coordinate the drafting of the basin area management plans. For each basin area, the regional directorate of the water management ministry (*Rijkswaterstaat*), the provinces, the water boards and the municipalities have partial responsibility for water issues and must closely cooperate in drawing up the management plans as well as executing the programme of measures contained in these plans. The coordinator of the river basin district (area) also takes care of the coordination between the different river basin districts and participates in the international river committees. The regional administrative committee (*Regionaal*

Bestuurlijk Overleg; LBO) is supported by a regional civil service consultation group (*Regionaal Ambtelijk Overleg; RAO*) and they are responsible for the regional working programmes (per river basin or sub-river basin) and for coordination with the national level. The RBO has an advisory status and not a formal role in decision making.

2.2. Responsible authorities for the establishment of river basin management plans

Management plans are established at the level of the sub-basin by the water boards (“waterschappen”) and DG Water (“Rijkswaterstaat”) of the Ministry of Infrastructure and the Environment. At a higher level, the provinces prepare a plan and programme of measures and the State is responsible for the national river basin plans.

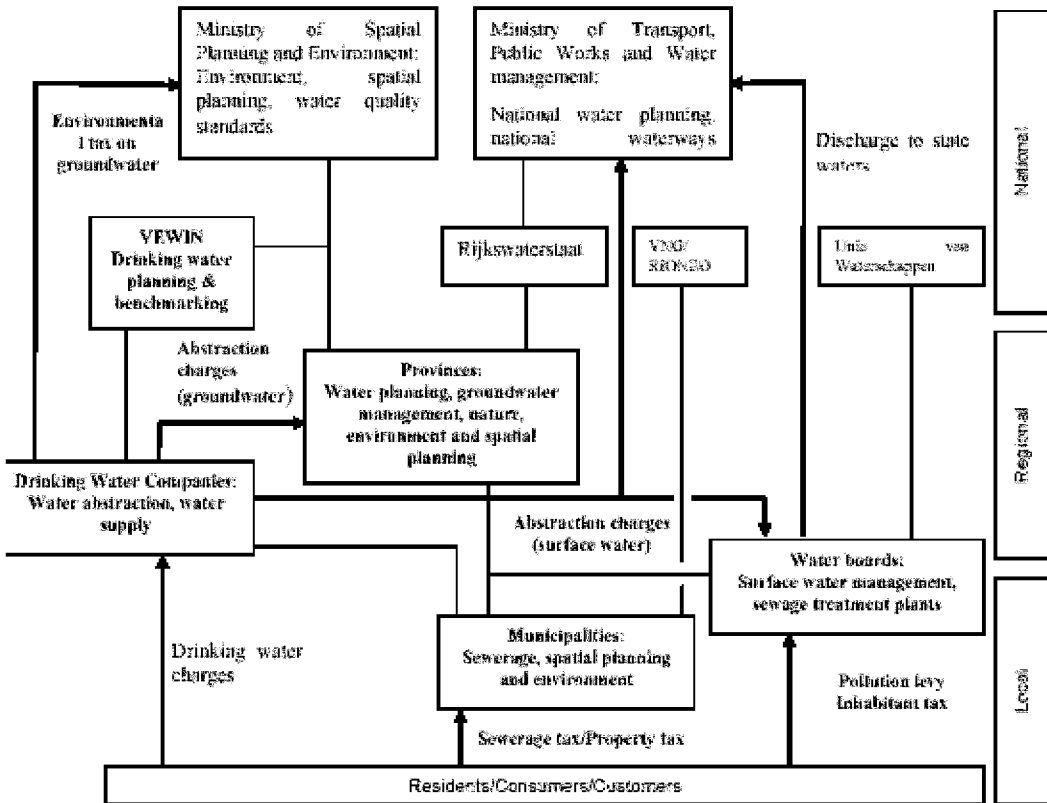


Figure: an overview of the organization (Euromarket 2004)

2.3. Specific plans for water management: urban waste water, nitrates and flooding

In the Netherlands there are specific plans for waste water collection and protection against pollution by nitrates coming from agricultural sources. However, these plans and the accompanying measures are part of the river basin management plans at the sub-basin level and at the national river basin level. It is the municipalities that are responsible for urban waste water collection based on the obligations following from Directive 91/271/EC and they make their own local plans. Waste water treatment is the responsibility of the regional water authorities – the water boards – and planning aspects of waste water treatment is an integrated part of the sub-river basin management plans of these regional authorities. There are also specific plans for agriculture: reducing nitrates-based pollution based on the obligations of Directive 91/676/EC.² Although the nitrates action programmes are based on agricultural legislation, the measures are also part of the river basin management plans. Measures for inundation based on Directive 2007/60/EC are in the Netherlands highly integrated with the river basin management plans, which are both part of the National Water Plan.

3. Delegation of the elaboration of the plans by regional and local authorities

In the Netherlands, being a unitary state, responsibilities lie at the lowest possible governmental level, to ensure that decision making remains close to the public. This is traditionally also the case in water management. Regional water management is the responsibility of the water authorities (the water boards), while strategic decisions are also made at the provincial level. Municipalities have responsibility for the collection of urban waste water and coordination with land use and town planning. To ensure a correct implementation of EU water directives, the central government needs coordination, supervision and control instruments.

3.1. Coordination of planning within the Netherlands

At the national level, the Minister of Infrastructure and the Environment prepares the national water plan, which contains the outline of the Dutch river basin management plans and the programme of measures. This is further elaborated at the regional level by the provinces and subsequently at the local level by the water boards (for regional waters) and DG Water (for State waters). These local plans have to take the regional plans into account and serve in particular to provide a detailed programme of measures.

² Keessen, A.M., Runhaar, H.A.C., Schoumans, O.F., Van Rijswijk, H.F.M.W., Driessen, P.P.J., Oenema, O., and Zwart, K.B., The need for flexibility and differentiation in the protection of vulnerable areas in EU environmental law: the implementation of the Nitrates Directive in the Netherlands, *Journal for European Environmental and Planning Law*, JEEPL 8.2 (2011), p. 162-185.

Coherence between the plans and the programmes of measures is created through consultation. When the Minister of Infrastructure and the Environment makes plans and takes decisions, he closely cooperates with the other relevant ministries, provinces, water boards and municipalities. At the regional and local level, the water boards (for regional waters) and DG Water (for State waters) conclude water agreements in order to coordinate their plans and measures. Moreover, the local competent water authorities have to take the regional plans into account when drafting their plans and programmes of measures.

3.2. Coordination of planning in international river basins

The Dutch river basin districts are all part of international river basin districts. The required coordination will take place within the context of the international river commissions for the Meuse, Scheldt, Ems and Rhine, which were already well established before the entry into force of the WFD. The WFD is also a prominent issue in the international discussions between the Rhine Water Directors.

3.3. Intervention instruments of the central government in case of non-compliance with the WFD obligations

The Minister of Infrastructure and the Environment can give instructions to a province or a water board concerning its tasks or the exercise of its competences if international obligations or supra-regional interests so require. Since DG Water falls under his ministerial responsibility, the Minister also has this competence vis-à-vis DG Water. At the end of the day, when cooperation and coordination is not enough to fulfil all the obligations of the directive, the Minister of Infrastructure and the Environment does have supervisory instruments to force decentralised authorities to take proper action.

4. The content of the river basin management plans

4.1. The level of ambition, the register of protected areas and the programmes of measures

In the Netherlands it has been the subject of fierce debate whether the obligations under the WFD to achieve a good status should be considered as obligations of result or as obligations of best efforts. At the state level, the environmental goals were initially considered as obligations of best efforts. The reason for this point of view was based on the intentions during the negotiations on the WFD and the Dutch legal culture in water management. During the last ten years this opinion was reviewed and nuanced, also because of discussions in the legal literature and comparative research.³ However, there

³ Keessen, Andrea M., Jasper J.H. van Kempen, Marleen van Rijswick, Jan Robbe and Chris W. Backes, 'European River Basin Districts: Are They Swimming in the Same Implementation Pool?', *Journal of*

is still no uniform answer to this question, also because of the obligations following from article 4 WFD, which are complex and not all of the same nature.

The river basin management plans integrate the register of protected zones, e.g. for Natura 2000, drinking water production, nitrate vulnerable zones and so on.

The programme of measures is part of several national and regional water plans (Rijkswaterstaat, provinces, water boards and municipalities) but is not fully integrated into the river basin management plans. One will only find a summary of the programme of measures in the several river basin management plans.

4.2. The legal status of water quality standards: intervention or target values?

With the WFD, Dutch water management has to make a transition from 'best effort' measures and (non-sanctioned) future quality objectives to obligations of result within a specific time frame, although this was an obligation under the older water directives for a long time. Water quality goals have to be translated into environmental quality standards and laid down in legislation in the form of either national standards, general rules and Ministerial prescriptions or provincial ordinances. National legislation will partly be based on EU standards, e.g. on priority substances and dangerous substances. National legislation will be important in regulating and guiding the nutrients problem and in determining Good Ecological Status (for Natural waters). Provincial Ordinances will mostly be used to make area-specific standards for nutrients and to determine Good Ecological Potential (for Heavily Modified or Artificial Waters). When good Chemical Status or Good Ecological Status is not feasible, exemptions will be used and they have to be justified.

The transposition of the water quality standards as intervention or target values resulted, after a great deal of discussion, in a particular compromise. For the time being the choice was to implement the water quality standards as target values in an Order of Council based on the Environmental Management Act (*Besluit kwaliteitseisen en monitoring 2009*), and they only have to be taken into account when water authorities determine their water plans. So, there is no direct legal relation between decision making like the granting of licences and the determined water quality standards as they follow from the WFD and its daughter directives. On the other hand, the only time when competent authorities do not have to meet the standards is when one of the exemptions mentioned in article 4 of the WFD is at stake.

The exemptions are part of formal legislation (*Besluit kwaliteitseisen en monitoring 2009*) and if a competent authority wants to make use of one of the exemptions this has to be part of the (sub-)river basin management plan and accompanied by adequate

reasoning. However, recent research has pointed out that the obligation to provide adequate reasoning for the use of an exemption per water body in each (sub-)river basin management plan is being implemented rather sloppily. The Netherlands extensively uses all kinds of exemptions at all levels. Their use is mentioned, but hardly justified in the river basin management plans at all levels.

4.3. The role of environmental principles in Dutch water law and the river basin management plans

The principle of no further deterioration

One of the principles underlying the Dutch Environmental Management Act is the 'stand-still principle' or the principle of no further deterioration. It is often mentioned as one of the central principles of water and environmental policy, but actually there are not many regulations in which the principle is formulated. However, it is laid down in the Order in Council with the water quality standards and the monitoring obligations and at this point in time it still uses the wording of the stand-still principle. Currently, a revision of this regulation with the environmental quality standards and the monitoring obligations is being prepared, in which it is proposed to use the wording of the WFD - 'no deterioration of the status of a water body'. The Dutch government assumes that the wording of 'no deterioration of the status of a water body' is less strict than the wording of the stand-still principle, which does not allow for any deterioration, not only in designated water bodies and not only when a lower status class will be reached.

The polluter pays principle and the principle of cost recovery

In general, the Dutch believe that the polluter pays principle is one of the more feasible principles of the WFD. The Dutch system is already built on the notion of the 'polluter pays' and the 'user pays', as water management is financed to a large extent by the fees paid by polluters and users. However, the burden is not shared equally, as the citizen pays a disproportionate share. Industry pays a reasonable share, but agriculture does not. This principle is not explicitly laid down in legislation.

The prevention or precautionary principle

This is a central principle underlying the Dutch Environmental Management Act, but is not formally laid down in environmental or water legislation.

The solidarity principle

The solidarity principle is also not laid down in legislation. It only occurs at the national level in discussions on what other Member States should do. Since the Netherlands is a delta, meeting the WFD goals in good time depends to a large extent on the willingness of the upstream Member States to meet the WFD goals on time. The financing of Dutch water management is however partly based on the solidarity principle.

5. Internal and external integration

As mentioned in the introduction, the external integration of water, the environment, spatial planning, agriculture and nature conservation is most important in attaining the goals of the WFD. In this section the external integration between several planning instruments in the Netherlands is described.

The river basin management plans are also strategic plans in the area of spatial planning and are based on the Spatial Planning Act (*structuurvisies Wet ruimtelijke ordening*). This connection, coupled with the signing of the river basin management plan by both the Minister of Infrastructure and the Environment and the Minister of Innovation and Economy) (the former three ministries of Transport, Public Works and Water Management, the Minister of Public Housing, the Environment and Spatial Planning and the Minister of Agriculture, Food Safety and Nature Conservation) should ensure that the river basin management plans are taken into account in the drafting of spatial planning plans, agricultural plans and nature conservation plans.

However, the national legislation does not oblige the authorities – both water authorities and other authorities – to ensure that their plans and administrative decisions are compatible with the river basin management plan(s). Only the local water authorities are obliged to take the regional river basin management plans into account when they prepare their plans and programmes of measures.

Integration also takes place concerning decisions based on the Environmental Management Act, such as permits for discharges into sewers or surface waters. It contains rules for coordination between environmental permits and discharge authorisations and sections of the Environmental Management Act have been declared applicable to the granting of authorisation under the Water Act. In addition, the regulations concerning water quality requirements are based on the Environmental Management Act. The Environmental Management Act does not prescribe a link between the river basin management plans and programmes of measures and the granting of permits for discharges.

The external integration of water management in the context of spatial planning also takes place in the drafting of local spatial plans and decisions, since they must be subjected to a “water test” (*watertoets*). Spatial plans and decisions are thus assessed according to their impact on both water quantity and water quality aspects. However, until now water quantity issues, e.g. water retention or safety matters, have dominated the use of this obligatory policy instrument, based on an Order in Council under the Spatial Planning Act (*Besluit ruimtelijke ordening*).

6. Access to justice

In the Netherlands only parties who can establish that their interests are directly affected by a decision can bring proceedings before the administrative courts. Interest

groups and environmental associations may also bring proceedings before the administrative courts, provided that they can demonstrate that their interest is directly affected by the decision. This enables them to act in the general interest, e.g. of the environment. However, since the introduction of the requirement of being an interested party, interest groups and environmental associations can only gain access to the courts if they have organized activities in order to protect the interest at stake prior to bringing court proceedings.

Proceedings under administrative law can be brought against the administration, i.e. against the competent authorities. Concerning civil/private law it is also possible to bring proceedings before the courts, both regarding public authorities and private parties.

Applicants can challenge decisions taken on the basis of the river basin plans before the administrative courts. The river basin plans themselves cannot be challenged directly before the administrative courts, but they can be challenged indirectly during these proceedings. Another option is to bring proceedings against the river basin management plans directly before the civil courts, although there is, as yet, no case law with regard to such cases.

7. Concluding remarks

The Netherlands implemented the obligations of article 13 WFD right on time.

The river basin management plans were developed in close cooperation with regional authorities in the field of water management and with other stakeholders like industry, agriculture, consumer organisations and environmental organisations. The participation framework was quite complex and in combination with the complexity of the WFD itself not all participants were fully satisfied with the process.

Looking at the river basin management plans, we must conclude that the ambition level is moderate. Most policy goals are chosen on the basis of pragmatic choices. As a result of eventual obligations of result, this has led to ecological goals that the water authorities can probably meet. At this moment, however, the economic crisis has led to decreasing financial means and difficulties in taking all the measures that are included in the river basin management plans and programmes of measures.

Great difficulties were experienced in combining WFD goals and obligations and the obligations following from the implementation of the Habitats directive. Because decision making in the field of nature conservation and protection – the designation of the Natura 2000 sites and the accompanying good conservation goals – was not yet finished, it was difficult to decide what measures in the field of water management would be most appropriate. ⁴

⁴ C. Dieperink, T. Raadgever, P.P.J. Driessen, A.A.H. Smit, H.F.M.W. van Rijswick, Ecological ambitions and complications in the regional implementation of the Water Framework Directive in the Netherlands, 14 (2012) *Water Policy*, p. 160-173.

Another element that the water authorities had to deal with was the amount of uncertainty emanating from the WFD. Many ecological, technical and legal issues were not at all clear, while at the same time the deadline for the implementation of the river basin management plans was approaching. This was also a reason for reducing the level of ambition in the first generation river basin management plans in the Netherlands.⁵

Regarding the above-mentioned elements of the Dutch river basin management plans that are probably not fully in compliance with the requirements of the WFD it must be stated that the new approach chosen in the WFD forces all Member States to adopt a 'learning by doing' approach, which will hopefully lead to a better next generation of river basin management plans in 2015!

⁵ G.T. Raadgever, C..Dieperink, P.P.J.Driessen, A.A.H.Smit, H.F.M.W.van Rijswick, Uncertainty management strategies: Lessons from the regional implementation of the Water Framework Directive in the Netherlands, *Environmental Science & Policy*, Volume 14, Issue 1, January 2011, Pages 64-75..