CHAPTER 11

TOWARDS MORE EFFECTIVE PROTECTION OF WATER RESOURCES IN EUROPE BY IMPROVING THE IMPLEMENTATION OF THE WATER FRAMEWORK DIRECTIVE AND THE AARHUS CONVENTION IN THE NETHERLANDS

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1. INTRODUCTION

The Netherlands is a country that lives on water and has a long and fascinating history of water management. Yet, water quality in the Netherlands is not good,[1] and a recent prediction made by the Netherlands Environmental Assessment

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1 CBS, PBL, Wageningen UR, *Waterkwaliteit KRW, 2015* (indicator 1438, versie 07, 12 januari 2016). www.compendiumvoordeleefomgeving.nl; www.compendiumvoordeleefomgeving.nl/indicatoren/nl1438-Kwaliteit-oppervlaktewater-KRW.html?i=2–76 (Accessed April 2016). See more extensively F.W. van Gaalen e.a., *Waterkwaliteit nu en in de toekomst. Eindrapportage ex ante evaluatie van de Nederlandse plannen voor de Kaderrichtlijn Water*, Den Haag: PBL 2016.

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Agency (Planbureau voor de Leefomgeving),[2] shows that by 2027 between 95% and 60% of Dutch waters will not fulfil the standards established under the Water Framework Directive.[3] Clearly, despite longstanding Dutch experience in water management, the effectiveness of implementation of EU Water law can still be improved upon.

In this chapter, we will provide an initial set of recommendations to improve the effectiveness of European water law by way of a better implementation of the substantive requirements of the Water Framework Directive and the procedural requirements of the Water Framework Directive and the Aarhus Convention in the Dutch legal order. Effective environmental policies, as laid down in EU environmental law, require both substantive and procedural elements.[4] Only if both are implemented well can we speak of effective environmental or water legislation and protection.[5]

Indeed, despite the Ministry having repeated its mantra that Dutch water law is in line with the Water Framework Directive[6] part of the ineffectiveness highlighted above can be attributed to the fact that the Dutch implementation of the Directive diverges from the manner in which the Court of Justice of the European Union (ECJ) interprets the Water Framework Directive.[7] Furthermore, shortcomings could derive from the manner in which the Netherlands implements the Aarhus Convention.[8]

In the so-called *Weser* case,[9] rendered in July 2015, the ECJ clarified that the environmental goals established under Article 4 of the Directive are an obligation binding upon each phase of a decision-making process; hence, at the level of plans

[2] W. Ligtvoet and others, *Waterkwaliteit en -veiligheid. Balans van de Leefomgeving 2014 – Deel 6*, Den Haag: Planbureau voor de Leefomgeving 2014. See also http://themasites.pbl.nl/balansvandeleefomgeving/2014/waterkwaliteit (accessed April 2016).

[3] Directive 2000/60/EC of 23 October 2000 establishing a framework for Community action in the field of water policy [2000] OJ L327/1.

[4] See also E.J.H. Plambeck, 'Paradoxes of the EU Regulatory Framework in Water Management: Developing an Assessment Framework to Put the Governance Approach to the Test', *Journal of Water Law* 2015 (24), p. 275, where he equates input-legitimacy with participation and output-legitimacy, or effectiveness with compliance, while compliance falls apart into substantive norm setting and the use of instruments to pursue compliance.

[5] See above, S. Maljean-Dubois, 'Introduction. The effectiveness of environmental law: a key topic', p. 3.

[6] *Kamerstukken II*, 2015/16, 31 710, nr. 44.

[7] H.F.M.W. van Rijswick, *AB* 2015/262; A.A. Freriks and H.F.M.W. van Rijswick, 'Programmatische aanpak stikstof en programmatische aanpak water: van tweeën een?', *TvAR* 2015/9, p. 399–415; F.M. Fleurke, 'Handhaving van Europees Milieurecht: resultaatsverplichtingen op het terrein van lucht en water', *NtEr* 2015/9, p. 284–291; H.F.M.W. van Rijswick and Ch.W. Backes, 'Ground Breaking Landmark Case on Environmental Quality Standards? The Consequences of the CJEU 'Weser-judgment' (C-461/13) for Water Policy and Law and Quality Standards in EU Environmental Law', *JEEPL* 2015/3–4, p. 363–377.

[8] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, 25 July 1998.

[9] Case C-461/13, *Bund für Umwelt und Naturschutz Deutschland eV v Bundesrepublik Deutschland*, ECLI:EU:C:2015:433 (*Weser*).

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and programmes as well at the level of decisions concerning specific projects.[10] There is, therefore, a direct linkage between the environmental goals of the Directive and the decision to authorise or refuse the development of a specific project that would deteriorate the quality of a specific water body covered by the Directive. Moreover, the *Weser* case clarified what 'deteriorating' means under the Directive. Deterioration occurs as soon as the status of at least one of the quality elements, within the meaning of Annex V to the Directive, falls by one class, even if that fall does not result in a fall in classification of the body of surface water as a whole.[11] In light of the one-out-all-out principle, this assessment takes place for each ecological or chemical quality element taken individually.[12] If an affected ecological or chemical quality element is already in the lowest class, any further worsening will qualify as deterioration.

In section 3, we will show that the linkage between the quality objectives under Article 4 of the Directive and the authorization of specific projects is only an indirect one in the Netherlands, i.e. through the medium of the programme of measures adopted for a specific water body. Moreover, we will explain that the binding character of the quality objectives under Article 4 of the Directive is not as clearly formulated as the Directive requires. Consequently, there is too much room for applying a so-called net-loss approach in the Netherlands.[13]

As effective environmental policies require both adequately implemented substantive and procedural elements, we turn to the second shortcoming in Dutch environmental law. This concerns the manner in which the Netherlands has implemented the Aarhus Convention, which is part of the EU environmental acquis.[14] Both the Water Framework Directive and Dutch water and environmental law can be improved, particularly regarding access to justice. The political shortcomings affecting EU law on this issue,[15] do not justify a breach of the Aarhus rights at the national level.[16] In section 4, we will look at the room available for improving both participation and judicial protection under Dutch

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10 Van Rijswick and Backes (n 7).

11 *Weser* (n 9), paras 69 and 70.

12 Van Rijswick and Backes (n 7).

13 Dutch academics speak of a 'per balance' approach, e.g. Marlon Boeve and Berthy van den Broek, 'The Programmatic Approach; a Flexible and Complex Tool to Achieve Environmental Quality Standards', 2012 (8) *Utrecht Law Review*, 74–85, 78.

14 Article 216(2) TFEU. Case C-244/09, *Lesoochranárske Zoskupenie VLK*, ECLI:EU:C:2011:125 (Zoskupenie). This is an example of mixed agreement, see. J.M.I.J. Zijlmans, *De doorwerking van natuurbeschermingsverdragen in de Europese en Nederlandse rechtsorde*, Den Haag: Sdu Uitgevers 2011, pp. 46; J.H. Jans and H.H.B. Vedder, *European Environmental Law*, Groningen: Europa Law Publishing 2012, pp. 71–74; and E. Hey and H.F.M.W. van Rijswick, 'Transnational watermanagement', in: O. Jansen & B. Schöndorf-Haubold (eds.), *The European Composite Administration*, Antwerpen: Intersentia 2011, p. 240.

15 For the proposal see COM(2003) 624 final. For the withdrawal see [2014] OJ C153/3.

16 L. Squintani and H.F.M.W. van Rijswick, Improving Legal Certainty and Adaptability under the Programmatic Approach, *Journal of Environmental Law*, 2016/3 pp. 443–470.

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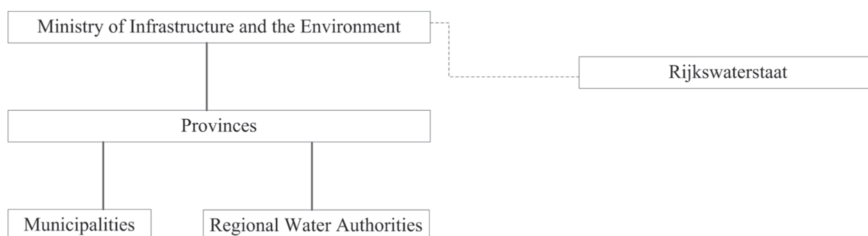
water and environmental law by juxtaposing the Aarhus Convention to Dutch water and environmental law.

In light of the findings shown in sections 3 and 4, we will formulate a series of recommendations addressed to the Dutch government and Dutch public authorities responsible for the implementation of the Water Framework Directive on how to improve the implementation of the latter in the Netherlands (Section 5). First, however, section 2 will provide an overview of how water management is structured in the Netherlands.

2. THE STRUCTURE OF WATER MANAGEMENT IN THE NETHERLANDS: AN OVERVIEW

As a decentralised unitary state, there are four kind of administrative bodies responsible for water quality policy in the Netherlands. The Ministry of Infrastructure and the Environment and provinces are generic administrative bodies, the regional water authorities are functional decentralized bodies,[17] and *Rijkswaterstaat* (RWS) is the executive agency responsible for implementing the Ministry of Infrastructure and the Environment's policies and regulations, with six national and seven regional divisions.[18] There is a top-down hierarchical relationship between the state, the provinces and the regional water authorities (see figure 1). Municipalities have a relatively small task in water quality management; they are responsible for waste water collection (but not the treatment thereof) and for granting licenses for discharges of polluted waste water on the sewerage system. Nowadays, almost all these discharges have been regulated by means of general rules that replace the requirement of a license.

Figure 1. Administrative structure of the Netherlands with regard to water quality



There are twelve provinces, governed by a directly elected Provincial Council (Provinciale Staten) and the Provincial Executive (Gedeputeerde Staten). All

[17] See, on the functional and decentral character of the regional water authorities more extensively, H.F.M.W. van Rijswick and H.J.M. Havekes, *European and Dutch Water Law*, Groningen: Europa Law Publishing, pp. 93–94; pp. 146 ff.

[18] See for more information https://www.rijkswaterstaat.nl/english.

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regional water authorities,[19] 22 in total, have a General Council (Algemeen Bestuur) consisting of directly elected members and appointed representatives of several stakeholder groups, and an executive administration (Dagelijks Bestuur).[20]

Figures 2, 3 and 4 show the administrative boundaries within the Netherlands.

Figure 2. Administrative boundaries of the twelve provinces[21]

19 See for more information www.dutchwaterauthorities.com.

20 Extensively Van Rijswick and Havekes (n 17), pp. 170 ff.

21 Source: https://simple.wikipedia.org/wiki/Provinces_of_the_Netherlands.

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Figure 3. Administrative boundaries of the 22 regional water authorities[22]

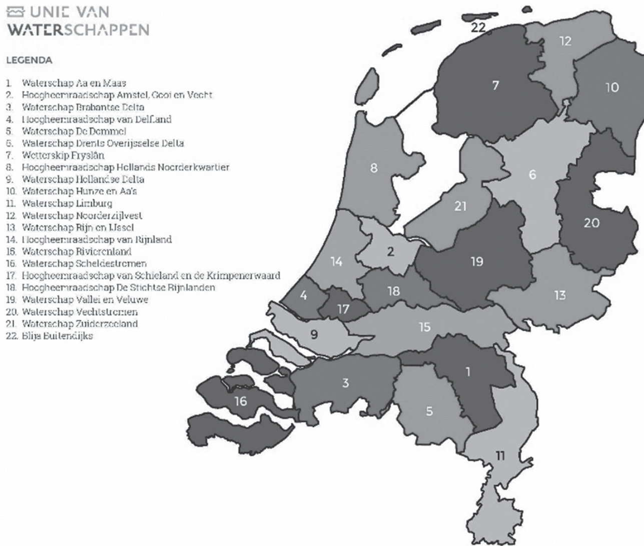

Figure 4. Administrative boundaries of the seven regional divisions of *Rijkswaterstaat*[23]

22 Https://nl.wikipedia.org/wiki/Lijst_van_Nederlandse_waterschappen#/media/File:2016-NL-Waterschappen-prov-1250.png.

23 Www.helpdeskwater.nl/publish/pages/36352/rws-regio.png.

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With regard to water quality, the main instruments are laid down in the Water Act (*Waterwet*).[24] There are the plans and programmes, laid down in Chapter 4 of the Water Act, and further elaborated upon in Chapter 4 of the Water Decree (*Waterbesluit*). These chapters refer to four kinds of plans: the central government's national water policy plan, regional water policy plans for the sub river basins made by the provinces, the management plans of the Ministry of Infrastructure and the Environment for state waters and the management plans of the regional water authorities for regional waters.[25] These plans and programmes must consist of, among others, the 'river basin management plans' (Art. 13 of the WFD) and 'programmes of measures' (Art. 11 of the WFD). Furthermore, discharges into surface waters are, according to Article 6.2 of the Water Act, prohibited without consent by a permit or by general applicable rules. The general applicable rules are laid down in several Orders of Council, which emanate from central government, or in regional ordinances from the regional water authorities. For specific projects, constructing or modifying a water management structure by or on behalf of a water authority, a decision for the whole project, i.e. a kind of permit with regard to all relevant effects on the water system and its direct environment, is necessary. The *project plan* is laid down in Article 5.4 of the Water Act.

With regard to the judiciary, there is a distinction between civil jurisdiction and administrative jurisdiction in the Netherlands.[26] The Civil Procedures Act (CPA – *Wetboek van Rechtsvordering*) and the General Administrative Law Act (GALA – *Algemene wet bestuursrecht*) contain specific provisions about court competences in civil and administrative cases, as well as on the procedural aspects thereof. With some exceptions, an interested party can contest an appealable decision by a competent authority before the administrative jurisdiction division of a District Court (*rechtbank*). In advance of that, you mainly have to raise objections in a pre-trial proceeding.[27] Appeals against the court's judgment are possible through the Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*; ABRvS). If it is not

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24 Van Rijswick and Havekes (n 17), pp. 108 ff.

25 *Idem*, pp. 215 ff.

26 See G.T.J.M. Jurgens and F.J. van Ommeren, 'The Public-Private Divide in English and Dutch Law: a Multifunctional and Context-Dependant Divide', *Cambridge Law Journal*, 71(1), March 2012, pp. 172–199, esp. pp. 181 ff. on the distinction between civil and administrative jurisdiction. See for a description of the historical development towards the current court system: R.J.G.H. Seerden and D.W.M. Wenders, 'Administrative Law in the Netherlands', in: R.J.G.H. Seerden (ed.), *Administrative Law of the European Union, its Member States and the United States. A Comparative Analysis*, 3rd edition, Antwerp & Oxford: Intersentia 2012, pp. 131 ff.

27 The main exception is, however, the application of para. 3.4 of the GALA in the preparation of a decision. See more extensively on the substance and requirements of pre-trial proceedings and its relationship with court proceedings, 'Pre-Trial Proceedings in Dutch Administrative Law', in: Ph.M. Langbroek, A. Buijze and M. Remac, *Designing Administrative Pre-Trial Proceedings*, The Hague: Eleven Publishing 2013, pp. 97 ff.

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possible to appeal before an administrative judge, appeals can be made to the civil jurisdiction division of a District Court, with the possibility of appeal against its judgment to a Court of Appeal (*gerechtshof*), and for an appeal in cassation to the Supreme Court (*Hoge Raad*).

Some definitions and principles provided in the GALA are particularly important for all administrative procedures in the Netherlands, as well as for decision-making in the field of water quality management, where we focus on in paragraphs 3 and 4. These are listed below.[28]

- An 'administrative authority' is a) an organ of a legal entity which has been established under public law, or b) another person or body which is vested with any public authority (Article 1:1(1) of the GALA);
- an 'order' is a written decision of an administrative authority constituting a public law act (Article 1:3(1) of the GALA);
- an 'administrative decision' is an order which is not of a general nature, including the rejection of an application for such an order (Article 1:3(2) of the GALA), e.g. a water permit; and
- an 'interested party' is a person or legal body whose interests are directly affected by an administrative order (Article 1:2 of the GALA). For example, NGOs can be considered as an interested party, if they look after a specific interest.

3. TOWARDS A BETTER PROGRAMMATIC APPROACH

As indicated in the Introduction, this chapter will focus first on the room available for improving the effectiveness of EU water policy by a sufficient implementation of the Water Framework Directive in the Netherlands. In light of the discussion taking place in the Dutch Parliament on this very issue,[29] we will focus on the main aspects discussed concerning the Dutch implementation of the Directive. First, we will consider the manner in which the quality standards under the Directive have been linked to the authorisation of specific projects (Section 3.1). Second, we will look at the manner in which the Netherlands implements the prohibition of deterioration under Article 4 of the Directive (Section 3.2) and, finally, we will look at the net-loss approach (Section 3.3.).

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[28] See further R.J.G.H. Seerden and D.W.M. Wenders, 'Administrative Law in the Netherlands', in: R.J.G.H. Seerden (ed.), *Administrative Law of the European Union, its Member States and the United States. A Comparative Analysis*, 3rd edition, Antwerp & Oxford: Intersentia 2012, pp. 131 ff.

[29] Question of SGP-member Bisschop of 25 September 2015, 2015Z17417; Answered on 12 October 2015, Aanhangsel Handelingen II 2015/16, nr. 273.

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3.1. THE LINKAGE BETWEEN QUALITY STANDARDS AND SPECIFIC PROJECTS

The general goal of the Directive is to establish a framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater (Article 1). This general goal is further refined to more specific goals, often placed in a mutual and diffuse relationship.[30] This makes the Directive a complex piece of legislation that is, at times, difficult to grasp – to paraphrase the words of AG Jääskinen.[31] As regards the environmental goals for surface water, Article 4(1)(a) of the Directive establishes that:

(i) Member States shall implement the necessary measures to prevent deterioration of the status of all bodies of surface water, subject to the application of paragraphs 6 and 7 and without prejudice to paragraph 8.
(ii) Member States shall protect, enhance and restore all bodies of surface water, subject to the application of subparagraph (iii) for artificial and heavily modified bodies of water, with the aim of achieving good surface water status at the latest 15 years after the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4 and to the application of paragraphs 5, 6 and 7 without prejudice to paragraph 8.
(iii) Member States shall protect and enhance all artificial and heavily modified bodies of water, with the aim of achieving good ecological potential and good surface water chemical status at the latest 15 years from the date of the entry into force of this Directive, in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4 and to the application of paragraphs 5, 6 and 7 without prejudice to paragraph 8.

These norms do not merely set out the goals of the Directive in a programmatic manner.[32] The Court of Justice did not clarify what it means by a programmatic manner. Squintani and Van Rijswick found that this concept can have different meaning under different EU environmental law directives in 2016.[33] In the broadest of these meanings, EU quality standards are merely long term policy planning objectives, which cannot be used to review the legality of specific decisions, allegedly adopted in breach of such goals. In *Weser*, the Court of Justice made clear that the environmental quality standards, under Article 4 of the Directive, must be respected

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30 J.J.H. van Kempen, *Europees waterbeheer: eerlijk zullen we alles delen*, Den Haag: BJu 2012, p. 119–122.

31 Opinion of AG N. Jääskinen of 23 October 2014 in Case C-461/13, *Bund für Umwelt und Naturschutz Deutschland eV v Bundesrepublik Deutschland*, ECLI:EU:C:2014:2324, point 4.

32 *Weser* (n 9), para 43.

33 Squintani and Van Rijswick (n 16).

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regardless of the long-term effects of a water plan.[34] They are binding in all phases of the decision making.[35] Furthermore, they must be achieved as regards all water bodies falling under the Water Framework Directive, regardless of whether they have been designated as a protected water body in a national or regional water plan.[36]

In the Netherlands, quality standards for surface water are established in accordance to Chapter 5 of the Environmental Management Act (EMA – *Wet milieubeheer*),[37] as referred to in Article 2.10 of the Water Act.[38] Yet, only the quality standards for the chemical status of water surfaces have been established in accordance with an Order in Council based on Chapter 5 of the EMA (the so-called *Besluit kwaliteitseisen en monitoring water 2009* – Bkmw 2009).[39] No binding provision has implemented the quality standards for the ecological status of surface waters. Some water quality parameters have been established by a group of experts in the so-called '*STOWA-maatlatten*', but this is nothing more than a report with an unclear binding force.[40] It is only a reference framework to be used in the context of monitoring and it is used by Dutch water authorities to motivate their water quality policies. Furthermore, in the Netherlands a distinction is made between designated water bodies as large rivers and lakes and non-designated ones in policies and legislation, although the WFD does not provide for this distinction. With regard to designated water bodies, quality standards, monitoring requirements and general policies all apply. For non-designated water bodies, only the general policies apply.

Another difference between the Water Framework Directive and the Dutch implementation thereof concerns the binding force of the quality standards under the Bkmw 2009. First, it was unclear to what extent it was possible to derogate from the quality standards implementing the Directive for grounds other than those indicated under Article 4 of the Directive. Second, the Dutch government does not consider that quality standards should serve to review the authorization of projects affecting the quality of water bodies covered by the Directive. Of these two differences, only the first one has been deleted. Indeed, as regards the grounds for derogation, the Explanatory Note to the Bkmw 2009 clearly stated that chemical quality standards and ecological standards for certain explicitly designated waters in very good status are binding, and that

34 *Weser* (n 9), para 50.
35 *Weser* (n 9), para. 31.
36 *Weser* (n 9), para 55. See also A.A.H. Smit and others, *Een onmogelijke opgave? Een onderzoek naar de wijze waarop waterschappen invulling geven aan de wateropgaven en de spanningen die zich daarbij voordoen,* Kaderrichtlijn water en Natura 2000, Universiteit Utrecht: Aquaterra Nederland/Leven met water, 2008.
37 *Stb.* 1979, 442, last amended by *Stb.* 2013, 20.
38 *Stb.* 2009, 107, last amended by *Stb.* 2015, 399.
39 *Stb.* 2010, 15, last amended by *Stb.* 2015, 394.
40 D.T. van der Molen and others (eds.), *Referenties en maatlatten voor natuurlijke watertypen voor de Kaderrichtlijn water 2015–2021*, STOWA 2012–31, Utrecht: Stowa 2012. This report is referred to in a Ministerial Decree, the so-called *Regeling monitoring kaderrichtlijn water* (Rmkw), *Stcrt.* 2010, 5615, last amended by *Stb.* 2015, 38398, which, however, does not provide binding force to these parameters as quality standards.

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derogations are only possible if they are compatible with those indicated under Article 4 of the Water Framework Directive. However, Article 2.1 of the Bkmw 2009 defined the standards as 'guiding standards' (richtwaarde), from which, in accordance with Article 5.1 of the EMA, it is possible to deviate by means of due motivation.[41] The ambiguity in the formulation of the requirements led to the situation in which several competent authorities considered the quality standards to be not binding.[42] In 2016, with the entry into force of the amended Article 2.1 of the Bkmw 2009, which no longer refers to the term of 'guiding standard', this difference has ceased to exist, although the legal regime is still restricted to chemical quality standards and ecological standards referring to the good status for a small amount of detailed designated water bodies.

As regards the linkage between quality standards and the authorization of specific projects, the Dutch government negates the existence of a direct link.[43, 44] The Dutch Council of State seems to have implicitly accepted this view in 2012.[45] In light of a parliamentary discussion following the *Weser* judgment, the Ministry for Infrastructure and the Environment replied that projects affecting the quality of waters designated under a water plan, 'must be assessed in light of the quality standards', although it is not made clear what these wordings really mean.[46] Indeed, these standards are inserted in the water plans which have less binding force; under Article 6.1a of the Water Decree (*Waterbesluit*) competent authorities must 'take a water plan into account' when granting or refusing a permit. Permits must be refused if the general aims of the Water Act can no longer be achieved and the negative effects cannot be avoided or compensated.[47]

This reasoning fails to take account of the fact that the quality standards in water plans apply only to designated water bodies, which does not cover the

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41 Additional Explanatory Note to the Bkmw 2009, appendix to *Kamerstukken II* 2009/10, 27 625, nr. 154, p. 6. Cf. J.J.H. van Kempen, *Europees waterbeheer: eerlijk zullen we alles delen*, Den Haag: BJu 2012, p. 131–132, note 93.

42 Ch.W. Backes, A.M. Keesen and H.F.M.W. van Rijswick, *Effectgerichte normen in het omgevingsrecht*, Den Haag: BJu 2012, p. 90–92; H.F.M.W. van Rijswick, 'De betekenis en vormgeving van waterkwaliteitseisen', *M&R* 2007, pp. 395–407; H.E. Woldendorp en M. Thijssen, 'Waterkwaliteitseisen: waterdicht geregeld?', *M&R* 2009, pp. 568–578; H.E. Woldendorp, 'Regulering van de waterkwaliteit: sluitstuk van de implementatie van de Kaderrichtlijn water (I en II)', *BR* 2010, pp. 293–315 and 382–394. Voor de praktijk, zie W.M. Janse and H.F.M.W. van Rijswick, 'De programmatische aanpak in het waterbeheer: een les voor de Omgevingswet?', *M&R* 2012, p. 246.

43 *Kamerstukken II*, 2009–2010, 32 427, nr. 3, p. 3.

44 *Kamerstukken II*, 2015/16, 31 710, nr. 44.

45 ABRvS 8 February 2012 (Waterkrachtcentrale Borgharen), ECLI:NL:RVS:2012:BV3249, paras. 2.21 ff. See also H.J.M. Havekes and H.F.M.W. van Rijswick, *Nederlands waterrecht in Europese context*, Deventer: Kluwer 2014, p. 293.

46 *Kamerstukken II*, 2015/16, 31 710, nr. 44.

47 Article 6.21 in conjunction with Article 2.1 of the Water Act. The management plan for the national waters includes an assessment framework for individual decisions (*Toetsingskader voor individuele besluiten*). The plans of the water managements do not usually include such a framework.

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non-designated water bodies that still fall under the Directive.[48] Although water management authorities extend the application of the water quality standards to non-designated water bodies in practice, they lack the legal competence to regulate activities which are not regulated by means of quality standards. This can be problematic in practice. For example, agricultural activities affecting water quality by means of fertilizing activities do not fall under the competence of water management authorities[49] and, hence, the performance of such activities is not subjected to the quality standards. Moreover, an obligation to 'take the quality standards into account' does not carry the same binding force as a requirement 'to act in accordance with' the quality standards. Under Dutch law, when the expression 'take into account' is used in a public law act, derogations are possible.[50] In our case, this would mean that grounds other than those indicated under Article 4 of the Directive could be used to set the quality standards aside and authorise a specific project that would risk the quality of a water body becoming worse. Finally, several human activities do not require a permit to be undertaken, but they simply have to comply with general binding rules.[51] As stated above, there are no general binding rules as regards the ecological quality standards of the Directive. Hence, there is no legal basis to review the legality of the activities undertaken.

3.2. THE MEANING OF THE CONCEPT OF 'NON-DETERIORATION'

As discussed in the previous section, the Directive aims at a good quality status for surface water, unless one of the exceptions under Article 4 apply. The manner to establish this status is provided in the Directive. Indeed, there are two groups of quality elements: the ecological quality and the chemical quality. The ecological element group is further sub-divided in three groups of quality elements: biological elements (water plants and animals), chemical and physicochemical elements (e.g. oxygen and nutrient levels) and hydromorphological elements (water flows and levels; the condition of beds, banks and shores and the continuity of rivers for fish migration), with the latter two sub-categories being supportive of the first one. In

48 It should be added that Best Available Techniques apply as regards the discharge into waters. See, on the arguments against the indirect assessment of quality standards extensively, E.J.H. Plambeck and L. Squintani, 'De bescherming en verbetering van de waterkwaliteit in Nederland, of: hoe vertroebeling niet bijdraagt aan een helder begrip en een juiste implementatie van de KRW', *M en R* 2017/2, pp. 2–14.

49 According to Article 3.84 jo. 3.85 of the Activities Decree (Activiteitenbesluit) there is no room for the competent authority i.e. the water management authority to deviate with 'customised rules' in this case.

50 See also B.A. Beijen (ed.), *Hoofdlijnen milieubestuursrecht,* Den Haag: BJu 2015, p. 83.

51 See A.P.W. Duijkersloot and others, 'Algemeen geregeld, goed geregeld?', *M&R* 2011/167, p. 576–585. The Water Management Authority Rijnland even states that in principle activities are authorised, unless it is proven that they affect water quality, see Water Management Authority Rijnland Toelichting op de Keur Rijnland 2015, p. 1.

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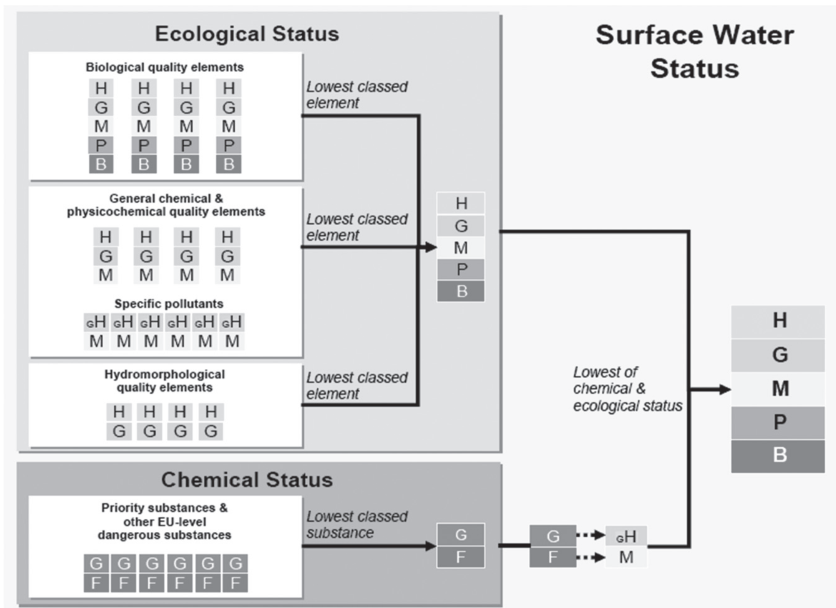
turn, each of these sub-groups are composed of specific elements. For example, the biological elements group is composed of a series of elements. These elements are specified for each of the five kinds of water bodies covered by the Directive, i.e. rivers, lakes, transitional waters, coastal waters and artificially and heavily modified surface water bodies. As an example, the biological elements for rivers are: composition and abundance of aquatic flora, the composition and abundance of benthic invertebrate fauna, and composition, abundance and age structure of fish fauna. Each element of the biological elements group can be classified in accordance with one of the following five quality classes: high (H), good (G), moderate (M), poor (P), and bad (B). Chemical and physicochemical elements can only influence status down to 'moderate' and hydromorphological elements down to 'good'. As regards the chemical status, the Water Framework Directive makes use of the quality standards priority substances and/or priority hazardous substances established under the Environmental Quality Standards Directive (Directive 2008/105/EC). Water bodies either comply (good – G – corresponding to gH in a five-stage scale) or not (fail – F – corresponding to an M in a five-stage scale) with this quality standards. The worst of the ecological or chemical elements determines the classification of the quality class for a water body, so-called one-out-all-out principle.[52] Figure 5 provides a visualisation of this system.

Figure 5. The relationship between the qualifications of individual ecological and chemical elements and the qualification of the surface waters status for a whole water body[53]



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52 Annex V, points 1.4.2, under i, to the Directive.

53 Source: www.gov.scot/Publications/2010/03/02155205/4 (accessed Febraury 2017).

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The *Weser* judgment makes clear that the prohibition of deterioration under Article 4 of the Directive does not apply at the level of the overall status of surface water quality, i.e. the quality status established at the hand of the worst ecological or chemical group for a water body as a whole. It applies at the level of each sub-element, e.g. an element of the biological quality elements. Therefore, an adverse effect on water quality must be considered as 'deterioration' in the sense of Art. 4 WFD if it deteriorates one quality component to a lower class.

This means that we have to look at the first of the four qualification moments from the perspective of ecological status, i.e. the qualification of a specific element, the qualification of the overall elements sub-group (e.g. biological quality elements), the qualification of the overall ecological status, and the qualification of the overall surface water status.

From the perspective of the chemical status, this means that we have to look at the first of the three qualification moments: the qualification of a specific substance; the qualification of the overall chemical status; and the qualification of the overall surface water status. Deterioration under the Directive occurs when the quality class of any of the elements covered by the ecological or chemical groups is worsened to an extent that it falls to a lower class.[54] When an ecological or chemical element is already at the lowest quality class established for that element, any form of further worsening is a deterioration.

In the Netherlands – but not only in the Netherlands –, there was ample discussion about the meaning of the deterioration ban, and, hence, of its implementation. Some scholars argued that the concept of deterioration applied to the overall quality class, while others argued in favour of an element-by-element approach.[55] Article 16 of the Bkmw 2009 was worded in such a way that it could be read in consistency with the element-by-element approach indicated above. Yet in practice, things were rather different. In the so-called *Nieuwe Meer* judgment, which concerned the ecological elements group, the Dutch Council of State failed to look at each specific element of the ecological elements group.[56] It seems that the Council of State interpreted the Bkmw 2009 as follows: the competent authority could assess the criterion of no deterioration and grant a permission for an activity by only looking at the overall ecological status, hence to the third of the four qualification moments discussed above. As long as the overall status is not deteriorating, the Council of State was of the opinion that a permission can be granted.

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54 Weser (n 9), paras. 55–70.

55 Y. Uitenboogaart and others (eds.), *Dealing with Complexity and Policy Discretion. A Comparison of the Implementation Process of the European Water Framework Directive in Five Member States*, Den Haag: Sdu uitgevers 2009, pp. 210 ff. for a comparison between different Member States.

56 ABRvS 13 april 2011 (De Nieuwe Meer), ECLI:NL:RVS:2011:BQ1066, r.o. 2.9.7; *M&R* 2011/165 with a commentary by H.F.M.W. van Rijswick; *BR* 2011/138 with a commentary by H.E. Woldendorp.

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It is not just the manner in which the Bkmw 2009 has been interpreted that shows a discrepancy between the Directive and its implementation in the Netherlands, regarding the meaning of the non-deterioration concept. The manner in which the quality of water bodies is monitored in the Netherlands also seems problematic from this perspective. Monitoring is of particular importance for determining whether a project will affect the achievement of the quality standards under the Directive.[57] Indeed, despite the silence of the Directive on this point, projections on whether a project will lead to a worsening or deterioration of the water quality of a water body will have to follow the same methodology applied to monitor water quality after that the project has been implemented. This is necessary to ensure that projections are a faithful representation of the changes caused by a specific project to the quality of a water body occurring in practice. The Directive refers to three different kinds of monitoring, i.e. surveillance monitoring, operational monitoring and investigative monitoring.[58] The Court of Justice in *Weser* did not link the concept of non-deterioration to one of these three kinds of monitoring. Yet, given that the operational monitoring aims at assessing any changes in the water status, resulting from the programmes of measures, this seems to be the kind of monitoring that needs to be used to assess whether or not deterioration occurs under the Directive. This means that the monitoring of water quality must happen at the locations and intervals of time indicated for operational monitoring, which differ from those for surveillance monitoring.[59]

In the Netherlands, under the Bkmw 2009, the distinction between surveillance and operational monitoring is not evident. These two kinds of monitoring seem to have been merged.[60] The difference between surveillance and operational monitoring is only made in one of the 'policy' documents referred to in the Ministerial Decree on the establishment of a monitoring programme under the Water Framework Directive (Rmkw),[61] which is based on the Bkmw 2009.[62] This policy document refers to the requirements for the locations and intervals of time prescribed by the Water Framework Directive. Yet, this document only has guiding force, as evincible from its very title, which uses the word *richtlijn* (guideline).[63] There is no legal requirement concerning the responsibility to select a monitoring location. Under the Bkmw 2009, the responsibility for implementing the monitoring programme for surface waters

57 B.A. Beijen, H.F.M.W. van Rijswick and H.T. Anker, The Importance of Monitoring for the Effectiveness of Environmental Directives, A Comparison of Monitoring Obligations in European Environmental Directives. *Utrecht Law Review*, 2014, 10 (2), (pp. 126–135).

58 Article 1.3.1 till 1.3.3 of Annex V to the Directive.

59 Article 1.3.4 of Annex V to the Directive.

60 Explanatory Note to the Bkmw 2009, *Stb.* 2010, 15, p. 72.

61 The Dutch name is '*Richtlijn KRW Monitoring Oppervlaktewater en Protocol Toetsen & Beoordelen*', 2014.

62 *Stcrt.* 2010, 5634, last amended by *Stcrt.* 2015, 38397.

63 Available at www.kaderrichtlijnwater.nl.

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rests with the authority that grants the discharge permit under the Water Act.[64] This is problematic for two reasons. First of all, authorities competent for the discharge permit under the Water Act are accustomed to working on the basis of the chemical status. Given that the Directive is based on a mixture of chemical and ecological status, it is unclear how the ecological status is taken into consideration by the authority for the discharge permit. In this respect, we repeat here that the requirements concerning the ecological status are not implemented by means of binding requirements. Hence, although the ecological status is part of the assessment framework for the discharge permit,[65] the specificity of the assessment of the ecological status is unclear. Second of all, the policy document clearly refers to the possibility of *merging* water bodies for the purposes of monitoring. By collecting data at a point at which the water quality of different water bodies merges, it is difficult, if not impossible, to assess the effect that a specific project has on one specific water body, as required under the Directive.

3.3. THE ROOM FOR A NET-LOSS APPROACH[66]

Under a net-loss approach,[67] it is possible to balance the negative effects that one project has on an environmental quality standard with the positive effects that the same project has on a different environmental goal or with the effects that another project or policy measures have on the same environmental goal. While the Water Framework Directive does not explicitedly exclude the possibility of pursuing a net-loss approach, it does severely limit it. Article 4 of the Directive clearly states that deterioration must be prevented, as discussed in section 3.1. According to the Court of Justice in the *Weser* case, this means that:

> *"It follows that, unless a derogation is granted, any deterioration of the status of a body of water must be prevented, irrespective of the longer-term planning provided for by management plans and programmes of measures. The obligation to prevent deterioration of the status of bodies of surface water remains binding at each stage of implementation of Directive 2000/60 and is applicable to every surface water body type and status for which a management plan has or should have been adopted. The Member State concerned is consequently required to refuse authorisation for a project where it is such as to result in deterioration of the status of the body of water concerned or to*

[64] Article 14 of the Bkmw 2009.
[65] Article 2.1 in conjunction with Article 6.21 of the Water Act.
[66] This section provides a summary of what has been written about this topic in Plambeck and Squintani (n 48).
[67] Also called 'per balance' approach, Marlon Boeve and Berthy van den Broek, 'The Programmatic Approach; a Flexible and Complex Tool to Achieve Environmental Quality Standards' (2012) 8 *Utrecht Law Review* 74, 78.

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jeopardise the attainment of good surface water status, unless the view is taken that the project is covered by a derogation under Article 4(7) of the directive. (para 50)"

The clause '*irrespective of the longer-term planning provided for by management plans and programmes of measures*' used by the Court in this passage makes a linkage between deterioration caused by a project and the effects of a plan or programme of measures. Given the strict interpretation of the concept of non-deterioration, discussed in section 3.2, a net-loss approach between different water bodies and a net-loss approach between different quality elements are excluded.[68]

Still, there seem to be two scenarios for which a net-loss approach is allowed. First of all, the clause '*unless the view is taken that the project is covered by a derogation*' shows that a net-loss approach can be pursued by means of one of the derogation clauses under Article 4 of the Directive. Most relevant for this purpose is the scenario envisaged by Article 4(7) of the Directive, which states:

"*7. Member States will not be in breach of this Directive when:*

- *failure to achieve good groundwater status, good ecological status or, where relevant, good ecological potential or to prevent deterioration in the status of a body of surface water or groundwater is the result of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, or*
- *failure to prevent deterioration from high status to good status of a body of surface water is the result of new sustainable human development activities* (…)"

It should be noted that the room for a net-loss approach under this derogation clause is quite limited, given that it only applies to failures due to new modifications to the physical characteristics of a surface water, as in the case of the building of new channels or the strengthening of a dike, or it requires a high status of surface water quality before a new project can be allowed. Moreover, in order to make use of this derogation, Member States must fulfil six cumulative requirements.[69] From these requirements, it appears that Member States must, in particular:

"*(a) all practicable steps are taken to mitigate the adverse impact on the status of the body of water;* (…)

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68 This could also be derived from Article 11(5) of the Directive, see also W.M. Janse and H.F.M.W. van Rijswick, 'De programmatische aanpak in het waterbeheer: een les voor de Omgevingswet?', *M&R*, 2012, p. 242–253; H. Sevenster 'Kansarm in Europa?', in: M.N. Boeve and R. Uylenburg (eds.), *Kansen in het omgevingsrecht: opstellen aangeboden aan prof.mr. N.S.J. Koeman*, Groningen: Europa Law Publishing 2010, p. 269.

69 On these requirements see Case C-346/14 European Commission v Republic of Austria ECLI:EU:C:2016:322 (Schwarze Sulm).

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> *(c) the reasons for those modifications or alterations are of overriding public interest and/or the benefits to the environment and to society of achieving the objectives set out in paragraph 1 are outweighed by the benefits of the new modifications or alterations to human health, to the maintenance of human safety or to sustainable development, and*
> *(d) the beneficial objectives served by those modifications or alterations of the water body cannot for reasons of technical feasibility or disproportionate cost be achieved by other means, which are a significantly better environmental option.*"

These requirements are quite burdensome to meet, especially when they have to be fulfilled by small projects. Hence, in light of the scope of application of this derogation clause, and of the stringency of the conditions for its application, the relevance of this possibility is quite tight.

Secondly, and most relevant, paragraph 50 of the *Weser* judgement suggests that a net-loss approach could be achieved by remaining within the realm of Article 4(1) of the Directive and hence without the need to rely on the derogation clause. Basically, Member States must avoid deterioration from taking place. Primarily, this should occur at project level, i.e. by taking measures aiming at avoiding the negative effects created by the specific project in consideration, given that the Court has explicitly excluded the relevance of the effect of the longer-term planning. This does not mean that the net-loss approach cannot be pursued within the programme of measures itself. Yet, this is, in our opinion, only possible if the programme of measures includes measures aiming at avoiding deterioration coming from the specific project taken into consideration.

Whether the Netherlands implemented the Directive correctly on the issue of the net-loss approach is unclear. The legal framework does not provide sufficient information to establish what kind of net-loss approach is allowed. In the Explanatory Note of the Bkmw 2009, it is indicated that, following the negative advice of the Council of State, a net-loss approach between different water bodies or between different quality elements is not allowed.[70] What is more ambiguous is whether a generic measure in a programme of measures suffices.[71] Moreover, the Dutch implementation mainly links the environmental objectives to the monitoring requirements, instead of implementing them in an independent way. This lack of clarity regarding the monitoring requirements discussed in the section concerning the meaning of the concept of non-deterioration, means that it is difficult to link the status of the water with a specific project. *De facto*, this would allow a net-loss approach.[72] If this is the case, we are of the opinion that the Netherlands does not comply with the Directive.

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70 Explanatory Note to the Bkmw 2009, *Stb.* 2010, 15.

71 *Kamerstukken II*, 2015/16, 31 710, nr. 44, p. 9.

72 H.E. Woldendorp, 'Vooruitgang bij 'geen achteruitgang', Het Europese Hof over het vereiste van geen achteruitgang in de Kaderrichtlijn water (zaak C-461/13)', *TOO* 2015/4, p. 479–493.

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4. TOWARDS BETTER PARTICIPATION AND JUDICIAL PROTECTION

The shortcomings concerning the implementation of certain substantive standards established by the Directive could be redressed by means of an effective public participation or judicial protection, at least partially. In this section, we will show that, as regards these two procedural aspects, the Netherlands is also still not fully implementing EU law. Substantive shortcomings are piling up on top of procedural shortcomings.

Thanks to the Aarhus Convention, growing amounts of attention are being paid to the participation of the public in the adoption of administrative decisions affecting the environment in the European Union and its Member States. Both the Member States and the European Union are party to this Convention. As the Convention is a mixed agreement, both legal orders are independent from one another and are subjected to the Convention. For the European Union, this means that the provisions of the Convention have a higher rank than EU secondary law.[73] For the Member States, this means that the provisions of the Convention enjoy the same legal force as EU law;[74] hence, they have precedence over conflicting national law provisions.[75] This also occurs as regards those provisions of the Convention that have not yet been implemented by means of EU secondary law.[76] As further discussed below, there are certain provisions of the Convention on public participation (section 4.1) and access to justice (section 4.2) that are relevant in the context of plans and programmes under the Water Framework Directive, which are not yet implemented in EU law.

4.1. PARTICIPATION TO THE DRAFTING OF WATER PLANS AND PROGRAMME OF MEASURES

Participation is one of the three pillars of the Aarhus Convention. Under Article 6 of the Convention, the public has the right to participate in the establishment of decisions on the specific activities mentioned under the Annex to the Convention. Moreover, under Article 7 of the Convention, the public must participate in the decision-making of the plans and programmes that relate to the environment. The participation process shall ensure the following:[77]

---

73 Article 216(2) TFEU. See also e.g. Case 104/81 Kupferberg, ECLI:EU:C:1982:362; and Case C-344/04, IATA and ELFAA, ECLI:EU:C:2006:10, paras. 35 and 36.

74 Zijlmans (n 14), p. 45.

75 Idem, p. 49.

76 Zoskupenie (n 14).

77 Article 6 (3, 4 and 8) of the Aarhus Convention.

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a. The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.
b. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.
c. Each Party shall ensure that, in the decision, due account is taken of the outcome of the public participation.

While Article 2 of the Convention defines the 'public' as one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organizations or groups, the concepts of 'plan' and 'programme' are not defined. Still these concepts are formulated in broad terms and seems to cover all plans and programmes made by a public body, regardless of whether they have binding force under national law.[78] If a plan or programme has a regulatory rather than a strategic character and it covers specific activities, it can be qualified as an Article-6 decision, rather than an Article-7 decision.[79]

The requirements of the Aarhus Convention seem to have been correctly implemented in the Water Framework Directive. Article 14 of the Directive has been drafted in advance of the participation of the European Union to the Convention, which finally took place in 2005.[80] Article 14 states:

> "(…) *Member States shall ensure that, for each river basin district, they publish and make available for comments to the public, including users:*
>
> *(a) a timetable and work programme for the production of the plan, including a statement of the consultation measures to be taken, at least three years before the beginning of the period to which the plan refers;*
> *(b) an interim overview of the significant water management issues identified in the river basin, at least two years before the beginning of the period to which the plan refers;*
> *(c) draft copies of the river basin management plan, at least one year before the beginning of the period to which the plan refers.* (…)"

Under this provision, there are three participation moments, which can begin as early as three years before the beginning of the period to which the plan refers. Given that during the preparation of a draft plan competent authorities

[78] United Nations Economic Commission for Europe, *The Aarhus Convention: An implementation guide*, second edition 2014, p. 173 stating that plan and programmes have legal value in only some of the legal orders of the Convention parties.

[79] L. Squintani and E.J.H. Plambeck, 'Judicial protection against plans and programmes affecting the environment. A backdoor solution to get an answer from Luxembourg', *JEEPL* 2016/3–4, p. 294–324, with further references.

[80] Decision 2005/370/EC [2005] OJ L 124/1.

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can already make some policy choices, and hence exclude some options, this approach maximizes the chances that participation takes place at a moment at which all options are available. Accordingly, it contributes to the effectiveness of the public participation rights.[81]

In the Netherlands, the duty to ensure public participation in the establishment of water plans has been implemented in two different manners. First of all, draft plans are subjected to the so-called 'public preparatory procedure' (*uniforme openbare voorbereidingsprocedure*), regulated under Division 3.4 of the GALA.[82] This procedure has two shortcomings. First, the participation procedure is required only after the draft plan has been published. Hence, it could be that certain options are already off the table. Paradoxically, the rounds of (structured) informal public participation that public authorities usually undertake, without these being regulated under a legal provision,[83] increase the chances that the official public participation procedure occurs when some options are already off the table.[84] Second, Article 6:13 of the GALA precludes the possibility to start a judicial review procedure if the claimant failed to participate in the uniform public preparatory procedure.[85] This rule shows that the uniform public preparatory procedure is part of the Dutch system for solving conflicts between the public and public authorities. Basically, it equates the uniform public preparatory procedure with an administrative review procedure. Hence, the uniform public preparatory procedure, rather than representing a means of cooperation between the public and competent authorities, it involves or is characterized by conflict or opposition between the public and the competent authorities. It is unclear whether the

[81] J. Adshead, 'Public participation, the Aarhus Convention and the Water Framework Directive', *Journal of Water Law*, 2006/17, pp. 185 ff.; W. Howarth, 'Aspirations and Realities under the Water Framework Directive: Proceduralisation, Participation and Practicalities', *Journal of Environmental Law* 2009/3, p. 391–417.

[82] See Article 4.1(1) of the Water Decree for national plans. Water plans made by the Provinces can be subjected to the same procedure, e.g. Water Regulation of the Province of Zuid-Holland, Water Regulation of the Province of Gelderland, Water Regulation of the Province of Zeeland, Water Regulation of the Province of Noord-Holland, Water Regulation of the Province of Fryslân. See also E.J.H. Plambeck, *Legitimiteit en effectiviteit in het Nederlandse zoetwaterbeleid: het stakeholders' perspectief*, scriptie Universiteit Utrecht, p. 56–58, available at www.uu.nl/ucwosl.

[83] See e.g. Code Interbestuurlijke verhoudingen, allowing decentralised auhtorities the possibility to express their opinion. If this possibility is used, interested parties and NGOs are allowed to express their opinions as well.

[84] See also B.J. Schueler, 'Wat doen we met de inspraak?', *M&R* 2014/49, p. 239; and A. van den Broek e.a., *Niet buiten de burger rekenen!*, Den Haag: SCP 2016, p. 58–59.

[85] The Dutch Council of State has concluded that 6.13 of the GALA is as such in accordance with the Arhus Convention as implemented in the EIA Directive, failing however to appreciate the fundamental difference between a public participation procedure and administrative review procedure, see ABRvS 2 December 2015, ECLI:NL:RVS:2015:3703 paras 21(1–10). See also Ch.W. Backes in his annotation under Case C-137/14, Commission v. Germany, ECLI:EU:C:2015:683: *AB* 2015/447, where he focuses on the case law based on 6:13 GALA restricting an appeal to the arguments a claimant have put forward in the uniform public preparatory procedure is not in line with Directive 2003/35.

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adversarial nature of the uniform public preparatory procedure affects the whole, or only part, of the public participation procedure. Neither the Convention nor its implementation under the Directive seems to allow room for equating public participation to administrative review, not even partially. All in all, we are of the opinion that this procedure does not ensure an effective participation, as required under the Directive and the Aarhus Convention.

That alongside the public preparatory procedure, the Netherlands has basically copied Article 14 of the Directive into its Water Decree (Article 4.3 of the Decree) is something that is welcomed. Hence, two extra participation rounds need to be organised. This solves parts of the shortcomings just discussed. Yet, political science studies show that public participation in the Netherlands cannot be considered to have been effective as regards the drafting of the first water plans under the Directive, despite the Commission's positive evaluation on this matter.[86] The main problem seems to be that the public does not have a chance to outweigh the position of those stakeholders, in particular of agriculture and business lobby groups, who take part in the participation rounds at a level which is closer to the decision-maker than the general public.[87] This study confirms a more general trend by which lowly-educated parts of society are not as capable of participating in such a public participation procedure as effectively as highly educated parts of society are, under equal circumstances.[88] This means that in the Netherlands, only certain parts of the public enjoy effective public participation.[89]

4.2. ACCESS TO JUSTICE TO CHALLENGE THE VALIDITY OF WATER PLANS AND PROGRAMME OF MEASURES[90]

In order to ensure the effectiveness of the participation rights, Article 9(2 and 3) of the Aarhus Convention regulates the right to access to justice. Article 9(2) of the Convention applies to Article-6 decisions and, if the parties to the Convention so

86 J. van der Heijden and E. ten Heuvelhof, 'Coping with Mandated Public Participation: The Case of Implementing the EU Water Framework Directive in the Netherlands', *Perspectives on European Politics and Society*, (2013) 14:4, pp. 403–417 and the literature therein referred. This study does not clarify the distinction between formal and informal decision making procedures. The study states that *de jure* the Netherlands comply with the Directive. Yet, this statement is not based on a legal analysis.

87 Ibidem.

88 A. van den Broek and others, *Niet buiten de burger rekenen!*, Den Haag: SCP 2016, pp. 55–61, with further references, in particular, M. Bovens & A. Wille, *Diploma democracy. On the tensions between meritocracy and democracy*, Leiden/Utrecht: Nederlandse Organisatie voor Wetenschappelijk Onderzoek 2009.

89 See further L. Squintani, The Aarhus Paradox: Time to Speak about Equal Opportunities in Environmental Governance, *JEEPL* 2017/1, pp. 3–5.

90 This section offers a summary of what has been written in Squintani and Plambeck (n 79).

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decide, to other kinds of acts.[91] Article 9(3) of the Convention applies to Article 7 decisions as established by the Aarhus Convention Compliance Committee (ACCC) in, among others, the *Belgium* and *Armenia* decisions.[92] The position of the ACCC is understandable considering the role that judicial protection has in ensuring the effectiveness of public participation.[93] The Court of Justice also interprets the Aarhus Convention on the basis of a teleological interpretation aiming at ensuring the effectiveness of the Convention.[94] Hence, it can be expected that the Court of Justice will not follow a different interpretation on this issue than the one given by the ACCC. In the field of air quality law, the Court of Justice has already established that parties affected by air quality must be able to challenge the (lack of a) plan, although it did not refer to the Aarhus Convention.[95]

The Water Framework Directive is completely silent on this issue. In light of the Aarhus Convention, and the manner in which the Court of Justice approaches this issue in the context of air quality law, it can be expected that in the field of the Water Framework Directive interested parties should be able to challenge a water plan as well. Still, Member States should set aside their reservations about

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91 The use of this option will be considered gold-plating, a phenomenon more and more in disuse in the last decade, On this phenomenon, its use in practice, with particular focus on the Netherlands see, e.g. L. Squintani, Gold-plating of European Environmental Law (diss., Groningen) 2013; H.T. Anker and others., Coping with EU environmental legislation: transposition principles and practices, Journal of Environmental Law 2015 (1), p. 17; J.H. Jans, L. Squintani with others, 'Gold Plating' of European Environmental Measures?, jeepl 2009 (4), pp. 417, 418; and L. Squintani, M. Holwerda and K.J. de Graaf, Regulating greenhouse gas emissions from EU ETS installations: What room is left for the member States, in M. Peeters, M. Stallworthy and J. de Cedra de Larragán, *Climate Law in EU Member States*, Cheltenham: Edwin Edgar, 2012, pp. 67–88.

92 United Nations Economic Commission for Europe, *The Aarhus Convention: An implementation guide*, second edition 2014, pp. 173 and 193. See also Aarhus Convention Compliance Committee, Belgium, ACCC/C/2005/11; ECE/ MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 31; and Armenia, ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, r.o. 28–38, in particular paras 35 and 36. See also J. Jendrośka and S. Stec, 'The Aarhus Convention: Towards a New Era in Environmental Democracy', *Environmental Liability Journal* 2006/5, p. 150; and H. Lang, *Public Participation in Environmental Decision-Making in China*, (diss.) Groningen 2014, p. 73. Cf. J. Jendroska, 'Public Participation in Environmental Decision-Making', in M. Pallemaerts (ed), *The Aarhus Convention at Ten*, Groningen: Europa Law Publishing 2011, p. 91–148.

93 United Nations Economic Commission for Europe, *The Aarhus Convention: An implementation guide*, second edition 2014, p. 187. For a recent overview of the literature on this topic, Lang (n 91), Chapter 3 and Jendrośka, (n 59) J. Jendrośka, Public Participation under Article 6 of the Aarhus Convention: Role in Tiered Decision-Making and Scope of Application, in: G. Bándi (ed.), *Environmental Democracy and Law. Public Participation in Europe*, Groningen: Europa Law Pubishing 2014, pp. 113–138, pp. 113–138.

94 E.g. *Zoskupenie* (n 14).

95 Joined cases C-165 to 167/09 Stichting Natuur en Milieu and Others v College van Gedeputeerde Staten van Groningen (C-165/09) and College van Gedeputeerde Staten van Zuid-Holland (C-166/09 and C-167/09), ECLI:EU:C:2011:348, 100 (RWE).

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the inclusion of Article 9(3) of the Convention into EU secondary law,[96] and the Directive should be made more explicit on this point.

In the Netherlands, it is not possible to challenge the regulation that sets the environmental quality standards, nor a water plan or water management plan or other policy documents or guidelines before the administrative judge.[97] This is due to the character of environmental standards, laid down in general binding rules and the lack of binding force of plans and policy documents and guidelines which leads to a lack of legal effect or legal consequences.[98] The only way to address these general binding rules, plans and policies before the administrative judge is to have them discussed when challenging an individual decision that can be challenged before the administrative courts. With the adoption of the Bkmw 2009, the Council of State had advised the government to allow administrative review of water plans.[99] The government was ready to take this possibility into account, but this required an act of parliament.[100] No such act has been adopted yet and private law does not seem capable of filling this lacuna. In the Netherlands, generally an action based on tort law with regard to the general binding rules, plans and policies is possible. However, as indicated by the Council of State, such an action is not a desirable alternative with regard to plans.[101] This is understandable considering that an action against a water plan based on tort has little if any chance of success nor would it be clear what remedies should be asked for.[102] The requirement of a causal link between the damage and the unlawful water plan seems a difficult to realized. It is the realization of the project in light of the plan that causes the damage, not the plan itself.[103] In conclusion, Dutch law does not seem to be compatible with the Aarhus Convention on this point.

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96 The withdrawal of the Commission's proposal for a (partial) implementation of Article 9(3) Aarhus Convention mentioned at note 13 is emblematic to this extent. See also M. Eliantonio, *Collective Redress in Environmental Matters in the EU: A Role Model or a "Problem Child"?*, *Legal Issues of Economic Integration* 41, no. 3 (2014): 257–274.

97 Article 8:5 i.c.w. Article 1 of Annex 2 to the GALA. See also ABRvS 27 January 2016, ECLI:NL:RVS:2016:152.

98 Havekes and Van Rijswick (n 45), p. 186.

99 Additional Explanatory Note to the Bkmw 2009, appendix to *Kamerstukken II* 2009/10, 27 625, nr. 154, p. 7.

100 Ibidem.

101 Ibidem.

102 L. Di Bella, *De toepassing van de vereisten van causaliteit, relativiteit en toerekening bij de onrechtmatige overheidsdaad*, Leiden: E.M. Meijers Instituut 2014. See also M.G. Faure e.a., Milieuaansprakelijkheid goed geregeld?, The Hague: Boom Juridische Uitgevers 2010. As regards NGOs, see United Nations Economic Commission for Europe, Task Force on Access to Justice, Study on the Possibilities for Non-Governmental Organisations Promoting Environmental Protection to Claim Damages in Relation to the Environment in Four Selected Countries, France, Italy, the Netherlands and Portugal, Unedited informal document, 2015; and M.G. Faure and others, Milieuaansprakelijkheid goed geregeld?, The Hague: BJuU 2010.

103 In other words, it cannot be excluded that the damage would have occurred even if the plan was legal, L. Di Bella, *De toepassing van de vereisten van causaliteit, relativiteit en toerekening bij de onrechtmatige overheidsdaad*, Leiden: E.M. Meijers Instituut 2014, Hoofdstuk 3. See also G.M.

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5. CONCLUSIONS

It cannot be contested that Dutch waters do not meet all of the Water Framework Directive's requirements from either a chemical or, mainly, from an ecological perspective. As indicated in the introduction to this chapter, projections do not show a significant improvement that is capable of bringing Dutch waters in line with EU water standards within the agreed upon deadline. In light of the discussion of the Dutch implementation of the Water Framework Directive, examined in sections 2 to 4, it cannot be denied that Dutch water law is responsible for such a finding, at least partially. Put boldly, Dutch water law affects the effectiveness of the Water Framework Directive. Indeed, in section 3 we showed that the Dutch implementation of the Water Framework Directive can be improved as regards several aspects covered by the Directive.

The most important one is the manner in which the quality standards for ecological elements are enclosed within the Dutch legal framework. At the moment of writing this contribution, they are not inserted in a legally binding document, but only in plans which are binding only upon the authorities that have established the plan. The quality standards for the ecological status of waters do not cover all water bodies covered by the directive and cannot be enforced as regards several human activities affecting water quality, such as agriculture. This issue is exacerbated by the fact that in the Netherlands several human activities do not require a permit to be undertaken. Hence, even when such activities fall under the jurisdiction of a competent authority, which has included the ecological quality standards in its water plan, deterioration cannot be prevented.

Another major finding was that, until January 2016, the meaning of the prohibition of non-deterioration was unclear. Although the Minister intended, since the very beginning, to follow an element-by-element approach in applying this prohibition, the way in which the legal rule was framed led to a situation in which public authorities applied this prohibition at the level of overall surface water status.

Finally, monitoring guidelines – there is no binding requirement on all types of monitoring required by the Water Framework Directive – do not ensure that the competent authorities are able to link changes in water quality to specific projects or measures.

In light of the above, no one should be surprised by the quality of Dutch waters being what it is today. The clarity, brought in 2016 as regards the meaning of the non-deterioration prohibition is welcome, but more needs to be done.

The quality standards for ecological elements should be inserted in general binding rules and each authority, charged with scrutinizing human activities affecting the quality of all water bodies in the Netherlands covered by the Directive,

van den Broek and M.K.G. Tjepkema, *De reikwijdte en rechtsgrondslag van nadeelcompensatie in het omgevingsrecht* (preadvies Vereniging voor Bouwrecht), IBR 2015, p. 33–47.

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should be obliged to apply these standards in their permitting and enforcement activities. Monitoring requirements should be binding and shaped in such a manner that it is possible to link a variation in the quality of a water body with a specific project. Both amendments concern acts that are adopted by the executive power, i.e. the Bkmw 2009 and the Ministerial Decree on the establishment of a monitoring programme under the Water Framework Directive. Accordingly, there is no need of an Act of Parliament to improve these two aspects of Dutch water law.

Alongside the shortcomings regarding the implementation of the Water Framework Directive, the analysis performed in section 4 highlights shortcomings in the implementation of the Aarhus Convention. Indeed, what is worst about the Dutch implementation of the Directive is that the general public seems to have been kept at a distance in the management of water bodies.

We recognize that public authorities organise informal and formal rounds of public participation, with the latter taking place in line with the Directive. Yet, the manner in which informal rounds of participation take place is unclear. The effects that the informal rounds of participation have on the formal round of participation are also unclear. Given that only the latter serves to implement the Directive and the Aarhus Convention, it is therefore unclear whether Dutch law complies with the Convention. The studies showing that only certain stakeholders can effectively take part in the decision-making process suggests that this is not the case. In general, as far as we could see, there are no mechanisms that allow lowly-educated groups of the public to participate in the decision-making process as effectively as highly-educated groups of the public or formal stakeholder associations can.

Alongside the shortcomings in the system for public participation, we have highlighted the lack of a system for judicial protection as regards regulations (including the quality standards for example), and mainly plans and programmes. Access to justice, to challenge the validity of water plans as such, is indeed impossible via the administrative courts and basically useless via the civil courts. The finding that EU law does not yet implement the Aarhus Convention provisions on access to justice, as regards plans and programmes, at least not explicitly, cannot serve as an excuse for the Netherlands not to assure judicial protection.

Dutch law should be amended on both issues. First, the relationship between the informal participation rounds and the formal participation procedure should be clarified. Legal certainty in the implementation of EU rights, which include the Aarhus rights, dictates the establishment of a legal basis for the informal rounds of participation. Essentially, they have to become formal. Moreover, they must be shaped in such a way that the public, and all the sectors therein, can participate effectively. Here, more attention should be paid to the position of the lowly-educated groups in society. More research on this issue should be financed

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and performed in order to develop mechanisms that ensure equality between various groups of the public when it comes to effective public participation. Finally, a judicial procedure should be developed to allow for the review of plans and programmes. This can occur by means of an *ad hoc* procedure. Given that the obligation to allow for judicial review of plan and programmes applies as regards all plans and programmes relevant for the environment, which may include land-use and regional development strategies and sectoral planning in transport, tourism, energy, heavy and light industries, water resources, health and sanitation, etc., at all levels of government, this *ad hoc* procedure should be regulated under an environmental act of general application, such as is a done at present by the EMA and will be done by the Environmental and Planning Act in the future. It could also be inserted into the GALA, but must be phrased in such a way to be limited to plan and programmes related to the environment. Under such a procedure, no linkage should be made between the participation in the public participation procedures and access to justice.

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