

## *Interaction between European and Dutch Water Law*

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**T**HE DUTCH ARE FAMOUS for their water management. Living for many centuries with a large part of their country below sea level, they have had to find ways to protect residents and property against flooding. From the beginning, it was clear that the only way to manage water problems was to work together, sharing responsibilities, money, and efforts (van de Ven 2004). The Dutch eventually came up with the polder model (see Chapter 9), and water management in the Netherlands is still organized around this model, although this may change in the future because of the influence of European Union (EU) environmental and water law. The Dutch are renowned not only for their cooperation-based methods, but also for their technical knowledge. They have successfully developed the technology to live in a delta below sea level, construct polders, and build dikes.

The legal arrangements necessary for this cooperative and innovative way of working are not so well known, however, although they have been of great importance for the successful struggle against water. In this context, the water boards have played a crucial role, with the task of local water management in designated regions (Havekes et al. 2003; see also Chapter 8). The fact that water boards are financially self-supporting has been an important reason for the success of water management in the Netherlands (Uijterlinde et al. 2003; see also Chapter 9), as has the fact that the Dutch realized early on that they had to invest in safety. Cooperative arrangements work best if all participants see their benefits (van Rijswick 2008; van Rijswick and Driessen 2006). Members of the water boards are elected from among the residents of an area, who benefit from the work of the local board and pay for water management in their area.

This chapter focuses on the interaction between European and Dutch water legislation, which together form one legal order. To understand Dutch water law, one needs to be knowledgeable about European water law, which takes precedence if any legal disputes arise. Several recent developments in both Dutch and Euro-

pean water law have had a great influence on existing legal arrangements. Dutch water law has inspired some of the European legislation, yet at the same time, it is being thoroughly revised because of European water law, especially the Water Framework Directive (WFD). The new Dutch Water Act has already taken into account new European developments, such as the Directive on Flood Protection and the Framework Directive on Marine Strategy.<sup>1</sup>

It is not only the legislation that is being altered. The Netherlands is developing a new vision on water management in anticipation of expected climate changes, among other factors. Up until 1985, water management was based on a sector approach, with different policies and legislation concerning the quality and quantity of surface water, groundwater, and marine waters individually. Protection against flooding was also a separate part of water management, with its own instruments and legislation. Another change has been from the use of technical solutions, such as dikes and storm surge barriers, to a new approach from about 2000 onward, which holds that water should be given more space and stored in the system as long as possible for times of drought.

Yet another development that has been receiving increasing attention is a move from government to governance (see Chapter 9). The WFD is a good example of this development, which has led from directives with concrete norms, standards, and uniformity to ones where norms and standards are made by many actors and on many levels, with a lack of democratic control because of the Common Implementation Strategy and soft law documents, and with the possibility to differentiate among regions.

The legal system of EU environmental and water law could be defined as a right-based approach. Directives make clear what level of protection is guaranteed. New EU legislation is characterized by more attention to procedures, multilevel governance, adaptive governance, transition management, cooperation, and flexibility. When it comes to safeguarding water rights, legal protection and enforcement are important. Governance does not fit well into this protective role of law or in concepts such as the rule of law and the legitimacy of norms and standards that should be created in a democratic decisionmaking process (Scott 2000; Scott and Trubeck 2002). The role of the Common Implementation Strategy for the WFD and the use of soft law to subsequently elucidate the scope and meaning of a directive's obligations are steadily increasing. The guidances for the implementation of the WFD are an example of this. There is no doubt that it is good to know the meaning of the obligations arising from the directive and to work together to improve the aquatic environment in a multilevel framework with a great deal of room for flexibility, decentralized decisionmaking within networks with a focus on effective problem solutions and the development of knowledge, but it is better to know what the consequences of legal obligations following from environmental directives would be before making a commitment. The issue with soft law such as the WFD guidances is the lack of democratic legitimacy. It is not clear who establishes a guidance, and the powers of the democratically elected bodies—the national and European Parliament—are negligent while the impact of a guidance on the implementation and final execution may be substantive, particularly when the European Commission was involved in its wording.

Part of the political balance of the scope of water rights, however, must be that the lower limit of each water right is monitored. The lower limit is formed by the minimal water rights, without which a decent existence would not be possible. These minimal water rights, laid down in norms, concern safety, drinking water, clean water, and scarce water. For this minimum, effective enforcement by the courts is necessary, and public and political responsibilities must be clear. New governance could be used for all water ambitions that go farther than these minimal rights.

The rule of law requires that legislation be properly legitimized, and this should be observed in water management too. It is imperative that the rights of interested parties to be properly informed, be involved in the decisionmaking process, and have access to the courts when their interests are wrongfully damaged or their rights violated not be eroded.

One could argue that a development toward governance is not completely new in Dutch water law. Still, the Netherlands does have to deal with the increasing problem of how to combine the protective and normative aspects of water law—with its strong focus on the rule of law, the legitimacy of norms and standards created in a democratic decisionmaking process, legal certainty, and enforceability—with the concepts of new approaches such as multiactor and multilevel governance, transition management, and adaptive governance (van Rijswick 2008).

International cooperation in river basin districts seems necessary to deal with new problems (Hey and van Rijswick in press) concerning the poor quality of surface water, as well as an overabundance or shortage. For the Netherlands, located downstream of four river basins, this new approach is crucial for the success of future water management. Cooperation is therefore necessary not only on the local and regional levels, but also on an international level. The WFD has given new impetus to transboundary water management.

Cooperation and the polder model have been typical of the Dutch approach to water management. In the Middle Ages, water management was based on cooperation among several owners and users of land, who all benefited from protection against water. Later, cooperation was necessary among several policy areas, such as spatial planning, agriculture, and industries, in order to realize the general desire to have sufficient economic activities combined with sustainable water management. Cooperation and the polder model formerly worked in a fairly diffuse way, aiming to meet shared goals such as protecting the water system combined with more intensely using land for agricultural purposes, building new housing developments while reducing water problems, or increasing the amount of emissions from industry yet still improving the water quality. This form of cooperation is a search for the best compromise, and for water management, it has been very successful with regard to safety, flood defenses, and water quantity and quality.

Under the influence of European law, with its strict binding rules and obligations to guarantee certain results, especially concerning environmental quality standards, Dutch management is also changing in this area. Until recent years, the Dutch were not too concerned about the strict obligations of the European water directives, although the European Court of Justice declared many years ago that environmental quality standards are “an obligation to guarantee a certain result.” Now that the WFD has come into force, a certain sense of resistance exists

in the Netherlands regarding these strictly binding obligations. What will they mean for the tradition of cooperation, poldering, and striving for common goals without legally binding obligations? Do the Dutch have to change their way of working?

Any fear of these binding obligations, which aim to achieve good status of all waters, is counterproductive. Some local and regional authorities want to take these measures and formulate these goals, which are certain to achieve the desired results, only because they fear the consequences of neglecting to implement the directive. Dutch resistance seems to be stronger with regard to the ecological norms and standards that have to be created at the national level than to the binding European standards concerning the chemical status of the priority substances. It can be argued that all parties would benefit from clear goals and standards (Smit et al. 2008). This fear can be diminished by gaining knowledge of the WFD and starting to work with it in the proactive and innovative way the Dutch are accustomed to when solving water problems. The binding obligations of the ambitious directive can help the Netherlands attain the goals for modern water management in cooperation other with policy areas such as spatial planning, the environment, nature conservation, agriculture, and industry. The threat of paying high fines or losing an advantageous position in negotiations in other policy areas of the EU (which in the end could cost a lot more money) can help motivate the authorities to take the necessary measures. To avoid condemnations by the European Court of Justice, it is necessary to have strong legal instruments at state level to influence the decisions of decentralized administrative bodies. This will seriously change the Dutch way of working. Decisionmaking at a decentralized level still will be possible in the future, but with clear limits on negotiation when setting specific goals and measures, as the European directives are binding.

This chapter describes Dutch water legislation with respect to the development toward integrated water management in the Netherlands as well as the EU. It begins with a focus on the integration of water legislation in general, including the changes in Dutch legislation up until the autumn of 2008 and the situation of water legislation in the EU until the WFD came into force. The recent changes—an integrated approach to water systems within river basin districts, a new vision of water management because of climate changes, and the influence of the legal system of European law on Dutch water legislation and management—are the main topics of the chapter. It provides an overview of Dutch and European water legislation, the WFD and its implementation in Dutch law, other relevant European water directives, and recent developments regarding integrated water legislation in the Netherlands.

## DEVELOPMENTS IN DUTCH WATER MANAGEMENT

In 2000, the Dutch government came out with Water Policy for the 21st Century (WB21), as well as the Fifth Note on Spatial Planning.<sup>2</sup> Both call for a more prominent role for water management in relation to spatial planning. The Committee for Water Management for the 21st Century examined the possibilities for maximum

water storage. This committee not only introduced a legal instrument to create an interaction between decisionmaking in the fields of water management and spatial planning (see Chapter 10), but also drew attention to the fact that water needs more room and should be kept in the water system as long as possible, released into the sea only as a final option.

In February 2001, in response to WB21, the central authorities, Interprovincial Consultations, Association of Water Boards, and Association of Netherlands Municipalities concluded the Preliminary Agreement concerning Water Policy for the 21st Century, which was a first step toward a joint approach to modern water problems. The agreement focuses on cooperation among competent authorities in several fields, including water management, the environment, spatial planning, and nature conservation. The Room for the River policy (introduced in the *Beleidslijn Ruimte voor de Rivier*, Stcrt. 1997, no. 87) aims to avoid any further building in the winter beds of the Dutch rivers, so that no more space to hold water will be lost. This key planning decision brings with it a large number of concrete measures that should result in greater protection against flooding because of climate change. On July 2, 2003 the National Administrative Agreement on Water was concluded by the same parties that were involved in the preliminary agreement mentioned above. In June 2008, this agreement was actualized.

The objective of the National Administrative Agreement on Water is “to get the water system in order and to keep it in order” by 2015, so as to anticipate changing conditions such as the expected climate change, rising sea levels, lowering of the soil surface, and an increase in hard surfaces such as streets as well as housing developments. In preparation, agreements have been concluded regarding such matters as safety, flooding, water quality, freshwater and groundwater deficits, and aquatic sediment.

The approach and implementation take place in stages, with the aid of an integrated working method. Implementation could be combined with plans in other policy areas, such as the reconstruction of rural areas, establishment of the National Ecological Network (the main ecological network of connected areas throughout the Netherlands, similar to the European Natura 2000 network), mining of surface minerals, rural development, cultural history, residential construction, and the building of industrial parks and infrastructure, all while taking account of the Birds and Habitats Directives. Tasks have been divided among the central authorities, provinces, water boards, and municipalities. The agreements establishing duties for the bodies involved must be laid down in the river basin management plans by 2009 at the latest. This ensures conformity with the structure and obligations of the WFD. Although there can be discussion over whether groundwater management should be regulated at the European level because of the principle of subsidiary, the Nitrates, Nature Conservation, and Groundwater Directives have regulated groundwater issues for a long time. With the implementation of the Water Framework Directive, groundwater management increasingly will be regulated on the European level. Because groundwater pollution is strongly connected with soil pollution, and soil pollution is caused by industrial and agricultural activities with a strong influence on the internal market, it is logical that the EU will also focus on groundwater management.

## DUTCH WATER LAW

Dutch water legislation still includes acts dating from the nineteenth and early twentieth centuries, such as the Water Management Act 1900, along with the modern water management legislation. It originally was based on a sector approach but in recent decades has been moving increasingly toward integrated management.

### *The Sector Approach*

Traditionally, for every new water problem the country faced, it enacted new legislation, such as the Pollution of Surface Waters Act after severe water quality problems, the Marine Pollution Act to protect the quality of seawater, and the Groundwater Act to regulate the distribution of scarce groundwater resources after a period of extreme drought. Groundwater quality is partly regulated by the Soil Protection Act and partly (as far as licenses for industrial activities are concerned) by the Environmental Management Act. Also within the scope of the Environmental Management Act are sewage management, most discharges into the sewage system, and water quality requirements. Unlike other EU member states, the Netherlands does not regulate authorization to discharge in environmental legislation, but in a true water act—the Pollution of Surface Waters Act, with the regional water boards and the minister of Water Management as competent authorities.

Besides water quality legislation, the Netherlands has several acts concerning flood protection and water quantity management, including the Land Reclamation and Dykes Act, Flood Defences Act, Public Works (Management of Water Control Works) Act, Water Management Act 1900, and Earth Removal Act. Management of surface water quantity has been regulated since 1986 under the Water Management Act; before then, it was governed by local regulations from the water boards. Local and provincial regulations guided flood protection until the Flood Defences Act came into force. Special legislation known as the Delta Act was enacted after severe flooding in Zeeland in 1953.<sup>3</sup>

### *Dutch Integrated Water Management*

It eventually became clear that the sector approach on which water management and the accompanying legislation was based was no longer sufficient, and the Netherlands turned to a new, more integrated approach based on water systems in 1985 (see Chapters 1 and 8). For several years, flood protection was also assumed to be part of integrated water system management. The legal system, however, did not follow this integrated approach, and the Netherlands still has an overabundance of water legislation that is difficult to understand and should be thoroughly revised in order to make integrated water system management and proper implementation of new European legislation possible. In Dutch administrative law, the principles of legality and specialty play important roles. The principle of legality means that the actions of administrative bodies should be based directly or indirectly on legal regulations (acts). The principle of specialty means that the powers of administrative bodies may be used only for the purpose for which they are intended. In

other words, the authority to request a license based on the Pollution of Surface Waters Act may be used only to protect the quality of surface water. Permits with regulations that also see to the protection of water quantity or that may be useful in attaining good ecological status are not allowed and will be qualified by the court as an abuse of power. Thus it is apparent that this legal system can cause difficulties for integrated water system management.

Because of these problems with the Dutch system of water legislation, and in order to provide a proper legal framework within which to implement the WFD in an adequate way, the Netherlands is preparing new integrated water legislation in the form of the Dutch Water Act. This act is now being discussed in the First Chamber of Parliament and will probably come into force in the autumn of 2009. This legislation will also make room for new solutions concerning safety and flood protection, given the new Dutch approach to protecting people and property against these risks. The Room for the River approach will have a great effect on possible developments and spatial planning, because the Netherlands is such a small and densely populated country.

### *European Integrated Water Management*

At the European level, as well as the international level, a similar development took place, although not in the same order. European water law started as part of European environmental law, with a focus on water quality. In the last century, directives came into force concerning the quality of drinking water, bathing water, and fresh fish water, along with others regulating the discharges of polluting substances into surface waters and groundwater. Special directives protected waters from pollution with nitrates from agriculture and introduced a proper level of wastewater treatment into the EU. All these directives had their focus on a special aspect of water protection, the sector approach, and the focus was merely on national measures and regulation.

The Helsinki Treaty and some bilateral and multilateral treaties, such as the Rhine Treaties, introduced the concept of *transnational water management* in 1992. Water quantity and protection against flooding were not part of European water legislation, however, perhaps because the solutions always are implemented in a national context, by spatial planning and practical or technical measures. This was not something the EU dealt with, because of the principle of subsidiarity and because these aspects did not seem to have much to do with the internal market, one of the main reasons for creating the EU.

On the European level, things changed with the implementation in 2000 of the WFD, which calls for integrated water management based on a river basin approach. Safety and protection against flooding are not part of its scope, but the Floods Directive, which regulates their assessment and management, is strongly connected with the WFD. There are initial plans for a separate EU Water Quantity Directive, following from policy concerning water scarcity in case of droughts. A new Groundwater Directive has also come into force, and a directive on environmental quality standards for priority substances is being prepared, both as daughter directives of the WFD.

### *Interaction between European and Dutch Water Law and Management*

Looking at these developments, both Dutch and the European, one can see that Dutch experiences with integrated water management have had an influence on European water law. During preparation of the WFD, consultation took place among with the member states, and the Dutch government gave input with regard to the Netherlands' water legislation over the past centuries, including its positive experiences with integrated water system management.

On the other hand, European water law also has had its effects on Dutch law. Although the Netherlands has had water legislation for a long time, the Dutch system had to change, although in some aspects only slightly, with the implementation of the European water directives. This is because strict obligations exist concerning the implementation of European law. It is not enough to have an effective system of water legislation on a national level; the national legislation has to comply with the obligations in the European directives. Dutch water legislation did not always meet these obligations, however, and this led to several decisions by the European Court of Justice condemning the Netherlands for not complying with obligations emanating from the EU water directives. After the implementation of the WFD, it became necessary to think about a complete renewal and integration of Dutch water legislation. The ways these effects have been translated into legislation will be the main issue below.

## TOWARD INTEGRATION IN WATER LEGISLATION

This section examines the move toward integrated water management in the legislation of both the Netherlands and the EU, as well as the broader international picture. River basin management plans and the recovery of costs for water services are discussed, as well as the instruments that are necessary to achieve the environmental objectives of the WFD.

### *Integrated Legislation in the Netherlands*

In the mid-1980s, the Water Management Act was initiated, legislation that was meant to eventually lead to an Integrated Water Act. Things never reached that stage, however. The Water Management Act was intended to introduce the initial means for integrated water management in accordance with the water system approach, although in essence, these means consisted only of an integrated planning system. Water management plans are established at the national, provincial, and water board levels and comprise the strategic government note on water management, management plans for national waters (the larger waters), provincial water management plans, and water board management plans for regional waters.

Integrated has a double meaning. First, it refers to internal integration within water management. It means that the water management plans concern both the quality and quantity of groundwater and surface water. Harmonization has been achieved by means of consultation among the different competent authorities in



the formulation of those plans; the approval of local authorities' plans by central authorities; the obligation that authorities, in their decisionmaking, take account of their own policy plans; and the requirement to consider higher-level plans in the establishment of lower-level plans. In this way, an integrated approach is achieved concerning the policy regulating the quality and quantity of surface water, and this integrated policy plays a significant role in the final decisionmaking by the water authorities.

Second, the term may refer to external integration among water management and related policy areas. A mechanism to ensure this, known as the "leapfrog arrangement," has been applied to plans made in the fields of water, the environment, spatial planning, traffic and transport, and more recently, with the implementation of the Habitats Directive, nature conservation. This leapfrog arrangement never worked very well, and a different mechanism for external integration has been chosen for the new Dutch Water Act.

### *Integrated Legislation in the EU*

On December 22, 2000, the Water Framework Directive entered into force. Current European water legislation was a mixture of different kinds of directives, and the WFD was implemented to provide a transparent, effective, and coherent legislative framework. It was intended to coordinate, integrate, and from a long-term perspective, further develop the overall principles and structures for protection and sustainable use of water in the EU in accordance with the principles of subsidiarity (van Rijswick 2003). The directive also makes a contribution toward enabling the EU and the member states to meet obligations arising from various international agreements on the protection of marine waters from pollution and on water protection and management, notably the UN Convention on the Protection and Use of Transboundary Watercourses and International Lakes, adopted on March 17, 1992, in Helsinki.<sup>4</sup> The WFD, like the Helsinki Convention, opts for a river basin approach to water management. The directive has broad objectives and interacts with other policy areas and directives. The choice of a river basin management approach has implications for competent national authorities, regulation, planning, and the use of executive instruments.

### *International Developments in Integrated Legislation*

Over the last few years, initiatives have been taken to develop a more coherent and integrated water policy internationally. An important organization in this field is the International Rhine Committee, functioning since 1950. In 1976, the Rhine chemical and chloride treaties came into force.<sup>5</sup> After the disaster near Sandoz in 1986, when the water of the Rhine River was heavily polluted by dangerous chemical substances after a fire in an industrial plant, an integrated approach was pursued by the riparian states.

The Helsinki Convention, drafted within the framework of the UN's European Economic Committee, concerns the protection and use of transboundary watercourses and international lakes, and aims to prevent, control, and reduce serious

adverse impacts on the environment in the broadest sense of the term. The convention includes provisions on the protection of groundwater. It contains a number of principles and proceeds from the combined approach of emission limit values and quality objectives. The treaty is based on cooperation agreements among riparian states of transboundary watercourses, with equality and reciprocity as its fundamental principles, which means that the interests of each member have the same importance, and all member states have to respect the interests of the others. Acts of one state may not significantly harm other member states.

As a corollary of the Helsinki Convention, international committees were set up for the protection of the Maas and Scheldt rivers. These international developments have been important for European water law, especially the WFD. In light of the developments, the Council of Europe and the European Parliament invited the European Commission to develop a more coherent water policy through which international agreements could be fulfilled. The WFD was its response to this request.

## THE WATER FRAMEWORK DIRECTIVE

The aim of the WFD is to effect an integrated and coherent water policy within the EU. Its purpose is the protection and improvement of all waters within the EU, including surface, ground, transitional, and coastal waters. This protection takes place by managing the entire water system, specifically for each *river basin*. Because river basins often extend over several countries, modern water management needs to have a strongly international transboundary dimension, which calls for a greater role for international cooperation (Keessen et al. 2008). As the approach chosen is based on river basins and the protection of surface waters as well as groundwater, the protection of the soil and ground also fall within the scope of the directive.

Another important feature of the WFD is that it is strongly purpose oriented, in the sense that achieving the aims of the directive takes priority, and this also includes its further legal elaboration. The goals are defined more concretely in the *environmental objectives* of Article 4 in the WFD. The final objective is to achieve a “good status” of the European waters by 2015. The legally vague concept of “good status” is defined further in the annexes to the directive. A distinction is made between the good status of groundwater and that of surface waters. The good status can be divided into a chemical component, which applies for both groundwater and surface waters, and an ecological component, which refers to just surface waters. Protected areas are listed separately in the environmental objectives. Such areas are not designated under the WFD, but on the basis of other EU regulations, such as the Nitrates or Habitats Directive. The WFD requires solely that all these areas be listed in a register and further stipulates that the most stringent protection regime is applicable.

The good status is the ultimate goal of the WFD and is further defined by way of *environmental quality standards*. The elaboration of good status must be laid down in the form of quality standards in statutory provisions. These standards are nothing new in water law; older directives have already set forth many of the quality requirements, both for waters with a specific function (drinking, bathing, fishing, or shellfish) and for certain substances.<sup>6</sup> It may be inferred from case law from the

European Court of Justice that quality requirements must be regarded as obligations to achieve a particular result, which member states have to meet under all circumstances, except when the directive makes exemptions possible. This does not detract from the fact that quality requirements may be formulated as both limit and guidance values. If legal measures such as permit procedures are not effective, then additional actual measures must be taken.<sup>7</sup> As environmental quality requirements have already been in existence in European water law and law in general for some time, it is surprising that this aspect of the WFD in particular has caused much ado in the Netherlands (LBOW 2004).

The chemical quality requirements are familiar to the member states, as they also existed in older water directives, but they refer only to priority substances under the WFD; a directive on priority substances is prepared to establish these chemical quality standards. The ecological quality standards relate to the former “grey list” of *substances* (List II) from Directive 76/464/EEC but are to some extent new insofar as they actually refer to ecological requirements such as *hydromorphology* and the *status of fish and water fauna* and have to be formulated by the member states. The fact that the protection level may not be lower under the WFD than under the protection regime that was provided by the older water directives implies that all existing quality requirements continue to hold.

The requirement of a good status for all waters by 2015 applies to “natural” waters, those that the member states have not designated as “artificial” or “heavily modified.” For these latter water bodies, the protection regime is slightly less restrictive: they need to have a good chemical status, but no more than a good potential regarding their ecological status. The WFD also contains a number of possibilities for setting less stringent objectives or postponing the deadline by which they have to be achieved, albeit under strict conditions.<sup>8</sup>

The *instruments* by which the objectives must be realized include both integrated river basin management plans, preferably for the entire transboundary river basin, and programs setting out the steps and measures the member states intend to take to achieve the aims. These measures should include all those necessitated by a number of existing directives.<sup>9</sup> The WFD distinguishes between the measures for diffuse and point-source pollution.

Measures and instruments need to be derived not only from water legislation, but also from other fields of policy. Here again, intensive international cooperation is necessary because of the transboundary river basins. The WFD also contains the obligation to recover the costs of *water services* in accordance with the “polluter pays” principle. Finally, the directive pays a great deal of attention to *public participation* and has opted for a combination of source- and effect-oriented policy. The effect-oriented policy will eventually determine whether the requirements of the WFD have been met.

## DUTCH IMPLEMENTATION OF THE WFD

Although the Netherlands was closely involved in the preparations for the WFD, its implementation in this country was not always straightforward (Gilhuis and van

Rijswick 2005; van Rijswick 2004). At the government level, arrangements to start the program of implementation were made at an early stage, as a timely implementation of the directive is required under EU law. The final discussion of the bill to implement the directive was delayed considerably, however, partly because of a report by Alterra that sketched a worst-case scenario for Dutch agriculture as a consequence of the WFD. The Dutch House of Representatives refused to discuss the bill until clarity was given on how the directive would be implemented in the Netherlands; this was prompted by the fear that the country was being far too ambitious in its plans to meet the requirements of the directive. Experiences with the Habitats Directive, whose strong protection regime resulted in many delays in economic investments and public works, were still fresh in people's memories. In addition, the requirements following from the EU air quality directives also caused enormous problems in the Netherlands, as the requirements are hard to fulfill in such a highly populated country, and because of the way the EU directive was legally implemented into Dutch law. The agricultural sector had already been finding it extremely hard to comply with the earlier Nitrate Directive, and a judgment of the European Court of Justice against the Netherlands for noncompliance with the Nitrate Directive made things no easier. It was only after the state secretary presented a memorandum on the pragmatic implementation of the WFD to the House of Parliament that the bill was piloted through without too much further discussion of its contents.<sup>10</sup> In the meantime, the European Court of Justice ruled against various member states because they had not yet implemented the WFD.<sup>11</sup> Proceedings were also pending against the Netherlands, but these were withdrawn after the Water Framework Implementation Act came into force.<sup>12</sup>

The Water Framework Implementation Act includes amendments to the Water Management Act (*Wet op de waterhuishouding*) and Environmental Management Act (*Wet milieubeheer*). The Water Management Act has been amended in the sense that the obligatory river basin management plans have been included in the existing National Policy Document on Water Management. The Dutch minister for Transport, Public Works and Water Management is the competent authority for the four Dutch river basins: the Rhine, Maas, Ems, and Scheldt. Provisions have now been added for international consultation, which fulfills the obligation to work on transboundary river basin management plans, and for the implementation of public participation. Amendments in the Environmental Management Act include environmental quality standards for the chemical and ecological status of waters; a sharpening of the standstill principle, or no deterioration principle, which protects the actual water quality from further deterioration; and the implementation of monitoring obligations.

The member states had to comply with a number of obligations in the WFD before the end of 2004. First, they had to compile a description of the river basin districts (Article 3). Second, they had to draw up reports containing a review of the impact of human activity on the status of surface waters and groundwater (Article 5). Third, they had to establish a Register of Protected Areas (Article 6).<sup>13</sup> This register has been completed, although some modifications will probably be needed in the Netherlands, partly because of areas that still have to be designated as protected because they include the location of intake points for drinking-water supplies.<sup>14</sup>

The member states have to qualify their waters in categories such as rivers, lakes, transitional, and coastal, and each has different criteria for good status. Reference conditions determine the status of a particular water body as high, good, moderate, poor, or bad. A great deal of work has gone into formulating this system.<sup>15</sup> Next, the member states must specify the ecological objectives of the various waters, then lay down these objectives in statutory environmental quality standards. In the Netherlands, these are based on the Environmental Management Act and will be discussed in Parliament at the beginning of 2009 before coming into force. After this, the measures needed to bring the waters into the required good status will be determined. The quality requirements for priority substances will take the form of limit values, whereas for other pollutants, the choice may be for guidance values. In cases concerning licenses for plants falling within the scope of the Integrated Pollution and Prevention Control Directive (IPPC), the WFD requires that all quality requirements be included as limit values in the granting of permits.

The need to meet these quality requirements raises the question of the impact they will have on decisions in other policy fields, such as spatial planning, agriculture, or industry. Must every government body take water quality standards into account or even observe them? Do they apply to every decision or only certain ones? On the one hand, the quality requirements have to be designed in such a way that they comply with European obligations; on the other hand, the Dutch as well as the other member states have a strong desire for a certain amount of flexibility. As it appears now, in the Netherlands, the environmental quality standards will have to be taken into account only when making water plans. In other member states, all governmental bodies have to take the WFD goals and standards into account. Achieving a good ecological situation likely will cause some headaches, because the mere adoption of certain measures is by no means guaranteed to bring about particular results.

This then raises the question whether the environmental objectives of the WFD should be regarded as obligations to achieve particular results or merely to make a “best effort.” A concern has arisen that these environmental objectives will become obligations to achieve particular results that will be difficult to fulfill. Most member states see these as obligations of results, all though the Dutch legislators still see them as obligations of best effort. To define the ecological goals, in the common implementation strategy, a more pragmatic approach (the so-called Prague method) is developed, in hopes that it will be possible to comply with the WFD simply by implementing the intended measures. Not only has this Prague method been adopted in the Netherlands, but it is a joint development of the member states. Whether this approach will be accepted by the European Court of Justice will not be known until the court gives its final ruling on this matter.

Speaking more generally, it could be argued that the member states may be placed in a difficult position because of the focus on an effect-oriented approach through obligations that are laid down as environmental objectives and quality standards. Although assessments will take place as to whether the required quality has been achieved, member states do not always possess all the instruments necessary to fulfill this responsibility. Causes may be natural factors (e.g., climate change, flowing water, the marine environment, ecological reactions, or unforeseen develop-

ments) or a lack of jurisdictional competences (for certain areas of policy, such as the registration and admission of veterinary medicines and plant protection products, more than one member state will be involved). Another problem is that international cooperation is often necessary in water regulation in order to achieve the desired results, and such cooperation will not always be equally successful. To some extent, the old-fashioned source-oriented approach of previous environmental directives posed fewer problems for member states, because each individual member state had control over the obligatory regulation of activities.

Preparation of the management plans for river basins and subbasins is currently taking place in the Netherlands; these have to be determined by the end of 2009. Public participation on these plans started at the end of 2008 (NWP 2009). Various pilot projects are being carried out, as the best structure for these plans is not yet completely clear. These projects explore what measures are needed to achieve certain objectives, and how and in what sequence they will best be applied to obtain the greatest results at the lowest possible cost. The river basin management plans also need to contain an overview of the program of measures by which the member states aim to comply with the objectives. A cost-benefit study will be an important factor in this respect. The actual program of measures in the Netherlands must be sought in various, possibly decentralized, plans.

In 2009, the river basin management plans will be finished, and the determination of quality standards for substances (by the EU) and ecology (by the member states) should be finished by the end of the year. The programs of measures have to be operational in 2012. By 2015, the member states must have complied with the objectives, apart from justifiable exceptions. At this point, we not only will have a clearer picture of the relationships within water management (for protection against pollution, inundation, and flooding), but also the relationships with other policy fields will be worked out in greater detail.

## A NEW INTEGRATED DUTCH WATER ACT

In a letter dated July 6, 2004, the state secretary of Transport, Public Works and Water Management informed the lower house of her intention to integrate the heavily fragmented, sectoral water management legislation.<sup>16</sup> To this end, the Outline Note Concerning the Integration of Water Legislation was drafted. A number of reasons lay behind this wish to integrate the legislation on water management. For one, the cabinet's outline coalition agreement titled "Join In, More Work, Fewer Rules" had opted to reduce the burden of regulation. Developments concerning the review of the financing of regional water management were another consideration. Yet another motivation was the desire to review the relationships among the different authorities in charge of water management, as well as between citizens and the authorities, to clarify and modernize the responsibilities (e.g., duties of care and supervisory relationships).

An important substantive reason for a review of the legislation was the policy-inspired change from the sectoral, object-focused management of water control works to a more integrated, function-based management of water systems. This

change had occurred over the past 30 years, and the legislation was no longer equipped for these policy and management developments. This had become all the more pressing in light of the European regulations, especially the WFD. The Netherlands thus decided to introduce integrated management of water systems and river basins, in which both the quality and quantity aspects will play a role, in new legislation called the Water Act, which should enter into force in the autumn of 2009. Recent and anticipated EU directives will also be implemented in the act. Achieving the objectives of the EU water directives requires more legislation than that contained in the Water Framework Directive Implementation Act, and it is expected that the Water Act will be better able to make this possible (CAW 2002 and 2005; de Heer et al. 2004).

The Outline Note Concerning the Integration of Water Legislation laid the necessary foundation for the Water Act, which is directed at water system management in the broadest sense of the term and will also regulate the accompanying infrastructure. The act aims to integrate a multitude of statutory regulations in the field of water management law. To this end, connections are being sought with the concept of water system management.

In the summer of 2005, a preliminary draft of the integrated Water Act was made public so that all interested parties, including provinces, municipalities, water boards, drinking-water companies, and environmental organizations, could give feedback. Advice also was sought from some state advisory boards, such as the advisory commission, regarding the water legislation. All these interested parties used this opportunity to provide their comments, which led to certain changes to the proposal. The proposal for this Water Act has been discussed in the legal literature as well.

### *Purpose and Scope*

The Water Act will not result in a complete integration of water legislation, as it concerns only water system management. Water chain management (drinking water and wastewater collection) will not be part of this act, but will be regulated under the Drinking Water Act and the Environmental Management Act. The Water Act aims to combine and integrate the Water Management Act, Pollution of Surface Waters Act, Pollution of Sea Water Act, Groundwater Act, Land Reclamation and Dykes Act, Flood Defences Act, Public Works (Management of Water Control Works) Act, and Water Management Act 1900. Later, parts of the Soil Protection Act (covering aquatic soils) will be included in the act, insofar as it concerns water system management.

The purpose and thus the scope of the Water Act will be, in particular, the protection, improvement, and management of water systems, as regards the following:

- Safety (in relation to flooding)
- Quality (in particular, the good status of all waters)
- Quantity (emergency overflow and water storage)
- Effective and safe use of water systems

Not only will this make the scope of the act wider than that of the WFD, but it will also be more in line with developments within Dutch water management

(WB21). In this way, new European developments in the areas of safety and quantity management may also be anticipated. On the other hand, one could argue that water chain management and water system management have such close connections that it would be preferable to integrate both parts of water management.

### *Legal Standards*

Based on the Water Act, legal standards will be set in place related to several of its goals: quality, quantity, and flood protection. The legal standards for the quality of water directly refer to Article 4 of the WFD—good ecological and chemical status—and will be laid down in a regulation based on the Environmental Management Act as environmental quality standards (AMvB Kwaliteitseisen en monitoring water). Legal standards for flood protection currently are based on the Flood Defences Act but in the future will be based on the Water Act. At present, no legal standards exist for surface water quantity (emergency overflow and water storage), but they too will be based on the Water Act.

Legal standards can play a crucial role in achieving water management goals and thus must have a certain legally binding nature. Concerning internal integration within water system management, the Water Act will give a legally binding role to water standards in decisions based on the act. The act will call for very little external integration, however, other than with spatial planning. Here the water management plans will be based on the Water Act as well as the Spatial Planning Act. With this planning system, which replaces the former leapfrog construction, external integration with spatial planning will be regulated, although not legally binding.

The Dutch government did not make the environmental quality standards based on the Environmental Management Act binding for decisions in other policy areas and based on other acts in the fields of the environment, nature conservation, spatial planning, and products. Serious discussions are ongoing in the Netherlands over whether EU law obliges that environmental quality standards play a binding role in decisionmaking in other policy areas. This question will also be very important for environmental quality standards based on the WFD. Currently, no EU legislation exists in the fields of flood protection or emergency overflow and water storage that gives legal norms or standards for the assumed protection level. This means that the discussion on the external integration of these standards into other policy areas is relevant only at the national level.

External integration *will* take place in a general way, however. National water plans will be signed by several ministers, responsible for the environment, spatial planning, water management, agriculture, and nature conservation. That should lead to responsibility in all these policy fields to achieve the goals of both the WFD and the Dutch Water Act.

### *Other Regulations and Provisions*

Besides integrated goals, another great step forward in the Water Act is the system of one water license for all aspects that may affect the water system. Every individual, industry, or governmental body that undertakes activities that may influence



the goals of the Water Act (safety, flood protection, water quality, or water quantity) needs a permit for these activities. Because of the broad goals of the act, no problems should arise concerning the legal principle of specialty. A real integrated approach is thereby made possible.

The competent authorities in the field of water system management will not change to any great extent under the new act. As far as strategic policymaking and supervision are concerned, the Ministry of Traffic, Public Works and Water Management and the provinces are competent. The act calls for only two operational water managers: the state (the minister of Traffic, Public Works and Water Management) for the larger surface waters; and the water boards for all regional waters, both surface water and groundwater.

The planning system under the new Water Act will be very similar to that in the Water Management Act, as described above, with water management plans at the central, provincial, and water board levels, as well as strategic and operational plans. The main change is that the water plans at the central and provincial levels will also be based on the Spatial Planning Act. Besides these other important aspects, the Water Act also will include regulations for the storage of surface water, financial provisions, specifications concerning legal protection, and public participation arrangements.

### *Relationship with EU Water Law*

One of the reasons for establishing the Water Act was the implementation of EU water law, not only the WFD, but also the other water directives mentioned above. One of the main problems in the integration of legislation is where it should stop. Looking at European water law, it is clear that the WFD is not the final piece of legislation to be incorporated. Many other water directives exist, and new ones are being prepared. At both the European and national levels, the integration of legislation is not an easy task. And the fact that external integration with other policy areas lacks proper regulation will make it all the more difficult to attain the ambitious goals of European and Dutch water policy.

Regarding the legal system of EU law, the new Dutch Water Act has proper supervision arrangements, in the form of regulations and individual instructions, for the central government to ensure that decentralized administrative bodies attain the prescribed European and national goals, although only when they fail to attain those goals using traditional methods such as cooperation within the polder model. As far as future European water legislation is concerned, the Water Act is intended for the future. New forthcoming legislation such as the Bathing Water, Flood Protection, and Groundwater Directives will be implemented in the Water Act without serious problems. In this way, the Water Act will both follow European developments such as the WFD and inspire new European water legislation (just as the EU Directive on Flood Protection was based on Dutch water policy concerning flood protection, emergency overflow, and water storage), not only because the Netherlands has ample experience in such aspects, but also because the proposal for the directive on flood protection and management leaves a great deal of room for regional arrangements and contains few binding rules or standards.

## CONCLUSIONS

This chapter has provided a general overview of the ways the Water Framework Directive is being implemented in Dutch law. Three important recent transformations are the conversion of water management from a sector approach to an integrated approach to water systems, with changes in legislation coming decades after changes in policy; alterations in water management because of new water problems such as climate change, which will lead to the necessity to provide more room for natural waters alongside the old technical measures; and finally, shifts in attitudes and legal arrangements because of the influence of strictly binding EU law. In all these arenas, one can see the mutual effects on European and Dutch water legislation and water policy.

As to the existing Dutch water legislation, the Netherlands has already, for the most part, based its water policy and management on an integrated approach, but they still have to be translated into legislation. The planning system based on the Water Management Act, in particular, served as the instrument for integrated water management, although this is not sufficient for the genuine and clear fulfillment of the obligations set out in the WFD. This is crucial from the point of view of legal certainty, so as to provide clarity for all parties involved concerning their obligations that follow from EU directives.

After all, the WFD is especially ambitious in its aims and, despite its name, is directed at many more policy areas than just water. This is the result of the objective of achieving good status for all waters and the decision to opt for the river basin approach. The WFD therefore will also require great effort in other fields, such as the environment, spatial planning, agriculture, traffic, and transport. The pursuit of the good ecological status of waters may also give a positive boost to nature conservation. External integration with other policy areas lacks proper regulation, however, on both the European and national levels.

On the implementation of the directive in the Netherlands, it was decided not to review the sector approach and the highly fragmented Dutch water legislation. That was regrettable and a missed opportunity. The legislative process is very slow in the Netherlands, however, and the implementation of the not exactly crystal clear WFD gives rise to many questions that require further study, while remembering that European law demands that directives be implemented on time. Given all this, the decision of the legislators to begin by fulfilling only those obligations that are absolutely necessary is understandable. It has already become clear from the Explanatory Memorandum to the Implementation Act that an integrated Water Act will be prepared. Dutch water legislation will benefit greatly from the thorough review taking place in conjunction with this new act. And it appears from the most recent draft that the Water Act will be able to apply the EU water directives properly.

At this point, it is doubtful that the obligations and objectives of the WFD can be fulfilled with instruments and powers spread out over so many different administrative bodies, water authorities, and those with responsibilities in other policy fields. The authorities in the Netherlands have a strong desire, however, to leave unchanged the existing administrative structures and powers, as well as hold on to

the Dutch way of working in water management, based on cooperation, consultation, and common goals. The polder model is highly appreciated here, and it fits well within the new governance approach.

Some countries regarded the WFD as a good opportunity to review their water legislation, and as a result, they have already become equipped with all the right instruments for obtaining good water status. Although the Netherlands may have lagged behind in this respect, it too is working to achieve integration in its water legislation and is now closely conforming with the WFD obligations. The positive elements in the Dutch implementation are the quality standards, which have now been laid down in statutory rules; the tightening of the standstill principle; and increased attention to the relationship between emission control and the quality approach. In these matters, the old water directives in the Netherlands fell short of the mark, and it is a sign of progress that remedies for these defects have been found.

The Dutch Water Act was drafted with an eye to the future, with a great deal of attention paid to national as well as European developments in flood protection, emergency overflow, and water storage. The new directive on flood protection seems to be inspired by developments in the Netherlands regarding more room for water and the fact that water problems should not simply be shifted downstream.

## NOTES

1. Directives 2007/60/EC and 2008/56/EC.

2. Directorate General for Public Works and Water Management, the Hague, December 2000. The government position was published after the recommendations of the Committee for Water Management for the 21st Century (Commissie WB21 2000).

3. After the damage to New Orleans, Louisiana, in the wake of Hurricane Katrina, people came from the United States to the Netherlands to learn about the Delta Works and the Dutch system of water management. A new Delta Plan and Delta Act have been proposed recently because of the need to adapt to the effects of climate change.

4. Approved by Council Decision 95/308/EC, OJ L186/42.

5. Agreement Concerning the International Commission for the Protection of the Rhine, Bern 1963; Convention on the Protection of the Rhine against Chemical Pollution, Bonn 1976; Convention on the Protection of the Rhine against Pollution by Chlorides, Bonn 1976.

6. Based on the Drinking Water Directive (75/440/EEC), amended by Directive 79/869/EEC; the Bathing Water Directive (76/160/EEC); the Fishing Waters Directive (2006/44/EC); the Shellfish Water Directive (2006/113/EC); and Directive 76/464/EEC, republished as Directive 2006/11/EC.

7. ECJ 18 June 2002, C-60/01; ECJ 8 March 2001, case C-266/99; ECJ 14 July 1993, case C-56/90; ECJ 12 February 1998, case C-92/96; ECJ 25 November 1992, case C-337/89; ECJ 14 November 2002, case C-316/00. Where water directives are involved, the case law often concerns those that have the protection of public health as an objective.

8. See Syncera Water, Arcadis, Institute for Environmental Studies (VU) and Centre for Environmental Law (UvA), *Verkenning argumentatielijnen fasering en doelverlaging (derogaties) Kaderrichtlijn Water [Argumentation to use the exemptions of the WFD]*, commissioned by RIZA, April 14, 2005, and Stichting Reinwater, *Kansen uit de Kaderrichtlijn water [New chances of the WFD]*, 2004.

9. Article 10 WFD and Part A of Annex VI; at least the measures from the Bathing Water Directives (76/160/EEC and 2006/7/EC), Birds Directive (79/409/EEC), Drinking Water

Directive (80/778), Seveso Directive, EIA Directive (85/337/EEC), Sewage Sludge Directive, Urban Waste Water Treatment Directive (91/271/EEC), IPPC Directive (96/61/EEC), Nitrate Directive (91/676/EEC), and Habitats Directive (92/43/EEC).

10. *Pragmatische Implementatie Europese Kaderrichtlijn Water in Nederland; van beelden naar betekenis* [Pragmatic implementation of the European water framework directive in the Netherlands, from images to meanings], TK 2003–2004, 28 808, no. 12.

11. ECJ 15 December 2005, C-67/05, *Commission v. German Federal Republic*; ECJ 15 December 2005, C-33/05, *Commission v. Belgium*; ECJ 12 January 2006, C-60/22, *Commission v. Portugal*; ECJ 12 January 2006, C-60/19, *Commission v. Italy*; and most important, ECJ 30 November 2006, Case C-32/05, *Commission v. Luxembourg*.

12. Case C-147/05.

13. For the Article 5 and Article 6 reports, see [www.kaderrichtlijnwater.nl](http://www.kaderrichtlijnwater.nl).

14. Initially the decision was made to designate the intake points with regard to surface waters. This does not appear to be in line with the requirements of the WFD, however, because the directive talks of the designation of water bodies. The protection areas have been provisionally included in the register in the case of groundwater. The European Commission has since ruled that inclusion in the register must relate to entire groundwater bodies. If the same methodology is applied for surface waters, it may be assumed that the entire water bodies must be included, and not just the intake points.

15. Three reports were presented in October 2004 in Utrecht: References and Draft Measuring Standards for Lakes in the Water Framework Directive, STOWA Report 2004–42; References and Draft Measuring Standards for Rivers in the Water Framework Directive, STOWA Report 2004–43; References and Draft Measuring Standards for Lakes in the Water Framework Directive, *Transitional and Coastal Waters*, STOWA Report 2004–44.

16. TK 2003–2004, 29 694, no. 1.

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