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Achieving the objective of a good water status

A comparison of the water legislation in Sweden and in the
Netherlands

Master thesis in Environmental law
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Preface

This thesis has been carried out in close co-operation with the Environmental Law Unit at the Law Department at the University of Gothenburg. The author's greatest gratitude goes to Lena Gipperth who has guided and supervised the work along the way. In this sense, also Martina Ekelund-Entson should be mentioned for her support.

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Abbreviations

ECJ	European Court of Justice
EMA	Environmental Management Act, <i>Wet Milieubeheer</i>
EQS	Environmental Quality Standards
SGU-FS	Sveriges geologiska undersöknings föreskrifter, <i>the Geological Survey of Sweden's Regulations</i>
SOU	Statens offentliga utredningar, <i>the Swedish Government Official Reports</i>
TFEU	Treaty of the Functioning of the European Union
TK	Tweede Kamer
WDF	Water Frame Directive
SGU	Sveriges geologiska undersökning, <i>the Geological Survey of Sweden</i>

Definitions

Baseline – an imaginary line which is normally consistent with the shoreline at low tide position. In cases where there are islands and islets off the shore line, the baseline represents a straight line between the archipelago's outer points.¹

Coastal waters (according to the Water Framework Directive) – “... surface water on the landward side of a line, every point of which is at a distance of one nautical mile on the seaward side from the nearest point of the baseline from which the breadth of territorial waters is measured, extending where appropriate up to the outer limit of transitional waters”.²

Environmental standard objectives (according to the Water Framework Directive) – the objectives laid down in Art. 4 of the Water Framework Directive.³

Environmental quality standard (according to the Water Framework Directive) – “... the concentration of a particular pollutant or group of pollutants in water, sediment or biota which should not be exceeded in order to protect human health and the environment.”⁴

Rules of consideration – rules that with varying degree of control indicate what individuals and governments have to follow when assessing whether and in what way, an environmentally sensitive activity or action is permissible. Rules of consideration can be both general, i.e. indicate more general precautionary measures, or particular, and specify in detail what measures that need to be taken.⁵

Good ecological potential (according to the Water Framework Directive) – “... the status of a heavily modified or an artificial body of water, so classified in accordance with the relevant provisions of Annex V” in the Water Framework Directive.⁶

Good ecological status (according to the Water Framework Directive) – “... the status of a body of surface water, so classified in accordance with Annex V” in the Water Framework Directive.⁷

Good groundwater chemical status (according to the Water Framework Directive) – “... the chemical status of a body of groundwater, which meets all the conditions set out in table 2.3.2 of Annex V” in the Water Framework Directive.⁸

Good groundwater status (according to the Water Framework Directive) – “... the

¹ United Nations Convention on the Law of the Sea art 5 och art 7

² Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 Establishing a Framework for Community Action in the Field of Water Policy, WFD art 2 (7) 1 nautical mile = 1852 m.

³ WFD art 2 (34)

⁴ WFD art 2 (35)

⁵ Michanek, Gabriel & Zetterberg, Charlotta, *Den svenska miljörätten*, (2 edn, Iustus 2008) p. 50 ff.

⁶ WFD art 2 (23)

⁷ WFD art 2 (22)

⁸ WFD art 2 (25)

status achieved by a groundwater body when both its quantitative status and its chemical status are at least "good".⁹

Good surface water chemical status (according to the Water Framework Directive)

– "... the chemical status required to meet the environmental standard objectives for surface waters established in article 4(1)(a)..." in the Water Framework Directive.¹⁰

Good surface water status (according to the Water Framework Directive) – "... the status achieved by a surface water body when both its ecological status and its chemical status are at least "good".¹¹

Groundwater (according to the Water Framework Directive) – "... all water which is below the surface of the ground in the saturation zone and in direct contact with the ground or subsoil."¹²

Heavily modified water body (according to the Water Framework Directive) – "... a body of surface water which as a result of physical alterations by human activity is substantially changed in character ...". The detailed criteria that must be met for a water to be described as heavily modified, are set out in Art. 4 (3)(a) of the Water Framework Directive.¹³

Programme of measures – a document which sets out requirements and actions needed to agreed environmental standard objectives to be achieved.¹⁴

Protected areas (according to the Water Framework Directive) – areas which have been given a particularly strong protection under the Water Framework Directive.¹⁵

River basin – "... area of land from which all surface run-off flows through a sequence of streams, rivers and, possibly, lakes into the sea at a single river mouth, estuary or delta".¹⁶

River basin district – "... area of land and sea, made up of one or more neighbouring river basins together with their associated groundwater and coastal waters."¹⁷ A river basin district can consist of more than one basin, but it may however not be so large that it includes several major river basins.¹⁸

⁹ WFD art 2 (20)

¹⁰ WFD art 2 (24)

¹¹ WFD art 2 (18)

¹² WFD art 2 (2)

¹³ WFD art 2 (9)

¹⁴ WFD art 11

¹⁵ WFD art 4 (1)(c). See also Annex IV

¹⁶ WFD art 2 (13)

¹⁷ WFD art 2 (15)

¹⁸ WFD art 3 (1) and Lena Gipperth, 'Ramdirektivet för vatten – ett framsteg för skyddet av unionens vattenresurser?', in Ellen Margrethe Basse (ed) *Fågelperspektiv på rättsordningen: vänbok till Staffan Wæsterlund*, (Iustus 2009)

Surface water (according to the Water Framework Directive) – “... inland waters, except groundwater; transitional waters and coastal waters, except in respect of chemical status for which it shall also include territorial waters.”¹⁹

Transitional waters (according to the Water Framework Directive) – “bodies of surface water in the vicinity of river mouths which are partly saline in character as a result of their proximity to coastal waters but which are substantially influenced by freshwater flows.”²⁰

Water district – see “river basin district”.

¹⁹ WFD art 2 (1)

²⁰ WFD art 2 (6)

Summary

The climate changes continually and has impact on the water quality on a European and global level. The Water Frame Directive (WFD) has been established on European level and sets up objectives and requirements for the member states to comply with. The purpose of this thesis is to achieve knowledge about the water legislation in Sweden and in the Netherlands and to compare the implementation of the WFD and how these countries have interpreted some of the key concepts of the directive.

The objectives in the Water Frame Directive indicate that in 2015 all water bodies within the European Union should have a good water status. It is not clear where the obligation in achieving a good water status lies. Both in Sweden and in the Netherlands there has been a great discussion on how the objective of good status should be interpreted. This thesis shows that the question is strongly related to the setting of environmental quality standards and their establishment and legal status in the legislation. Both countries have concluded that the objective of a good water status should be interpreted as an obligation of result, although the Netherlands has a slightly different interpretation of the obligation. Similarly both countries are using environmental quality standards as tools for achieving good water status. In Swedish law environmental quality standards are adopted at a regional level by the national water authorities' so-called water authorities. In the Netherlands, the responsibility for establishing environmental quality standards has been placed on a national level. The most important legal function of the environmental quality standards in both the Swedish and in the Dutch legal system is to control the authority decisions taken by the competent authority when deciding on permits and supervising already ongoing activities or as in the case of the Netherlands, when deciding on the water plans on different levels. The Dutch environmental quality standards are legally qualified as guiding values. Since the quality standards have been established in accordance with EU legislation (and deviations may only occur according to set European legislation) it is however more fair to talk about limit values, in a European law context. In Sweden it was decided that since the quality requirements are based on EU law and that these standards can be said to express the objective of the WFD (a good water status), they should be of binding nature, i.e. limit values.

The WFD does not to a full extent address the legal function and status of the programmes of measures, even though it can be assumed that they play a great part for the enforcement of the WFD. In Swedish legislation it is not indicated which governing body will control and enforce the measures in the programmes of measures. It is not indicated which authority is responsible for making sure that the programmes are complied with or which legal actions can be taken if measures are not being complied with. It seems more correct to talk about the programmes as being strategic documents rather than legally binding plans of action. The same applies for the Netherlands. In neither country the measures are addressed towards operators.

1 Introduction

1.1 Background

Clean water is of vital importance not only for humans but also for the environment. Water knows no land borders and in order to improve and preserve good status of water resources countries need for to co-operate. In 2000 the European Commission decided upon the Water Frame Directive²¹, WFD, with the purpose to establish a framework for the protection of inland surface waters, transitional waters, coastal waters and ground waters.

The preamble of the WFD tells us about the significance of water;

“Water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such.”

Water is thus a heritage that must be protected for future generations. The ultimate objective of the WFD is sustainable use of water and the environmental objective defined in the Directive is for all water bodies within Europe to achieve at least good status by 2015.

To be able to at least reach good water status more steps must be taken towards a more integrated water policy throughout the union. Within such policies, integration of protection of water and sustainable management of water into other community policy areas such as spatial planning is necessary. The directive should in this case provide a basis for a continued dialogue and for a development of strategies towards a further integration of policy areas.²²

The WFD contains mostly procedural obligations. It does require a transparent, effective and coherent legislative framework²³, but will solely set out minimum standards leaving Member States to decide whether they wish to implement stricter rules or not. This gives the Member States the opportunity to have a more ambitious water policy. The WFD itself does not contain detailed policy objectives for each water system or prescribe the Member States to take specific policy measures. Instead it demands Member States to have an integral water management, where the authorities co-operate to achieve specific objectives. The area of discretion given by the WFD leaves room for flexibility and possibility to consider the natural differences of the European water bodies. At the same time discretion can lead to different levels of ambition when defining current water status. Differences in implementation can make it difficult to create the integrated approach for the water management that the WFD is asking for.

²¹ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy OJ L 327/1 (Water Frame Directive)

²² See WFD recital (9) and (16)

²³ See WFD recital (18)

1.2 Questions and purpose

The purpose of this thesis is to achieve knowledge about the water legislation in Sweden and in the Netherlands. Further, the intention is to compare the implementation of the WFD and how these countries have interpreted some of the key concepts of the directive.

- **The objective of a good water status**

To what extent is the objective of a good water status being used in the national legislation? How can the objective be described in a legal sense? What are the legal consequences of the setting of the objective in the legislation? Is the apprehension of the goal setting that the actual water status will be reached within the WFD's timeframe of 2015 or that measures at least will be in force at that time?

- **Environmental quality standards**

Are environmental quality standards being used as tools to realize the objective of a good water status and in that case, how are they being used? What does the environmental quality standard state and who decides upon them? Are there standards that will describe both chemical and ecological status? In that case, which legal function do these standards have and how are they binding? What is the legal consequence if a standard is not being met – for current activity, in a change of current activity, for a new activity and for activities that were earlier permitted? Can a given permission for activity be drawn back, if the standards are not being met? Is it forbidden to deteriorate the water quality? What duties exist and can be asked of the Member States concerning the prevention of deterioration of water status according to the WDF?

- **Programmes of measures**

What legal status do the programmes have and whom are they addressed to? How is the binding force proposed? How concrete are the programmes? Do the programmes prescribe direct and concrete measures?

1.3 Disposition

The thesis will take its starting point with describing some essential background facts concerning the concepts in focus for this study. The purpose and main objectives of the directive will be described along with a presentation of different approaches possible when implementing the directive. This background information will give knowledge needed for a deeper understanding of the problems that may arise when implementing the WFD and prepare the reader for the upcoming comparison between the two countries.

The two next parts of the thesis will provide the reader with information about the Swedish and Dutch implementation on the WFD. First focus will be put on Swedish legislation. Here the water bodies affected by the WFD will be described as well as the main actors working in the implementation progress. The main actors' competences and responsibilities along with some important features of the water management will be presented.

The last chapter will contain a comparing conclusion of the two different countries' implementation and interpretation of the key elements of the WFD.

1.4 Method and material

When comparing the two countries' different ways of implementing the WFD, the national legislation has been used as main source. In that sense, the thesis follows a traditional judicial methodology, using legislation and policy documents as well as legal literature and articles. It is important to note I master Dutch on a fairly good level I do not have Dutch as my mother tongue which limits my research possibilities for parts of the thesis. I have taken part of material translated into English to the extent that this was available. Since a lot of material was relatively new due to new legislation in the Netherlands it was not always possible to get access to translated material. To be able to reach relevant information on the water management and legislation in the Netherlands, legal scholars in European and Dutch Water Law, were contacted, at the Institute for Constitutional and Administrative Law at the Centre for Environmental and Policy, Faculty of Law at Utrecht University.

Information about water management and legislation was found at national official websites.

The part of the Swedish implementation is completely provided within a project at the department of Law at the University of Gothenburg, composed by Lena Gipperth and Martina Entson-Ekelund.

2 The Water Frame Directive

This chapter of the thesis will put focus on the legal establishment of the environmental objectives in the WFD. The chapter will hereby provide a short view of the purposes and history of the Union's water legislation and will then continue with the most important parts of the WFD to introduce the reader to the upcoming comparison of the Swedish and Dutch interpretation and enforcement.

2.1 The WFD in Brief

2.1.1 Short view on the history of water legislation

Water is indispensable for human survival and development. It is essential for human life and is needed for many industrial activities and processes. Adequate quantities of sufficient quality water have to be available in the wilderness to sustain wildlife, plants and unique ecosystems. Too much water can cause loss of life and serious damage through flooding. Too little water is equally devastating, since water is something that we need to survive. Water does not know land borders and this has been recognized by the European Union which began to set out a common legislation of all Union water in 1975 with the establishment of the Surface Water Directive.²⁴ In 1980 the legislation went on developing and setting binding quality targets for our drinking water, which also included quality objective legislation on fish waters, shellfish waters, bathing waters and ground waters.²⁵ In 1991 a second phase of new water legislation started, including new and improved legislation such as the adoption of the Urban Waste Water Treatment Directive²⁶, providing for secondary waste water treatment and the Nitrates Directive²⁷, addressing water pollution by nitrates from agriculture. A new improved Drinking Water Directive²⁸ was adopted in 1998 and in 1996 a Directive for Integrated Pollution and Prevention Control²⁹ was adopted (which was revised in 2008).

In the mid 90's accepted requests from the Environment Committee of European Parliament and from the Council of Ministers led to fundamental rethinking of the European water policy. An open process to change the water policy had started and the outcome was clear, the current water policy was too fragmented and needed to be changed. The EU Member States agreed upon the Water Frame Directive in the year of 2000.

²⁴ Council Directive 75/440/EEC of 16 June 1975 concerning the quality required of surface water intended for the abstraction of drinking water in the Member States OJ L 194/26

²⁵ Council Directive 80/778/EEC of 15 July 1980 relating to the quality of water intended for human consumption OJ L 229/11

²⁶ Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment OJ L 235/40

²⁷ Council Directive 91/676/EEC of 12 December concerning the protection of waters against pollution caused by nitrates from agricultural sources OJ L 375/1

²⁸ Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption OJ L 330/32

²⁹ Directive 2008/1/EC of the European Parliament and of the Council of January 2008 concerning integrated pollution prevention and control OJ L 24/8

2.1.2 Content

River basin management approach

Contrary to older water legislation in the Union, the WFD adopts a more holistic approach reflected in the river basin management approach. The river basin approach means that co-ordination of administrative arrangements take place within river basin districts.³⁰ Member States shall identify the individual river basins lying within their national territory and, for the purposes of the WFD, assign them to individual river basin districts. The WFD states that a river basin means “*the area of land from which all surface run-off flow through a sequence of streams, rivers and possibly, lakes into the sea, a single river mouth, estuary or delta*”.³¹ The Member States have to designate river basin districts and competent authorities for the river basins.³² If a river basin is extended to more than one member state it has to assigned as to an international river basin and Member States shall ensure the coordination of their national measures.³³

Environmental Objectives– Designation of Water Bodies

The WFD contains environmental objectives for surface waters³⁴, ground waters³⁵ and protected areas³⁶. Before the objectives for the specific water bodies can be set, the Member States need to designate surface water bodies on the basis of their ecological quality. Water bodies can be assigned as normal (natural), heavily modified or artificial water bodies. The designation will have consequences for the good status objective, since only natural water bodies have to achieve good ecological status,³⁷ unless an exemption is justified. Heavily modified or artificial classified water bodies only need to achieve good ecological potential.³⁸ The criteria for designating water bodies as artificial or heavily modified are to a relatively large extent open, leaving Member States free in designating the water bodies. For instance, the good ecological potential status of a water body could be achieved without changing the modified hydro morphological characteristics. The designation will also affect the setting of certain environmental objectives.³⁹

The surface water status is determined by both ecological and chemical status and good surface water status requires good ecological status as well as good chemical status.⁴⁰ The more precise criteria to determine ecological and chemical status are laid down in

³⁰ WFD art 3

³¹ WFD art 2 (13)

³² WFD art 3 (1) and (2)

³³ WFD art 3 (4)

³⁴ WFD art 4 (1) (a)

³⁵ WFD art 4 (1) (b)

³⁶ WFD art 4 (1) (c)

³⁷ WFD art 4 (1) (a) (ii)

³⁸ WFD art 4 (1) (a) (iii)

³⁹ See Andrea Keesser (red.), ‘European River Basin Districts; Are the swimming in the Same Implementation Pool?’ [2010] Journal of Environmental Law 1, on the how different ways of designating water bodies will affect the setting of environmental objectives

⁴⁰ WFD art 2 (17) and (18)

the WFD.⁴¹

The No-deterioration Principle

One of the purposes with the WFD is to establish a framework which prevents further deterioration and protects and enhances the status of aquatic ecosystems.⁴² The prevention of further deterioration is often referred to as the no-deterioration principle. The transposition of the no-deterioration principle into national legislation is not formally required, as long as the national legislation implementing the WFD is interpreted in the light of this principle.⁴³ Thus the WFD states that the water quality may not deteriorate, unless specific exemptions are allowed under the WFD. One question is what the no-deterioration principle refers to. No-deterioration may mean no-deterioration at all, but could also refer to no-deterioration between status classes. This is because the WFD mentions different status classes. Other questions remain relating to this topic. The WFD itself does not consider the spatial scale on which deterioration can be observed, the time scale in which deterioration is observed, the scale of seriousness that determines whether deterioration has taken place and the possibility of compensating for deterioration with improvements elsewhere in the river basin. This uncertainty could lead to different interpretations by the Member States.

Programmes of measures

In order to achieve the objectives established under Article 4 of the WFD, the Member States are required to develop programmes of measures for each river basin district.⁴⁴ Each such programme shall include basic measures which are mandatory and qualify as minimum requirements.⁴⁵ When necessary, each programme of measure shall include additional supplementary measures. Supplementary measures might range from the use of legislative and administrative instruments to codes of good practice and controls of emission.⁴⁶ This gives some freedom to the member state if there is need for more action or research in a certain area. All necessary measures have to be laid down in the programme of measure and a summary has to be included in the river basin management plan. The programmes of measures shall be established at the latest nine years after the date of entry into force of this Directive and all the measures shall be made operational at the latest 12 years after that date, which is 2012.⁴⁷ The programmes of measures shall be reviewed, and if necessary updated at the latest in 2015 and every six years thereafter.⁴⁸ The demand for programmes of measures is an independent requirement irrespectively of the status the water bodies. This means that the Member States will have to develop such plans even if the current water quality is good. However, the WFD does not specify exactly what legal status is given to these programmes of measures.

⁴¹ WFD Annex V

⁴² WFD art 1 (a) and art 4

⁴³ Andrea Keessen (red), 'European River Basin District: Are they Swimming in the Same Implementation Pool?' (2010) *Journal of Environmental Law* 14

⁴⁴ WFD art 11

⁴⁵ WFD art 11(1-3)

⁴⁶ WFD art 11 (4) and annex VI part B

⁴⁷ WFD art 11 (7)

⁴⁸ WFD art 11 (8)

Information and consultation with the public

The WFD contains several statements that show the importance of co-operation and information to actors in the society. For this purpose it states that the success of the directive relies on close cooperation and coherent action at Community level, member state and local level, as well as in information, consultation and involvement of the public, including users.⁴⁹ Member States shall further encourage the active involvement of all interested parties in the implementation of the WFD, especially regarding the river basin management plans, which should be made available for comments to the public.⁵⁰

2.2 Enforcement of the directive on a national level

Directives are frequently used as a legal instrument in the area of European environmental policy. As opposed to regulations, directives are not directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, but shall leave to the national authorities the choice of form and methods.⁵¹ Since the goal of a directive is to achieve a certain result, it does not suffice for a member state to only take selective steps towards achieving WFD objectives. Here, a case from 1989 is of interest where the ECJ stated that the fact the United Kingdom had taken all practical steps cannot justify failure to comply with requested obligations of result in the concerned directive.⁵² Thus, it is up to the member state whether transposition is done via an Act of Parliament or in a Regulation and if it chooses to implement new legislation or not.

Directives address Member States and usually oblige them to act in a certain way. Private persons, companies and other actors can never be obligated directly by a directive. The direct effect of European law is developed by the ECJ and states that European law not only entails obligations for the Member States but can also create rights for individuals. The principle of direct effect enables individuals to immediately invoke a European provision before a national or European court, may the situation allow for this. The case law shows that if a provision in a directive constitutes a concrete and sufficient and unconditional measure, individuals may acquire rights upon a member state.⁵³

If a natural or legal person is not content with the legal enforcement and implementation of the WFD in a member state, they are left to trust that the Commission will start an infringement proceeding. If the Commission considers that a member state has failed to fulfill an obligation according to a directive, the Commission has full discretion to start a proceeding.⁵⁴

The enforcement of the environmental objectives will thus take place on national level

⁴⁹ WFD recital (14)

⁵⁰ WFD art 14

⁵¹ TFEU art 288 (3)

⁵² Case 337/89 *Commission v United Kingdom* [1992] ECR I-06103

⁵³ According to the Direct Effect doctrine, certain specific and clear obligations may create rights for also natural and legal persons. See for example Case 26/62 *NV Algemene Transport van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR I

⁵⁴ TFEU art 258 (1)

with starting point in the actual WFD, providing for the objectives and tools for the national Member States to make use of in their own national legislation. To be able to harmonize and achieve the formulation of the water objectives for all water bodies the Commission has developed a so-called Common Implementation strategy (CIS).⁵⁵ CIS non binding guiding material can be used by Member States for seeking guidance about for example how to designate of water bodies. Although, it is important to remember that this material only provides for guidance and the responsibility is put on the Member States to designate water bodies.

Transposition of the WFD into national legislation could easily be expected to be complex task since the directive links to a lot of other directive, not all of them in the water sector. The WDF itself states that Member States are to enforce the laws, regulations and administrative provisions necessary to comply with the obligations set out in the directive at latest 22 December of 2003.⁵⁶ To be able to achieve this legal transposition, some countries might have had to take more steps than others, depending on the nature of the current national legislation.

2.3 The objective of a good water status

2.3.1 The term and its legal sense

The WFD includes a number of different objectives and requirements the Member States have to comply with. The ultimate objective is to at least reach good water status for surface and ground water bodies, which requires meeting certain environmental objectives, both chemical and ecological. A deadline for 2015 is set out in the directive.⁵⁷ As an integral part of the good water status objective, Member States have to prevent further deterioration of all aquatic ecosystems.⁵⁸ In order to achieve, the Member States have to implement all the *necessary measures* and prevent or limit the input of pollutants into ground waters.⁵⁹ They also have a general duty to protect, improve and restore all surface water bodies with the aim to achieve the objectives within the time frame set out in the framework.⁶⁰

Before the introduction of the WFD in 2000, it was focused was on setting physical and chemical parameters. The WFD is seeking to characterize the water quality in more precise ecological terms, which is something rather new to Union law.⁶¹ The legal status of the good status obligation for waters has been lively discussed in some countries. This is because the legal effect of the objective are vaguely expressed. In some parts the objectives are defined as environmental quality standards.

How to classify the legal status of the good status is a question of a complex dimension

⁵⁵ Common Implementation Strategy for the Water Frame Directive (2000/60/EC)

⁵⁶ WFD art 24

⁵⁷ WFD art 4

⁵⁸ WDF art 1 (a)

⁵⁹ WFD art 4

⁶⁰ WFD recital (19)

⁶¹ On the difficulties on setting ecological environmental objectives see: William Howarth, 'The Progression Towards Ecological Standards', (2006) Journal of Environmental Law

and is strongly connected to what status is given to the environmental quality standards set by the national governments. The fact that the objective might be seen as an ultimate objective or a requirement for long-term measures taken by the state may have consequences for the implementation of the WFD.

To achieve good water status, specific chemical and ecological objectives have to be met. The chemical objectives are set on EU level in the annexes to the directive, not leaving much discretion for the Member States. The chemical objectives might still be used differently in the legislation. The ecological objectives are generally set at national level, leaving more discretion for the Member States. Here the Commission also participates in the process to make sure that the common understanding of the Member States are in conformity with the purposes of the WFD. The WFD further limits the member state's responsibility and they cannot be demanded to take further precautionary measures if this does not follow from EU law.

It is clear that the good status objectives contains a lot of exemptions and the formulation "*Member States shall protect, enhance, and restore all bodies of surface water.... with the aim to achieve at least good surface water status...*"⁶², can be said to be rather vague.

Environmental standards are defined in the WFD as "*the concentration of a particular pollutant or group of pollutants in water sediment or biota which should not be exceeded in order to protect human health and the environment.*"⁶³

It is not an easy task for the Member States to determine what the good status obligation actually consists of. If a member state uses best effort as legal qualification for an environmental objective, it is obliged to use the most suited measures and to do its best to reach the objective.⁶⁴ If obliged measures are taken, without the result being achieved, the member state has still fulfilled its obligation of best efforts. Nothing implies that a member state, that uses best efforts as legal qualification, would not be serious in its work to reach the environmental objectives.⁶⁵ This is because Member States are obliged to use suitable measures to reach a wanted result. If instead the legal qualification for environmental objectives is an obligation of result, it is crucial that the aimed result is achieved within the set time limit.⁶⁶ The outcome of this discussion will to a large extent affect which legal status will be given to the environmental quality standards set out in the countries' legislation. How the Member States decide to determine the legal qualification of environmental quality standards will affect the possibilities of attaining the objectives in the WFD.⁶⁷ Here the choice between the use of limit values and guiding values can seriously affect the possibilities. The legal qualification of the good status obligation and how to set the environmental quality standards seem to be a hot topic, at least among legal experts in the Netherlands.⁶⁸

⁶² WDF art 1 (a)

⁶³ WFD art 2

⁶⁴ Van Rijsvick and Havekes, *Waterrecht in Nederland* 198

⁶⁵ Ibid 198

⁶⁶ Ibid 199

⁶⁷ Andrea Keessen, 'European River Basin District: Are they Swimming in the Same Implementation Pool?' (2010) *Journal of Environmental Law* 1

⁶⁸ Interview with Marleen Van Rijsvick, Utrecht University 2010-01-22 and Andrea Keessen, *Journal of*

The significance of the difference between best result and best effort and limit or guiding values should not be exaggerated because of all possibilities for Member States to make exemptions, offered in the WFD.⁶⁹ Further, the legal qualification of the good status obligation and the environmental objectives does not tell much about the level of ambition regarding, for example, programmes of measures.

2.4 Surface water, ground water and protected areas

There are different environmental objectives for surface waters, ground waters and protected areas.⁷⁰ To be able to give the surface waters the label of a good status, both chemical and ecological good status has to be achieved. The WFD describes what is intended to be maximal, good and moderate ecological status for different categories of surface waters (rivers, lakes, coast waters) and for heavily modified waters or artificial waters. Based on these descriptions, the Member States have to establish values for biological quality factors, which will be used to determine if the water body fulfills the objective of a good ecological surface water status.⁷¹ The definitions for ecological status are vague and will not prescribe for specific values with biological definition. The commission will give out recommendations in order to help Member States to clarify the differences between maximal, good and moderate status.⁷² To achieve good chemical status, environmental quality standards cannot be exceeded.⁷³ For heavily modified or artificial water bodies, there is an exemption for the ecological objective of good status. Instead, they will have to reach the status of ecological potential.⁷⁴ However, Member States still have to reach good chemical status. Good status for ground waters is reached when the water body has a good chemical status⁷⁵.

2.5 Exemptions – an integral part of the objectives

Even though the Member States have to meet the environmental objectives to achieve the objective of good status for all water bodies there are certain exemptions available. Exemptions are an integral part of the environmental objectives since there are a lot of opportunities for the national Member States to use them. Furthermore, the exemptions and objectives are laid down together in the WFD.

There is an opportunity to an extension of the deadline of 2015 if certain criteria are

Environmental law, 'European River Basin Districts - Are they swimming in the same implementation pool?' (2010) Journal of Environmental Law 1 7

⁶⁹ Andrea Keessen, Journal of Environmental law, 'European River Basin Districts - Are they swimming in the same implementation pool?' (2010) Journal of Environmental Law 11

⁷⁰ See WFD art 4

⁷¹ WFD Annex V, table 1.2.1- 1.2.5

⁷² WFD Annex V, table 2.4.1

⁷³ WFD art 16 (7) and Annex IX

⁷⁴ WFD art.4 (a)(iii) and Annex V, 1.2.5

⁷⁵ Annex V table 2.3.2

met.⁷⁶ Extension of the deadline can be allowed if the measures to achieve the objective in 2015 complied with would be disproportionately expensive⁷⁷. The extension of the deadline shall be limited to a maximum of two further updates of the river basin management plans except in cases where natural conditions are such that the objectives cannot be achieved within this period.⁷⁸ The extension of the deadline and the reasons for it need to be mentioned in the river basin management plan.⁷⁹ Apart from the extension of the deadline of 2015 there are exemptions in the directive that allow the Member States to decide on less stringent objectives if the water in question is so affected by human activity or that the natural condition is such that an achievement of higher objectives would be infeasible or disproportionately expensive.⁸⁰ This exemption can moreover only be used by the Member States if they can show that this needed human activity cannot be achieved in a different manner which would be a better environmental option.⁸¹

The exemptions referred to can only be used under the condition of no further deterioration occurring in the status of the affected water body.⁸² The no-deterioration principle is mentioned in the WFD as one of the purposes with the directive.⁸³

Finally, exemptions from the environmental objectives are allowed and even the duty of deterioration of the status of a water body, if this is a result of new modifications to the physical characters of the surface water body or alterations of the ground water level or new sustainable human development activities.⁸⁴

All exemptions used by the Member States have to be included in the management plan that will be updated every six years.⁸⁵

2.6 The practical enforcement of a good water status

For the realization of the objectives set in the WFD, the Member States are required to have a functional operating water management. So far the focus has been on the legal implementation of the objectives of the WFD.

The Member States will start the implementation process of the WFD by determining the current water status. The determination of the water status is then followed by the drafting of required environmental quality standards for realizing and achieving the set objectives and values for the environmental quality.⁸⁶ Since the directive and its contained objectives are only binding upon the governments and not to each and every

⁷⁶ WFD art 4 (4)

⁷⁷ WFD art 4 (4) (a) (ii)

⁷⁸ WFD art 4 (4) (c)

⁷⁹ WFD art 4 (4) (b)

⁸⁰ WFD art 4 (5)

⁸¹ WFD art 4 (5) (a)

⁸² WFD art 4 (5) (c)

⁸³ WFD art 1 (a)

⁸⁴ WFD art 4(7)

⁸⁵ WFD art 4 (3) (b) art 4 (4) (b) art 4 (6) (c) and art 13 (7)

⁸⁶ WFD art 16 (7-8), art 22 (6), annex V 1.2.6 and annex VIII, 1-9

citizen, the enforcement of the environmental quality standards requires a process whereby the demands on the state of the environment will be transformed into governing requirements directed at different actors.⁸⁷ The first step in this process of the enforcement of a water quality standard is to determine how large impact a water body can take without exceeding the established standards. The process will lead to legal requirements on the polluters and other actors and constitutes a legal operationalization. This means that environmental quality standards need to be used when issuing permits and other approvals to have real effect.

The programme of measure is an instrument used to operationalize the environmental quality standards into more precise requirements that can be directed to different actors, such as polluters.⁸⁸ An important and frequently discussed question is what legal status and binding force these programmes of measures should have. The question is strongly related to what legal status and definition is given to the environmental and ultimate objective of a good water status, since by giving programmes of measures a legally binding status, environmental quality standards can be enforced in an intended manner. The WFD does not explicitly specify that programmes of measures should be legally binding upon individuals and operators. But they are developed to achieve the environmental quality standards and if these standards are legally binding, so should the programmes of measures be. Nothing is mentioned in the WFD about the legal status of the programmes of measures why case law is needed.

Regarding the drafting and presentation of the programmes of measures, not much is stated in the WFD. It can be expected that we will see some differences in the way of presenting these programmes. If the way of drafting the programmes will affect the possibilities of achieving the good status obligation or the other environmental objectives in the WFD, is a question yet to be answered.

⁸⁷ SOU 2005:113, p. 53

⁸⁸ SOU 2005:113, p. 54

3 The Swedish Implementation

3.1 The Swedish water management

3.1.1 Affected waters

Since 2004, Sweden is divided into five water districts, which together form a geographical and hydro-logical basis for the national water management. The districts, which follow the large sea water bodies; the northern part of the Gulf of Bothnia, the southern part of the Gulf of Bothnia, the South of the Baltic Sea and the North Sea, are then divided into 119 river basins along with about 12 000 smaller sub-basins.⁸⁹ According to the Regulation on Quality Management of the Aquatic Environment (förordning (2004:660) om förvaltning av kvaliteten på vattenmiljön) the Regulation on Water management, the Swedish Environmental Protection agency and the Geological Survey of Sweden, SGU, are being responsible for drawing up regulations for the classification of surface- and groundwater bodies.⁹⁰ In compliance with the regulations of the National Environmental Protection agency, the physical structure of water courses and seas will constitute an essential criterion in the work of classification. The term “body of surface waters” is primary aiming at lakes with an area less than 1 km² along with water courses that are 15 km or longer. Shorter water courses can under certain circumstances constitute their own body of surface water, but only on the condition that they are located downstream, a water course that are longer than 15 km, or a lake located downstream that are larger than 1 km . This exception was added to make it possible to retain a continuous hydro-graphical network. However there is nothing that prevents that larger water courses and lakes are being divided into bodies of surface waters that are shorter than 15 km for water courses respectively smaller than 1 km for seas, if this can be considered as being legitimate based on differences in status- and influence classification.⁹¹ According to the regulations of SGU for ground waters, storage for ground waters has to have a withdrawal of water that is larger than 10 m , to be acknowledged under the WFD. They have to provide or be meant to provide for more than 50 persons with drinking water.⁹²

⁸⁹ http://www.vattenportalen.se/fov_sve_djup_.htm, accessed at 2009-09-03.

⁹⁰ The Regulation on the Water Management, chapter 3, section, 4

⁹¹ NFS 2006:1, *Naturvårdsverkets föreskrifter om kartläggning och analys av ytvatten enligt förordningen (2004:660) om förvaltning av kvaliteten på vattenmiljön, bilaga 4*

⁹² SGU-FS 2006:1, *Sveriges geologiska undersökningsföreskrifter om kartläggning och analys av grundvatten enligt förordning (2004:660) om förvaltning av kvaliteten på vattenmiljön*

3.1.2 Major water operators

The ultimate responsibility for the realization of the environmental goals of the WFD in the Swedish law has the government that through the Ministry of the Environment will represent Sweden as member state on European Union's Water Director's meeting.⁹³ The practical enforcement of achieving the environmental goals lies on the five River Basin District Authorities/Provincial Offices, each of them responsible for the water quality within their own district.⁹⁴ The River Basin District Authorities fundamental tasks consist of deciding upon and see that existing environmental quality standards are being complied with. Despite the name, the River Basin District Authorities are no real authorities, but self-governed departments placed within five County Administrative Board Offices. Also the County Administrative Boards serve an important purpose in the practical enforcement of the WFD, since they according to the Regulation of the County Administrative Boards (Förordning (2007:825) med länsstyrelseinstruktion), have a duty to cooperate with the River Basin District Authority that are responsible for that district.⁹⁵ In addition the rest of the County Administrative Boards have another important function, since they constitute a link between the local and national level and between the River Basin District Authorities and other actors.

At every River Basin District Authority there is a Water District Board that makes decisions on the authority's various fields of responsibility. The Water District Board, consisting of 11 members from among others the County Administrative Boards, municipalities, are allowed to delegate to the civil servant officials of the River Basin District (in practice at the secretariat of the water authority) , to draw up proposals for environmental quality standards, programmes of measures and river basin management plans etc., put the programmes of measures into practice and environmental supervision and with being responsible for co-ordination and decision making in other questions. However, it is always the Water District Board that makes the decision on adopting environmental quality standards, River Basin Management plans and programmes of measures within the district, which follows by the Regulation of the County Administrative Board.⁹⁶

Apart from the River Basin District Authorities and the country's 16 County Administrative Boards, a large number of other actors play an important role in the practical enforcement of the WFD. As an example the 290 municipalities in Sweden are responsible for questions regarding spatial planning, giving out permits for new activities and for supervision and control of activities that could have an impact of

⁹³ <http://www.naturvardsverket.se/sv/Arbete-med-naturvard/Vattenforvaltning/Vem-gor-vad/Nationell-niva/>, 2011-10-03. On the CIS's Water Director's meetings, one water director from each member state will participate. Among other tasks, they have to decide upon common guidelines for the CIS cooperation and lead and coordinate the work within the organization's many sub groups. See <http://www.naturvardsverket.se/sv/Arbete-med-naturvard/Vattenforvaltning/Arbetet-inom-EU/> , accessed at 2011-10-03 and also <http://www.naturvardsverket.se/sv/Arbete-med-naturvard/Vattenforvaltning/Arbetet-inom-EU/Arbetsgrupper/>, accessed at 2011-10-03

⁹⁴ Environmental Code chapter 5 section 11

⁹⁵ The Regulation of the County Administrative Boards, section 27

⁹⁶ The Regulation of the County Administrative Boards, section 24

people's health and the environment. In many of the River Basins there are voluntary water conservation unions and coastal water unions, in which local and regional actors (municipalities, provinces, industries and agricultural organizations) take part, with a common interest for matters regarding water conservation.⁹⁷ The primary task for the unions are to co-ordinate those actors with an impact on the water quality within a certain geographical water area, so that you with joint measures will be able to supervise the environmental conditions in the area.⁹⁸ The purpose of this so-called control of recipients is to illustrate which effects on the environment that arises from contaminations and other emissions, to investigate the connection between current environmental status and possible changes that follows from emissions and other contaminations and also develop the base for planning and evaluation of different forms of protective measures.⁹⁹ Apart from water conservation unions and coast water unions, there are also so-called Water Councils. Their main function is to see to that all the water supplies in a River Basin District are being managed in a comprehensive perspective. Like the above mentioned interest associations, the Water Councils provide for a forum for discussions concerning matters about water management. One important distinction is that they are open to all interested parties in a River basin.¹⁰⁰ Since the incorporation of the WFD many water conservation unions have, in order to involve a broader circle of actors, transformed themselves to Water Councils. Others have chosen to act in its current form, but have in addition to this established subordinated or parallel organizations with an equivalent function.¹⁰¹ On the national level authorities like the National Board of Fisheries, the National Board of Agriculture, the National Chemicals Inspectorate and the National Board of Forestry, serve an important purpose, when it comes to implementing the WFD. They have a shared responsibility when it comes to achieving different environmental quality objectives. An especially important role to play in this work have the two state authorities the Swedish National Environmental Protection agency and SGU, who are responsible for drawing up regulations, advises and manuals and to provide for reporting to the EU commission.¹⁰²

⁹⁷ Since the middle of the 1970's there are also so called water unions, a type of association which have as task to through water conservational measures to promote an effective use of water. See Regulation (1976:997) about water unions

⁹⁸ NV rapport 5489, p. 14 f and SOU 2002:105, p. 173

⁹⁹ <http://www.naturvardsverket.se/sv/Tillstandet-i-miljon/Miljoovervakning/Vad-ar-miljoovervakning/Miljoovervakningsdata-genom-andra-verksamheter/Miljoovervakning-genom-recipientkontroll/>, accessed at 2009-10-27.

¹⁰⁰ www.lansstyrelsen.se/NR/.../0/VMSO_Nyhetsbrev1_2006.pdf, 2009-10-19 and *Vattenråd – teori och praktik*, Vattenmyndigheterna Södra Östersjöns och Västerhavets vattendistrikt.

¹⁰¹ Interview with Anna Ek, fresh water biologist, County Administration within the district of Västra Götalands län, The water authority, 2009-10-27

¹⁰² The Regulation on the Water Management, chapter 9 section 1-2

3.2 The objective of a good water status

3.2.1 The objective of a good water status and its relationship to established environmental quality standards

According to the Regulation on the Water management, the five water authorities in Sweden shall establish quality requirements for surface water bodies, groundwater bodies and for protected areas within each water district.¹⁰³ These requirements are formulated so that the current water status cannot be deviated and all water bodies that have not been explicitly excluded from the applicable area of the directive at the latest the 22nd of December 2015 will have reached at least a good status.¹⁰⁴ The term quality requirement is not explained neither in the legislation nor in the preparation work of the legislation, except from the fact that the requirement of establishing quality requirements are subject to the general heading “Environmental quality standards”.¹⁰⁵ It is further not elaborated on a national level what is to be understood, with the directive’s good water status obligation, it is instead directly referred to the WFD’s annex V.¹⁰⁶

The objective of a good status was, in the working material of the water authorities’ proposal of environmental quality standards, seen to be an independent quality requirement (a requirement that was meant to be equal to an environmental quality standard) and not only as an overall environmental objective.¹⁰⁷ When it in December of 2009 was time for the water authorities to establish the environmental quality standards in the districts it was chosen for another solution. The quality requirements are seen as being legal tools in the work of achieving a good water status (see figure 1). This is clear from the regulations worked out by the water authorities, where it is mentioned that *the quality requirements for surface water bodies are aimed to see to that all surface water bodies will reach high or good ecological status and good chemical surface water status at the latest at the 22nd of December of 2015, if they are not excepted by the regulations concerning artificial and heavily modified water...”. A corresponding regulation exists concerning ground water bodies, although here will instead a requirement for good chemical respectively qualitative ground water bodies, be applicable.¹⁰⁸*

¹⁰³ The Regulation on the Water Management chapter 4 section 1

¹⁰⁴ The Regulation on the Water Management chapter 4 section 2-6 a

¹⁰⁵ The Regulation on the Water Management chapter 4, see also *Länsstyrelsen Västra Götalands Läns (vattenmyndigheten Västerhavet) föreskrifter om kvalitetskrav för vattenförekomster i distriktet, 14 FS 2009:553, 2§*

¹⁰⁶ The Regulation on the Water Management chapter 4, section 2-7.

¹⁰⁷ Se exempelvis *Förslag till miljö kvalitetsnormer för Västerhavets vattendistrikt. Samrådsmaterial för perioden 1 mars – 1 september 2009*, s. 15 samt *Förslag till miljö kvalitetsnormer för Bottenhavets vattendistrikt. Samrådsmaterial för perioden 1 mars – 1 september 2009*, s. 4.

¹⁰⁸ Se exempelvis *Länsstyrelsen Västra Götalands läns (Vattenmyndigheten Västerhavet) föreskrifter om kvalitetskrav för vattenförekomster i distriktet, 14 FS 2009:533, 2 och 4-8 §§* samt *Länsstyrelsen i Västernorrlands läns (Vattenmyndigheten i Bottenhavets vattendistrikts) föreskrifter om kvalitetskrav för vattenförekomster i Bottenhavets vattendistrikt, 22 FS 2009:59, 2 och 4-8 §§.*

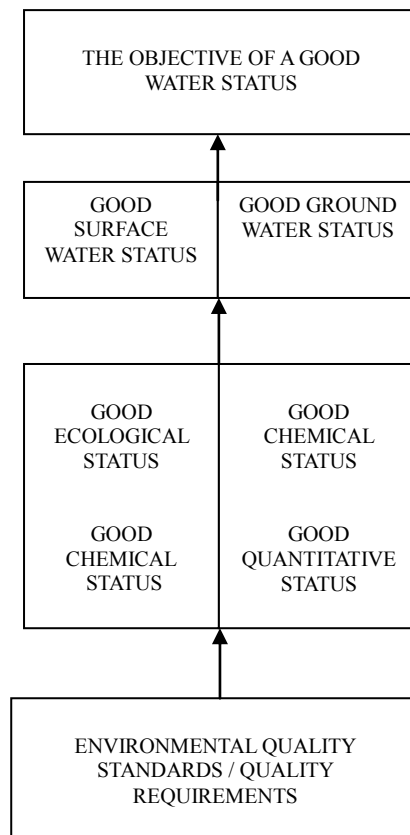


Figure 1. The relationship between the objective of a good water status and national environmental quality standards in Swedish water policy

An interesting question is how current environmental quality standards are meant to relate to the prohibition of deviation on the water quality in the regulation on the water management.¹⁰⁹ In this question the water authorities were a long time of the opinion that the requirement for no-deterioration should be interpreted as an independent quality requirement and not only as an overall objective.¹¹⁰ The problem was that such interpretation would have made it impossible for all types of deteriorations of already achieved statuses. In the directive there is no regulation regarding mixing zones, like the case in the American Clean Water Act (Federal Water Pollution Control Amendment of 1972). When the Water Authorities took the decision regarding quality requirements for the different districts it was chosen to look at the requirement for no-deterioration as an integrated part of the current stating environmental quality standards and not as a quality requirement in itself.¹¹¹ Despite the decision of the Water Authorities it can in

¹⁰⁹ The Regulation on the Water Management chapter 4 section 2-6 a

¹¹⁰ See *Förslag till miljö kvalitetsnormer för Västerhavets vattendistrikt. Samrådsmaterial för perioden 1 mars– 1 september 2009*, s. 3-5 samt *Förslag till miljö kvalitetsnormer för Bottenhavets vattendistrikt. Samrådsmaterial för perioden 1 mars– 1 september 2009*, p. 4

¹¹¹ This means that when it comes to ecological status, deterioration is allowed as long as the deterioration does not contribute to the whole classified status being deteriorated, for example by going from high to good status

certain cases still be justified to talk about the requirement of no-deterioration as an environmental quality standard, something which is obvious when studying the regulations of the Water Authorities.¹¹² This because, for example, regarding surface and ground water statuses that will not reach a good chemical status, it would not otherwise exist a lower limit for how bad water quality that can be accepted.¹¹³

3.2.2 A good water status – an ultimate environmental objective or a requirement for long term measures being taken?

In the final report from the Environmental Code Committee with proposal for amendments in the Environmental Code (Miljöbalken 1998:808), the Swedish most important environmental legal act, the question was, whether the WFD: s environmental objective would be interpreted as an absolute requirement or only as a request for long term measures to be taken at the latest at the 22nd of December 2015. The investigation concluded that the quality requirements in the Regulation on the Administration of the Quality of the Water Environment will be interpreted according to the first model. However, it was held to be problematic to establish the term's level of ambition, since the WFD, unlike EU law concerning air quality, does not fully clarify what a good status implies.¹¹⁴

3.3 Environmental quality standards as legal instruments

3.3.1 Environmental quality standards in Swedish law

According to the Environmental Code, the government or the authority that the government determines can issue regulations in the form of general or domain specific environmental quality standards “...if it is necessary to permanently protect human's health or the environment or to remedy injuries on or detriment to human health or environment...”.¹¹⁵ Such regulations can for pollution- or disturbance levels take the form of binding limit values that *may not* be exceeded or undercut, but they can also adopt the form of guiding values that *should not* be exceeded or undercut.¹¹⁶

Besides limit and guiding environmental quality standards there are rules that indicate highest, alternatively lowest, presence of organisms in surface and ground water which may give guidance for the state of the environment.¹¹⁷ Examples on such bio-indicators can be the presence of algae in lakes and coastal waters or unhealthy micro-organisms in surface or ground waters.¹¹⁸ There are also environmental quality standards that

¹¹² Se exempelvis *Länsstyrelsen Västra Götalands läns (Water Authority Western sea) föreskrifter om kvalitetskrav för vattenförekomster i distriktet, 14 FS2009:533*, 10-11 §§

¹¹³ Grahn, Sara, Provincial Office, Västra Götalands läns, Water authority Western sea, 2010-02-10.

¹¹⁴ SOU 2005:59 p. 71

¹¹⁵ Environmental Code chapter 5 section 1

¹¹⁶ Environmental Code chapter 5 section 2, pt. 1-2

¹¹⁷ Environmental Code chapter 5 section 2, p. 3

¹¹⁸ Prop. 1997/98:45, p. 44

indicate quality requirements subject to EU law.¹¹⁹ The legal status of these standards is not directly shown in the legal text. Instead you have to look at the national and EU law that the standard is based on to determine whether it is a limit or a guiding environmental quality standard, alternatively a standard that only will function as a basis for forming a judgment. In practice this is difficult to deduce, since the WFD contains many different objectives and quality factors.¹²⁰

Despite the fact that the Environmental Code's environmental quality standards can be manifested in different ways, it is important to remember that the specific formulation is lacking relevance. The environmental quality standard's legal effect is determined by the material quality requirements and the practical enforcement regulations being set up.¹²¹

3.3.2 Environmental quality standards in the field of water law

When applying the Regulation on the Administration of the Quality of the Water Environment, the term environmental quality standard is assumed to have the same meaning as in the Environmental Code, why the standards issued can be of four different types.¹²² Unfortunately it is neither clarified in the regulation nor in the provisions issued by this legal act, which type of environmental quality standard that will aim on respective provision.

Taking into account that national authorities have been given the authorization to decide on such quality requirements on the environment that follows with Sweden's membership in the EU, one could assume that the binding force of those provisions issued according to the Regulation on the administration of the quality of the water environment will constitute "*...requirements as for the rest of the environment that follows from Sweden's membership of the European Union*". This interpretation was recently codified by the national government.¹²³ Therefore the examination if the standards are to be seen as binding limit value or as having guiding value will have to be determined in each separate case, depending on what is prescribed for in the actual directive which the national standard is implementing.¹²⁴

A large number of different environmental quality standards, or quality requirements as referred to in the Swedish legislation, exist. A few examples are "high ecological status", "good ecological status", "good chemical status" and "good quantitative status". A common factor is that they all aim for a level of status that is good or higher. There are also standards that will determine a lower level of protection such as the requirements of "moderate ecological status" or "unsatisfactory ecological status". This is due to the possibility to set aside the requirement of an at least good status in the

¹¹⁹ Environmental Code chapter 5, section 2, pt.4

¹²⁰ Fröberg, p.35

¹²¹ See chapter 2.3.4

¹²² Regulation on the Water Management chapter 1 section 2

¹²³ See Prop. 2009/10:183

¹²⁴ Fröberg, p. 36

WFD.¹²⁵

As stressed earlier it can in Swedish environmental legislation be difficult to understand the relationship between quality requirements and environmental quality standards.¹²⁶ This is probably the reason why there was a debate in 2009, regarding the legal status for environmental quality requirements on the water law area. The most important question brought up was whether water authorities should be legally authorized to “...establish the requirement for “Good ecological status” for surface water bodies in the form of environmental quality standard that states that a good ecological status shall be reached within a certain time limit...”.¹²⁷

One argument that was brought up against the water authorities being able to establish binding quality requirements was neither in the WFD nor in the Regulation on the Administration of the Quality of the Water Environment, is there a regulation that clearly demands that the Member States shall establish national environmental quality standards for ecological status – and especially not standards with a binding character. It was instead held that the directive’s definition of the term “environmental quality standard” only requires the Member States to establish guiding values that *should* not be exceeded. Another argument, also emphasized, was that the proposed environmental quality standards were not set up according to the regulations prescribed by law. This because the regulation in the Environmental Code that gives the government the right to delegate power of decision making to national authorities solely refer to standards which follows from the Swedish membership in the European Union (i.e. standards which according to the wording of the WFD solely will be able to be formulated as guiding values).¹²⁸

An argument that spoke for the water authorities’ possibility to establish binding standards was that the objective of a good water status not solely can be taken as a general objective but rather as an objective that is to be met within given time frames. Due to this background, conclusion was reached those environmental quality standards, which indirectly can be said to express the objective of the WFD, will be able to be formulated in binding wordings. Yet another argument brought up in the context was that there is nothing that forbids individual Member States to adopt more severe legislation than that follows from the directive.¹²⁹

In the National environmental protection agency’s regulations and general advice on the

¹²⁵ See for example: *Förvaltningsplan Norra Östersjöns vattendistrikt 2009-2015*, Vattenmyndigheten Norra Östersjön, Länsstyrelsen Västmanlands län, s. 144 ff. samt *Förvaltningsplan Bottenvikens vattendistrikt 2009-2015*, Vattenmyndigheten Bottenviken, Länsstyrelsen Norrbotten, p. 161 ff.

¹²⁶ See 2.2.1.

¹²⁷ Björk, Owe, Alrutz’ Advokatbyrå AB, Paper on *Establishment of the quality requirements for water districts (fastställande av kvalitetskrav för vattendistrikt)* and Michanek, Gabriel, Juridiska institutionen, Uppsala universitet, *Statement regarding the discussion of the water authorities’ formulation of objectives and quality requirements (Utlåtande i frågan om vattenmyndigheternas formulering av mål och kvalitetskrav)*

¹²⁸ Björk, Paper on *Establishment of the quality requirements for water districts (fastställande av kvalitetskrav för vattendistrikt)*

¹²⁹ Michanek, *Statement regarding the discussion of the water authorities’ formulation of objectives and quality requirements (Utlåtande i frågan om vattenmyndigheternas formulering av mål och kvalitetskrav)*

classification of the environmental quality standards for surface water bodies it is stated that the water authorities will “...*classify ecological status or potential and chemical surface water status for surface water bodies to determine what environmental quality standards should be established.*¹³⁰ For the realization of the classification it is further stated that the authorities, when it comes to ecological status, will use three different categories of so called quality factors – one biological, physical-chemical and one hydro morphological. Each category contains a number of quality factors, which all will be classified using one or more parameters. The starting point for every judgment made by the water authorities is that each and every parameter will be valued from five levels of statuses (high, good, moderate, unsatisfactory and bad), where the lowest value will indicate which status will be accredited each quality factor as whole. In the same way will the, or those statuses that will indicate the lowest status control which all together ecological status the water course can be said to have (see figure 2 and 3).¹³¹

¹³⁰ NFS 2008:1, *Naturvårdsverkets föreskrifter och allmänna råd om klassificering och miljö kvalitetsnormer avseende ytvatten*, chapter 2, section 1

¹³¹ NFS 2008:1, chapter 2 section 2

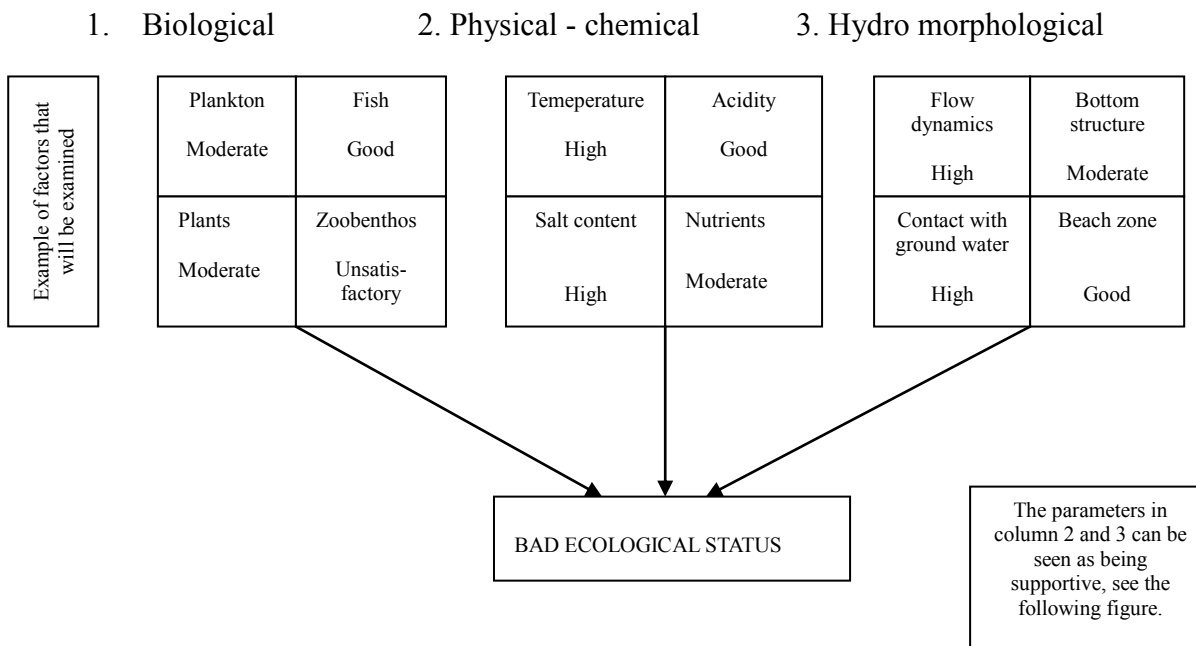


Figure 2. Simplified schedule of classification for surface water courses *Source: NV rapport 5489, En bok om svensk vattenförvaltning, p. 34.*

A surface water course's ecological status will be established with starting point in several different quality factors, which all can be categorized into three categories – one biological, one physical-chemical and hydro morphological. Each quality factor contains of one or more parameters where the worst parameter will indicate which status will be accredited the quality factor as whole. In the same way, the quality factor with the lowest status will indicate the all together ecological status for the water course.

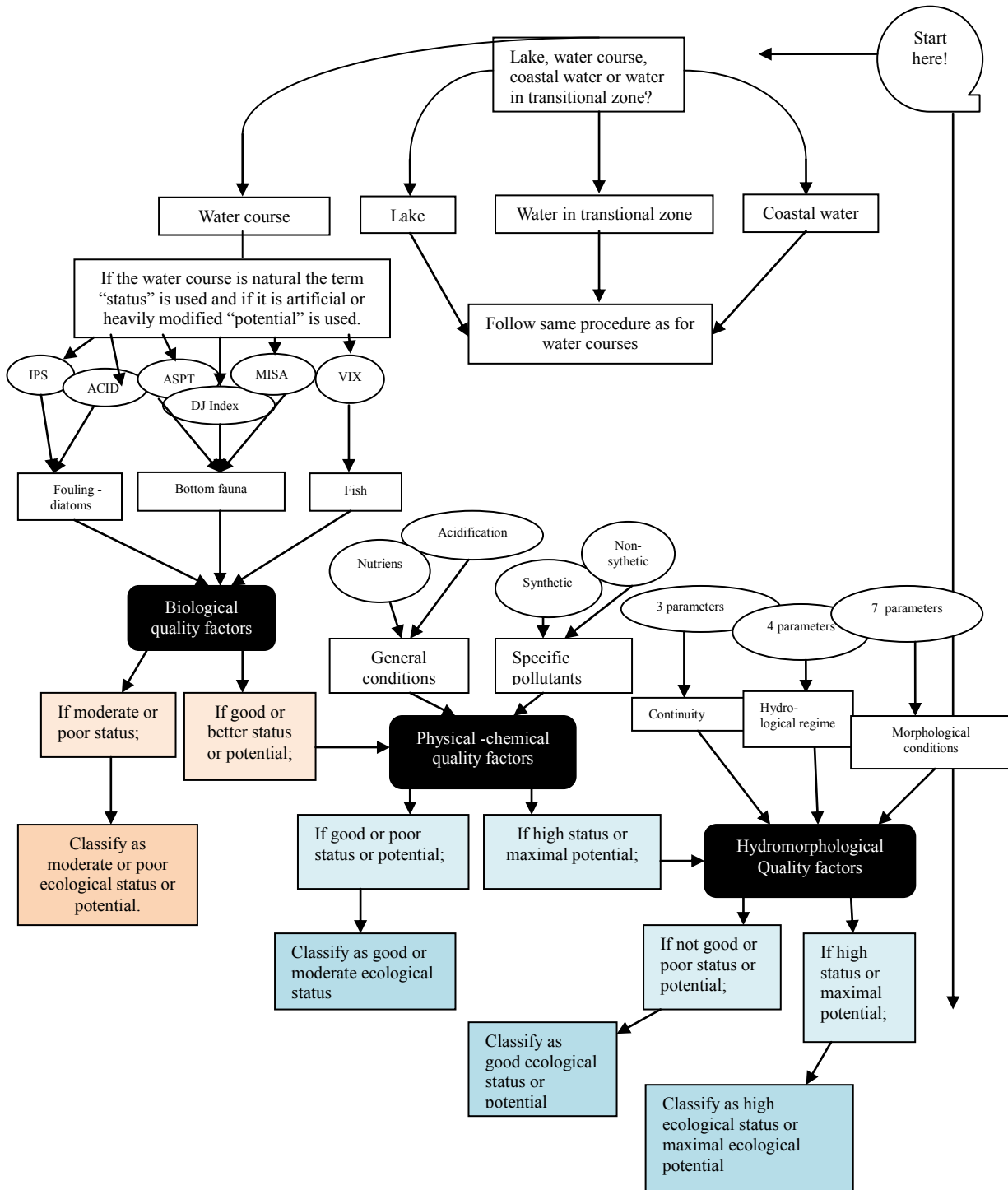


Figure 3. Close-up on the classification of ecological surface water status. *Source: Källa: NV Handbok 2007:4, Status, potential och kvalitetskrav för sjöar, vattendrag, kustvatten och vatten i övergångszon.*

A comprehensive schedule over the procedure concerning classification of the surface water course's ecological status or potential and chemical surface water status. In certain cases it might be of practical use to work parallel with several steps at the same time. H, G, O, D stand for high, good, moderate unsatisfactory respectively bad ecological status. G and EG stand for good respectively not achieving good chemical surface water status.

When it comes to the chemical surface water status, no quality factors as for the ecological status will be established. Instead the judgment of the water authority will have its starting point in a number of different given priority substances. The intended substances will be précised in the so-called priority substances directive¹³² and in the Regulation for Environmental Quality Standards for fish- and shellfish waters (förordning (2001:554) om miljö kvalitetsnormer för fisk- och musselvatten).¹³³ Contrary to the case for ecological status, there are for chemical surface water status solely two statuses of levels – “good” or “not good”.¹³⁴

In the regulations of SGU about status classification and environmental quality standards for ground waters it is indicated that, when it comes to such water courses, will be a classification from quantitative as well as from chemical ground water status, where the indicated status can be either “good” or “unsatisfactory”.¹³⁵ What criteria that has to be fulfilled for each category is précised in the regulations of SGU.¹³⁶

3.3.3 Environmental quality standards and its relation to other national instruments

3.3.3.1 The Environmental Code's general rules of consideration in brief

The overall objective in Swedish environmental law is to promote a sustainable development which means that present and coming generations will be assured to have a healthy and good environment. What is in greater detail to be understood with the term “sustainable development” is not easy to know, since in this context, it is only indicated that such a development is based on the knowledge that nature in itself has a protection value and that the man has a responsibility to capture it.¹³⁷ Some guidance

¹³² Directive 2008/105/EC of the European Parliament and of the Council of 16 December 2008 on environmental quality standards in the field of water policy, amending and subsequently repealing Council Directives 82/176/EEC, 83/513/EEC, 84/156/EEC, 84/491/EEC, 86/280/EEC and amending Directive 2000/60/EC of the European Parliament and of the Council

¹³³ NFS 2008:1, chapter 2, section 7

¹³⁴ NFS 2008:1, chapter 3, section 4

¹³⁵ SGU-FS 2008:2, Sveriges geologiska undersökningens föreskrifter om statusklassificering och miljö kvalitetsnormer för grundvatten, section 8

¹³⁶ SGU-FS 2008:2, section 6-7

¹³⁷ Environmental Code chapter 1, section 1, para. 1

can be found in the second section and in the code's general rules of consideration, which both indicate the overall general material requirements which have to be accomplished to protect the environment. Moreover it is indicated in the code that it should be used in such way that certain environmental objectives can be achieved. These objectives will then be reflected in a numerous of different general and more specific requirements directed at operators.

The Environmental Code's general rules of consideration holds good for all operators that carry out or have the intention to carry out an activity or take an action that is not negligible in each case.¹³⁸ Since the rules do not define what is to be understood with the term "activity", guidance has to be sought in the preparatory work of the law, where it is indicated that the term is aiming at activities of continuous or recurrent nature, independent of the activity can be classified as business or not.¹³⁹ The general rules of consideration not only turn to operators but also to courts and other authorities which have the task to examine issues such as licenses, approvals and dispensers, which is apparent from the legal text.¹⁴⁰

In the general rules of consideration, who's design to some extent differ, certain requirements are laid down which can be said to aim at specific issues or certain parts in an activity. Among other things requirements for operators to select a location that brings minimum intrusion and inconvenience for human health and the environment¹⁴¹, that chemical products or biotechnical organisms that are likely to have risks for these interests are avoided¹⁴² and that there is housekeeping of raw materials and energy¹⁴³. In addition the use of "best available technology" is required, which means that operators must use the best technology available within or outside the borders of Sweden, provided that the technology is possible to use economically and technically within industries typically.¹⁴⁴

Besides the rules that aim at specific issues or a certain parts of an activity, the general rules of consideration prescribe for a general requirement of precautions, a requirement that has to be considered when applying all above mentioned rules. The obligation is being expressed as that all "*that carry out or have the intention to carry out an activity or take an action shall carry out protective measures, observe restrictions and take precautions otherwise needed to prevent or inhibit or counteract that the activity or the measure will result in damage or detriment for human health or the environment.*"¹⁴⁵

The Environmental Code's general rules of consideration apply to the extent that they do not seem unreasonable, taking in the environmental benefit that can be achieved through the requirements must be related to the costs that may arise in each case.¹⁴⁶ Besides the cost aspect shall in the judgment also be taken into account whether the

¹³⁸ Environmental Code chapter 2 section 1

¹³⁹ Prop. 1997:98:45 part 2 p. 13

¹⁴⁰ Environmental Code chapter 2 section 1

¹⁴¹ Environmental Code chapter 2 section 6

¹⁴² Environmental Code chapter 2 section 4

¹⁴³ Environmental Code chapter 2 section 5

¹⁴⁴ Environmental Code chapter 2 section 3 para 2 and prop. 1997:98, part 1, p. 216

¹⁴⁵ Environmental Code chapter 2 section 3 para 1

¹⁴⁶ Environmental Code, chapter 2 section 7

requirements are addressed to an industry or an individual.¹⁴⁷ The cost to arrange for precautions has to be taken into account when you establish what a reasonable level is when it comes to the question about best available technology. According to the assessment then made the requirements that are established against an operator cannot be unreasonable taking into account the circumstances in each case. In each case particular attention should be drawn of which degree and nature of environmental impact we are dealing with, the character of disturbance and the sensitivity of the environment that could be affected.¹⁴⁸

3.3.3.2 The general rules of consideration and its relation to environmental quality standards

Although there is in Swedish law a relatively strong connection between the Environmental Code's general rules of consideration and environmental quality standards, it is only indicated in one place in the second chapter of the whole code how the both regulatory systems are meant to relate to each other.¹⁴⁹ In July 2010 the rules of consideration were amended.¹⁵⁰ The old version of the legislation stated that the assessment made under the rules of consideration can never lead to an environmental quality standard as referred to in chapter 5, section 2, paragraph 1, pt 1 being disregarded.¹⁵¹ The amendment states that *despite* the assessment of consideration, requirements needed for the compliance of an environmental quality standard *shall* be set.¹⁵² Further, if a programme of measure has been established to meet the standard, it will work as guidance for the assessment. When the assessment under the rules of consideration regards the admissibility, authorizations, approvals or exemptions for an activity or measure that provides an increase in pollution and can be expected to in a not insignificant way, contribute to an environmental quality standard as referred to in chapter 5, section 2, paragraph 1, point 1, being disregarded, the activity or measure can be allowed if it complies with an established programme of measures, will be subject to conditions on taking or paying compensatory measures which increases the possibilities to meet the standard to an extent that is not insignificant, or despite that it hampers the possibilities to meet the environmental quality standard in a short term or in a small geographical area, is likely to have significantly increased ability to meet the standard in the long run or in a larger area.¹⁵³

The opportunities provided by the rules of consideration, in term of setting more stringent requirements to comply with an environmental quality standard, only apply to limit values (as referred to in the Environmental Code, chapter 5, section 2, paragraph 1, point 1). The provision becomes clearer for when an activity can be allowed even if it

¹⁴⁷ Prop. 1997:98, part 1, p. 232

¹⁴⁸ Prop. 1997:98, part 2, p. 45

¹⁴⁹ According to the Environmental Code's preparatory work current environmental quality standards form an important decision base in a possible assessment whether an operator is living up to the general rules of consideration's requirement on appropriate location and precautions. See SOU 2005:113, p. 62

¹⁵⁰ Prop. 2009/2010:184

¹⁵¹ For the old version of the legislation see Prop. 2009/2010:184

¹⁵² Environmental Code, chapter 2 section 7, paragraph 2

¹⁵³ Environmental Code, chapter 2 section 7, paragraph 2, point 1-3

will contribute to an environmental quality standard (limit value) being disregarded.

3.3.4 The environmental quality standard's legal effect when applying the Planning and Building Act

In the Swedish legislation, questions relating to spatial planning and use of land are regulated in the relatively new Planning and Building Act (Plan- och bygglag (2010:900)). The provisions aim “...with due regard to the individual's right to freedom, at promoting social progress towards equal and good living conditions and a good and lasting sustainable environment for the benefit of the people of today's society and as well as of future generations”.¹⁵⁴

The Planning and Building Act states that land and water areas shall be used for the purposes for which the areas are best suited for.¹⁵⁵ According to the Planning and Building Act the environmental quality standards will be observed and followed for decisions concerning municipal plans and planning, regardless if it is a question of making binding detailed development plans and area regulations or guiding comprehensive plans or regional plans. When the City Council once has adopted a plan it has a governing impact in its relation to both authorities and other actors.¹⁵⁶

Despite the fact that according to the Planning and Building Act it is not allowed to adopt plans that will contribute to environmental quality standards being exceeded, it has in practice turned out that few of the plans will be stopped by the standards.¹⁵⁷ This is something that, at least to some extent, is due to the limited possibilities for the rest of the public actors to interfere with the municipal plan monopoly. The only actual possibility, is the requirement in the Planning and Building Act that the County Administrative Board “shall examine the municipality's decision to adopt, amend or annul a detailed development plan or area regulations if there is cause to believe that the decision does not observe an environmental quality standard under chapter 5 of the *Environmental Code*”.¹⁵⁸ It should in this context be noticed that the duty to interfere with municipal plans belongs to the County Administrative Board and not to the water authority itself as organization.

¹⁵⁴ Planning and Building Act Chapter 1 section 1

¹⁵⁵ Planning and Building Act Chapter 2 section 2

¹⁵⁶ Planning and Building Act Chapter 2, section 10. A municipal plan can be formulated so that it will create a barrier to new businesses which could jeopardize the achievement of a current environmental quality standard. It is though solely binding plans that have legal effect and can be enforced. A guiding plan can thus be overlooked without any legal consequences. Compare also to RÅ 2008 not 13

¹⁵⁷ NV rapport 5915, *Har miljö kvalitetsnormer förbättrat utomhusluften?*, p. 11 f

¹⁵⁸ Planning and Building Act chapter 11 section 10 pt 3

3.3.5 The environmental quality standards legal effect when applying the Environmental Code

The primary responsibility for enforcing the Environmental Code's environmental quality standards has in Swedish law been given to the public authorities and municipalities.¹⁵⁹ The formulation in the legislation was recently redrafted and states that "...*Authorities and municipalities shall be responsible for the environmental quality standards being met.*"¹⁶⁰ The earlier formulation stated that authorities and municipalities were responsible for *ensuring* that the standards were complied with in several different contexts – when planning, when supervising when establishing new regulations and when examining licenses, approvals and dispenses.¹⁶¹ It was never clear how far the requirement "ensure" really stretched for the authorities and municipalities. One interpretation was that requirements should be set as high as required for the current standards to be met. This rule would hereby apply as a separate unlimited material requirement alongside with the Environmental Code's general rules of consideration. Another interpretation is that the rule would mean a general obligation for the public to presume agreed standards in their practical work, without any specific obligation laid on individuals. Instead it is the environmental code's other substantive rules, such as the general rules of consideration, that will indicate the framework for the actual environmental requirements.¹⁶² According to the preparatory work the amendment was necessary because the word "ensure" was too difficult to interpret.¹⁶³

The Environmental Code indicates among others a duty of permit for certain engagement in environmentally hazardous activity and water activity.¹⁶⁴ For other operations, it is possible to voluntarily apply for permit.¹⁶⁵ When it comes to approvals and dispenses it is detailed in the legislation under what conditions such can be granted.

3.3.5.1 Examination for permits, approval or dispense for new licensed activities

The old rule on examination of new activities was recently removed to be replaced with a new counterpart within the rules of consideration.¹⁶⁶ The new formulation of the rule

¹⁵⁹ Environmental Code chapter 5 section 3

¹⁶⁰ Environmental Code chapter 5 section 3

¹⁶¹ See prop. 2009/10:184, p. 7

¹⁶² Note that larger land or water areas can be explained as being environmental protection areas "...*if it requires specific regulations because the area or part of the area is exposed to pollutions or else does not fulfill the requirements of an environmental quality standard*". For protection areas shall the government, alternately the provincial office, issue those regulations of safety measures and precautions, necessary for the protection of the area. If these regulations are neglected, permits can be limited or joined with amended or new conditions, or be withdrawn and continues activity be prohibited. Compare to the Regulation on administration on quality of water chapter 7 sections 19-20, chapter 24, section 1 and chapter 26, section 9

¹⁶³ See prop. 2009/10:184, p. 37

¹⁶⁴ Environmental Code chapter 6 section 6 and chapter 11 section 9 and 13

¹⁶⁵ See for example Environmental Code chapter 9 section 6 para 3 and chapter 11 section 9 para 2.

¹⁶⁶ See SFS 2010:882 and Environmental Code chapter 2 section 7

for permits, approvals or dispenses requires that an assessment of consideration always has to be made. Higher requirements can be set if needed to comply with an environmental quality standard, though only for those with the legal status limit value. If there is programme of measure set to comply with the limit value, this should be used as guidance for the judgment of which requirements can be required. The activity or measure can still be allowed if the actual activity or measure is compatible with a programme of measure that has been established to follow the norm or the programme of measure is subject to conditions to “....take or pay for compensating measures that will enhance the possibilities to comply with the norm to a not insignificant extent”. The activity or measure can also be allowed to take place “although it will hamper the possibilities to comply with the environmental quality standard short term or in a small geographical area, can be assumed to provide for significantly increased possibilities to comply with the standard on a longer term or in a larger geographical area”.¹⁶⁷

3.3.5.2 Other situations

The Environmental Code's rules of examining permits, approvals and dispenses for new activities are unique in Swedish environmental law. This because it is the only rule where it is in greater detail described how the Code's environmental quality standards will relate to prescribed for substantive examination rules. It should however be stressed that there is a number of other situations where an activity or measure can contribute to an environmental quality standard being exceeded, inter alia;

- When examining permits in connection with extension or amendment of permit given existing activity.
- When examining permit for not amended existing activity that is lacking of previously given permission.
- When reexamining a permit or condition for environmentally hazardous activities or water operations, after application or other initiative of authority alternatively after application of the permit holder.
- When withdrawing permit, approval or dispense and when prohibiting continued operations.
- When supervision authority decides upon injunctions or prohibitions.
- If a new or existing activity or measure affects the environment, without requirement for authority decision for permit, consultation or notification.

In all above mentioned cases, which all relates to the question of admissibility to engage in an activity, several rules in the environmental code are being actualized. Most

¹⁶⁷ Prop. 2009/10:184, p. 46 f

important in this context are the rules that aim at realizing the code's environmental quality standards.

3.3.5.3 Opportunity to review, withdrawal and ban on further activities

For a professional operator to engage in environmentally hazardous activities or a water activity, a permit¹⁶⁸ is in most cases required according to the Environmental Code.¹⁶⁹ After a permit has been granted and res judicata it becomes valid against everyone, as regards those questions that have been subject to examination in the verdict or decision of the authority of supervision. Permits have legal force or legal effect, against all public authorities, individuals and professional operators etc. This however creates no obstacle that certain regulations established by the government or an authority to "break through" current permit in a way that it "*...limited or combined with changed or new conditions, or withdrawn and continues activity forbidden*".¹⁷⁰

In Swedish law, the starting point is, permits issued under the Environmental Code, are valid for unlimited time, if nothing else is apparent from the individual conditions.¹⁷¹ According to the Environmental Code can and in certain situations shall¹⁷² a supervising authority review a permit as far as it is concerning a regulation "*...of the allowed production quantity or other similar regulation of the scope of the activity...*" and amend or withdraw conditions or other regulations or announce new such in a number of different situations. This is for example the case if at least ten years have passed from when the permit was announced, if new technique for measurement or estimation for pollution or other disturbance would bring significantly better presumptions for controlling the activity or if it through the activity has arose an inconvenience of essential significance that was not possible to foresee at the actual examination of the permit. But it could also be a situation where an activity "*...with some significance is contributing to an environmental quality standard being exceeded*".¹⁷³ According to the preparatory work it is not sufficient that there is a risk that an environmental quality standard can come to be exceeded for the latter ground for review to apply, but an actual infringement due to the whole activity as such also has to have taken place.

One limit with the review of the permit is that new conditions and other regulations cannot be so extensive that the activity cannot longer be conducted or that it will be

¹⁶⁸For permit and licensable activities is here also referred to activities that only require dispense or approval.

¹⁶⁹Environmental Code chapter 9 and 11

¹⁷⁰Environmental Code chapter 24 section 1

¹⁷¹Environmental Code chapter 16 section 2

¹⁷² In environmental code chapter 26 section 2 para. 2 it is stated that a supervising authority that "*...finds the conditions in a permit for environmentally hazardous activity or water activity not being sufficient and conditions in general exist...shall...apply for review or address the issue of changing or withdraw conditions without any further specific proposal for this...*".

¹⁷³ Environmental code chapter 24 section 5 According to the regulation on the water management chapter 6 section 5 para. 1 p. 2 a programme of measure shall among others contains "*measures to the extent that is necessary to reach a review of a permit for or conditions for environmentally hazardous activity and water activity*".

considerably more difficult.¹⁷⁴ According to the Code's preparatory work it has to concern "...*very restrictive regulations that is almost equivalent to that the activity cannot longer be conducted.*"¹⁷⁵ If all mentioned criteria are fulfilled, the supervising authority can announce stricter conditions than earlier prescribed. The level of requirement is though established by using the Code's rules of consideration.¹⁷⁶

In cases where a current environmental quality standard is being exceeded, but for some reason there is no possibility to request a review of an already approved, unlimited permit, there are only limited opportunities to ban further activity. This is for example the case if the person that applied for the permit has left a false statement of significance for the decision of the authority.¹⁷⁷

At a possible infringement of a current environmental quality standard it does not seem to be the legislator's intention that the authority of examination should be able to use the rule of withdrawing permits. The legislation, however, offers a possibility to withdraw the permit if it is necessary to fulfill Sweden's obligations followed by the member ship of the European Union.¹⁷⁸ According to the preparatory work this rule should be applicable when the union has forbidden the use of certain pesticides.¹⁷⁹ It is not clear whether the rule is applicable at an infringement of an EU law environmental quality standard. This since an oversight of such a standard a lot of times are caused by a large number of environmental affecting actors, while the standard itself does not entail a prohibition to engage in a certain form of activity or to take any specific actions. Adding to this uncertainty is the fact that in Swedish legislation there is no legally established obligation for an examination authority to decide upon withdrawal or prohibition.¹⁸⁰

3.3.5.4 Activities that do not require permit

Activities that do not require permits according Swedish law still have to fulfill the Code's general rules of consideration.¹⁸¹ With the exception for notification activities, no-licensable activities do not need any formal application.¹⁸² It can therefore be difficult for an operator to foresee what precautions can be expected on a more concrete level. Some guidance for which environmental requirements that are applicable is to be found in each respective water districts programme of measure, since it is here indicated how concerned supervising authority is suppose to relate to both licensable and

¹⁷⁴ Environmental code chapter 25 section 5 para 5

¹⁷⁵ Prop. 1997/98:45

¹⁷⁶ SOU 2005:113, p. 71.

¹⁷⁷ Environmental code chapter 24, section 3, pt 1 and 4

¹⁷⁸ Environmental code chapter 24, section 3, pt 7

¹⁷⁹ Prop. 1997/98:45, part 2, p. 255

¹⁸⁰ SOU 2005:113, p. 70 f

¹⁸¹ See chapter 2.3.2.1

¹⁸² What activities and operations that are obligated to be notified are further indicated by the Ordinance concerning Environmentally Hazardous Activities and The Protection of Public Health (Förordning (1998:899) om miljöfarlig verksamhet och hälsoskydd) and by the Ordinance on Water activity etc. (Förordning (1998:1388) om vattenverksamhet m.m.)

no- licensable activities and other operations.¹⁸³

As an example, under a programme of measure can be indicated what supervisory authorities and other national authorities have to do to overcome discharges from individual sewages. As example of concrete measures it is stated that the Environmental Protection Agency, in consultation with other provincial offices in the district, shall provide for data for, and develop binding regulations and/or other instruments so that discharges from individual sewages are reduced and that municipalities, in co-operation with concerned provincial offices, will develop water and sewage water plans.¹⁸⁴

Regarding the question which environmental requirements could be imposed on no-licensable activities (for example notification activities) it should be noted that there is a rule in the Environmental Code that gives national supervisory authorities a general opportunity/obligation to issue orders of precautions.¹⁸⁵ This regulation has no limitation in time and can be used for an unlimited numbers of authority inventions. Opportunity/obligation to issue orders of precautions are aiming at improving the compliance with the Code and its regulations, judgments and other decisions issued by virtue of the Environmental Code's provisions. For an order of precautions to be issued it must be clear that the decision does not aim at limiting a judgment or decision that has legal force and that the measures of precautions taken are not more intrusive than necessary in the individual case.¹⁸⁶

In addition to the general rule of precaution there is another provision in the Environmental Code that makes it possible for a supervisory authority to issue such urgent orders or prohibitions necessary in order to avoid health effects or serious damage to the environment.¹⁸⁷ This rule, which is also applicable for licensable activities, can come to use when an operator has neglected a regulation of prohibition on discharging waste water or solid matter or gas from land, buildings or structures etc. issued by the government.¹⁸⁸

¹⁸³ Environmental code chapter 5 section 6

¹⁸⁴ See for example *Åtgärdsprogram Västerhavets vattendistrikt 2009-2015*, Vattenmyndigheten Västerhavet, Länsstyrelsen Västra Götaland, p. 11 f.

¹⁸⁵ In the view of the rule in the environmental code chapter 5 section 3 and chapter 26 section 1 it can be argued that national supervising authorities not only have an opportunity to invoke the code's rules of precaution measures but also an obligation. This since it is indicated in the regulation it is stated that the authorities "...shall ensure compliance with the objectives of this Code and rules issued in pursuance thereof" respectively "...shall ensure compliance... environmental quality standards that are adopted... in connection with decisions concerning permissibility, permits, approvals, exemptions and notifications, supervision or the issuance of rules".

¹⁸⁶ Environmental code chapter 26 section 9

¹⁸⁷ Environmental code chapter 24 section 1 and chapter 26 section 9 para 4

¹⁸⁸ Environmental code chapter 9 section 4. See also chapter 9 section 5, in where it is stated that "...the Government may, where this appears more appropriate than issuing decisions in individual cases, issue rules in cases other than those referred to in section 4 laying down prohibitions, protective measures, restrictions and other precautions relating to environmentally hazardous activities".

3.4 Programmes of measure as legal instruments

3.4.1 The Swedish regulatory regime

In the Instrument of Government (regeringsformen 1974:152), the one out of the four fundamental laws that regulates the state's constitution, laws and other regulations etc. it is stated that the right to issue acts of legislation belongs to the Riksdag, the representative of the people.¹⁸⁹ The government which is accountable to the Riksdag, has the primary responsibility for the actual enforcement of the laws.¹⁹⁰

According to the Instrument of Government provisions concerning the relations between private subjects and the public institutions which relate to obligations incumbent upon private subjects, or which otherwise encroach on the personal or economic circumstances of private subjects, have to be regulated by law, in other words, regulations issued by the Riksdag.¹⁹¹ This means however no obstacle for the Riksdag to authorize the government to, with support of the Instrument of Government, issue regulations within several areas of law such as “protection for life, security or health”, nature conservation and environmental protection” or “plants and building environment”.¹⁹² When the Riksdag has authorized to the government to issue regulations in a certain question you can also in certain cases grant the government to transfer to a management authority or a municipality to further on issue regulations in the subject. This will be carried out by a so-called sub delegation.¹⁹³

3.4.2 The Swedish Law's programmes of measures in brief

According to the Environmental Code, the government or the authority and municipality that the government authorizes shall draw up and make decisions about programmes of measures “*for the compliance of an environmental quality standard*”.¹⁹⁴ As a starting point the law does not state any requirements for the public to draw up standardized programmes of measures if there is no certain need for such. An exemption for this general rule is the case for programmes of measures needed for protection of the Union's water status, since it according to the WFD has to be drawn up such document irrespective of a an environmental quality standard is being violated or not.¹⁹⁵ The documents, which will be established by the five national water authorities, have to be sufficient for current water quality standards to be achieved.

A program of measure *can* according to the Environmental Code cover all activities and measures that could possibly affect the possibilities to live up to current environmental quality standards and this regardless of the activities affecting the environment quality

¹⁸⁹ The Instrument of Government chapter 1 section 4

¹⁹⁰ The Instrument of Government chapter 1 section 6.

¹⁹¹ The Instrument of Government chapter 8 section 3.

¹⁹² The Instrument of Government chapter 8 section 7, pt 1 and 4

¹⁹³ The Instrument of Government chapter 8 section 11

¹⁹⁴ Environmental Code chapter 5 section 4-5

¹⁹⁵ The Regulation on the Water Management chapter 6 section 1

are licensable or not.¹⁹⁶ Moreover, the programmes are allowed to regulate also a larger geographical area than what is directly covered by the environmental quality standard that is at risk being violated, since also pollutions and disturbances outside the actual area of the standard tend to affect the possibility to live up to clear indicated guiding and limit values.¹⁹⁷

Within the framework for a program of measure *shall* be indicated whom any environmental quality standards that the document aims to achieve, which measures have to be taken in this context, which municipalities and/or authorities that will have to see that the standards are being realized and also a given time frame for the procedure. The programme of measure also has to contain the information otherwise needed according to EU law.¹⁹⁸ In addition, the programmes of measures should contain information on how the requirements for improvements should be distributed between the polluters that affect the possibilities to meet environmental quality standards and between different measures. If a programme is related to a limit value, it shall contain information of what improvements are expected from each measure and how the measures together are expected to contribute to the standards being complied with. A programme of measure will also contain an analysis of how the measures are intended to be financially funded.¹⁹⁹

3.4.3 The design of the documents on the Water law area

Besides the Environmental Code's general requirements on what a program of measure shall or should contain, the Regulation on the Administration of the Quality of the Water Environment imposes a number of aspects that otherwise needs to be included to protect the water courses within the union. According to the regulation it shall among other things be précised what measures needs to be taken to establish water protection areas, or otherwise protect drinking water, for achieving reviews of permits or terms for environmentally hazardous activity and water activities and also for preventing or regulate diffuse emissions of contaminated subjects. Besides it is indicated especially that programmes of measure for protection of water quality standards also have to contain such measures and references that follow from the regulations in the WFD, for which the Regulation on the administration of the quality of the water especially make reference to.²⁰⁰

Despite the fact that in the Environmental Code and it's special law it is indicated what aspects that need to be considered within the framework for a program of measure, guidance is lacking when it comes to the question how concrete designed the programmes need to be. This is something that is apparent from each respectively water district's, in which are established 37 alternately 38 measures that indicated

¹⁹⁶ Environmental Code chapter 5, section 6 and prop. 1997/98, part 2, p. 51

¹⁹⁷ Environmental Code chapter 5, section 1 paragraph 2

¹⁹⁸ Environmental Code, chapter 5 section 5-6

¹⁹⁹ Environmental Code, chapter 5 section 6, see also prop. 2009/10:184

²⁰⁰ Regulation on the Administration of the Quality of the Water chapter 6 section 5

municipalities and authorities must take. These measures are common for all districts.²⁰¹

Within areas where a large number of the water courses already meet the objectives of the WFD, and where there is no reason to fear a detriment of the water courses, the programmes are in general relatively simple and standardized. In those cases where you have to take actions in several measures for meeting the standards of the WFD, or where there is a risk that the quality will impair, the proposals are in general more far reaching and detailed.²⁰²

3.4.4 Strategic or legally binding documents?

It is not clearly indicated in the Swedish environmental legislation which governing body will control and enforce the measures for a program of measures. Since the water authorities are responsible of establishing the programmes of measures, they are probably also responsible for the enforcement. The law, however, does not entail any sanctions for a water authority that does not operationalize the measures in time or which legal instruments are available when the document is not being complied with. Instead it is only indicated that authorities and municipalities, within respective districts, have a general obligation to take action in such measures needed for such a document.²⁰³ It can be mentioned as an illustrative example, that the municipalities are obligated to take into account the programmes of measures, in all their activities including plan and construction issues. There is no rule, however, that can force a municipality to adopt, amend or repeal a detail plan. This entails that a provincial office or water authority cannot impose municipalities who remain passive and consequently not designing land or water areas, to follow what is required in existing programmes of measures.

Individuals and operators can never be obligated to perform an action subject to a programme of measure, as well as is it not allowed for the public to let a programme of measure form the direct basis for an authority decision. Instead the obligations that are directed against private actors must always be manifested by general regulations or in a decision with a specific addressee and be based on substantial requirements, for example the general rules of consideration. However, programmes of measure are not in all ineffective in relation to private entities, since these documents indirectly form a base for the judgment made in connection with the plausible assessment that is describing the level of ambition for the application of the general rules of consideration.²⁰⁴ After the amendment of the rules on the general rules of consideration, the link between the former and programmes of measures has been made stronger since it is now stated in the legislation that they are to be used as guidance for which

²⁰¹ Björkman, Ulla, *Uppdragsrapportering: "Åtgärdsprogrammets styrande styrande effekt med hänsyn till regeringsformen"*

²⁰² See "Läshänvisning – åtgärdsprogram I Västerhavets vattendistrikt", *Förslag till åtgärdsprogram for Västerhavets vattendistrikt. Samrådsmaterial för perioden 1 mars – 1 september 2009*

²⁰³ Environmental Code chapter 5 section 8, see also prop. 1997/98:45, part 1, p. 260 and 271 and Annex 1, p. 463 f

²⁰⁴ SOU 2005:113, p. 75 f.

requirements that can be set in order to comply with environmental quality standards.

Based on the discussion that has now taken place it can be concluded that municipalities and authorities are obligated to comply with the substantial requirements that are indicated in a programme of measure. Where the binding obligation lies is not clear, where in general there are no sanctions or when a programme of measures is not complied with.²⁰⁵ Another problem is that municipalities and authorities in Swedish law solely have right to take actions provided for in the programmes of measures in cases where there is a legal ground for the action. In other words the action must be based on an administration decision that will impose on the individual municipality or authority to take action so that the programmes can have real effect. In the environmental special legislation it is not uncommon that such references are missing why sometimes authorities and municipalities see themselves forced to refrain from implementing measures which they have been imposed to carry out. It can therefore be questioned if it is not more appropriate to see programmes of measures as being strategic planning documents, or means to achieve current environmental quality standards, rather than being binding plans of action.²⁰⁶

²⁰⁵ See thus Planning and Building Act chapter 12 sections 1 point 3, where it is indicated that Provincial Office will try the municipality's decision to approve, amend or withdraw a detailed plan if there is a risk that the decision might mean that an environmental quality standard according to Environmental Code's chapter 5 is being violated.

²⁰⁶ SOU 2005:113, p. 75 f and NV rapport 5489, p. 47

4 The Dutch Implementation

This chapter of the thesis contains information about the complex system of the water legislation in the Netherlands. The chapter starts with the Dutch regulatory regime providing for the basis of the establishment of the Dutch water management. The main actors in this area will be presented and their respective tasks as well as the way in which the key issues of the WFD have been implemented by the Dutch legislator and are being enforced by the National government.

4.1 A brief description of the Dutch regulatory regime

The Dutch water legislation is not specifically mentioned in the Constitution Act (Grondwet voor het Koninkrijk der Nederlanden van 24 augustus 1815), but the Constitution Act states that “*It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment*”²⁰⁷. It is also worth mentioning that “*the authorities shall take steps to promote the health of the population*”.²⁰⁸

The actual drafting of legislation takes place in several ways in the Dutch legal system. Legislation is made by the Parliament and the Government together in an Act of Parliament. Implementing rules are drafted by the Parliament in an Order in Council (Algemene Maatregel van Bestuur), or by individual ministers (Ministeriële Regelingen). The power of drafting legislation is laid down in the Constitution Act, where the power is jointly given to the Government and the Parliament.²⁰⁹ A bill becomes an Act of Parliament once it has been passed by the States General and ratified by the King.²¹⁰ The power to make Order in Council is given to the Parliament and is considered and decided upon by the Council of Ministers, and these Orders in Council are also to be signed by the King and the Ministers involved.²¹¹ In general, all legislation has to be hierarchically related so that lower ranked legislation can never be in conflict with higher ranked legislation and rules. The courts consider themselves to be authorized to answer questions relating to hierarchy, as long as they do not test the Acts of Parliament against the Constitution, which is prohibited by the Constitution.²¹²

4.2 The national Water Management

The Netherlands is a country that is historically associated with water management and the country consists of an area for which the water protection planning is of vital

²⁰⁷ The Constitution Act art 21

²⁰⁸ The Constitution Act art 22

²⁰⁹ The Constitution Act art 81

²¹⁰ The Constitution Act art 87

²¹¹ The Constitution Act art 89

²¹² The Constitution Act art 120

importance for its survival. A very large part of the country lies below sea level, protected by dykes, and a large part of the countryside is constructed by the people themselves (polders). It goes without saying that the high population density, combined with an economy largely based on transport, navigation and ports, results in pressure on the environment, which has to be managed carefully.

When transposing the WFD, at first, no new legislation was introduced in the Netherlands. Before the introduction of the new integrated Water Act (Wet van 29 januari 2009, houdende regels met betrekking tot het beheer en gebruik van watersystemen), the regulation of the water management system had a more decentralized approach where a lot of responsibility was given to the provinces and municipalities. In 2004, the State Secretary of Transport, Public Works and Water Management publicized their intention to integrate the heavily fragmented water management legislation.²¹³ Moreover there was a strong opinion that the new Water Act should lead to better integration with the spatial planning.²¹⁴ The Water Act now in force does not regulate water management in every detail and will not result in a complete integration of water legislation and some rules will be regulated in secondary legislation. The rules concerning environmental quality standards will for example be regulated by the Environmental Management Act (Wet van 13 juni 1979, houdende regelen met betrekking tot een aantal algemene onderwerpen op het gebied van de milieuhygiëne), hereafter, EMA.²¹⁵ Wastewater and drinking water management will not be regulated in the Water act, but instead will be regulated by the Drinking Water Act (Wet van 18 juli 2009, houdende nieuwe bepalingen met betrekking tot de productie en distributie van drinkwater en de organisatie van de openbare drinkwater voorziening) and the EMA.

4.2.1 Affected Waters

To comply with the river-basin approach in the WFD, the Dutch water management is based on this approach, now containing four river-basin districts; Maas, Schelde, Eems and Rijn rivers, which together form a geographical and hydro-logical basis for the national water management.²¹⁶ The borders of the River Basin Districts are laid down in an Order in Council, the Water Decision (Besluit van 30 november 2009 houdende regels met betrekking tot het beheer en gebruik van watersystemen), based on the Water Act, in which the ground waters in the districts are assigned.²¹⁷ Both the Noordzee and Waddenzee also fall within the scope of the Water Act. Each of these four river-basin districts is part of international river-basin districts.²¹⁸ Every river-basin district is surrounded by District Water Boards (Waterschappen), each of them organizing a sub-

²¹³ TK 2003-2004, 29 694, nr 1

²¹⁴ TK 2006-2007, 30 818, nr 3

²¹⁵ The following acts are being integrated in the Water Act; Wet op de Waterhuishouding, Wet op de Waterkering, Grondwaterwet, Wet verontreiniging Oppervlaktewateren, Wet verontreiniging Zeewater, Wet van 14 Juli 1904, Wet beheer Rijkswaterstaatwerken, Waterstaatswet 1900

²¹⁶ Water Act art 1 (2)

²¹⁷ Water Decision art 1 (2) para 1 and Annex 1

²¹⁸ WFD art 3 para 3

basin. There are now 25 sub-basins, and therefore also 25 water boards (Waterschappen), which were all clustered into four river-basin districts when implementing the WFD.

4.2.2 Major water operators and their competences

There are a great number of organizations involved in the tasks within the water management, which creates a rather complex organizational scheme. Another typical signification of the water law area is that the water management is carried out with a strong decentralized approach, which has bearing in a tradition typical for the Netherlands, not solely for water legislation in general.²¹⁹

The Dutch implementation of the WFD is managed by the national government, where the formal competent authority from 2010 is the Ministry of Infrastructure and the Environment. The Ministry of Infrastructure and the Environment consists of policy departments and executive departments, as well as the Directorate-General for Public Works and Water Management (Rijkswaterstaat), the Transport, Public Works and Water Management Inspectorate and the Royal Netherlands Meteorological Institute.

The Dutch water management and the Water Act are based on a clear distinction between larger and smaller waters.²²⁰ Larger waters (Rijkswateren; rivers, canals, lakes and coastal waters) are being run at a national level and smaller on a regional level.²²¹

The Ministry of Infrastructure and the Environment, as well as the Minister of Agriculture, Nature Conservation and Food Quality and the Minister of Housing, Physical Planning and the Environment, are responsible for national water planning and policy. Together these authorities draw up a strategic national water plan (het Nationaal Waterplan²²²) for the four river-basin districts containing the main elements of national water policy and the associated aspects of national spatial policy.²²³ The main elements are according to the legislation an indication of the desired development of the water and the four different river-basin management plans.²²⁴ The national authorities will designate water bodies in the main water courses as artificial, heavily modified or natural.²²⁵ Besides the drafting of strategic plans, the Ministry is also in charge of drawing up operational plans for the main water courses in every river basin district. This also includes the drafting of programmes of measures in the context of the WFD.²²⁶ The draft of the national water plan will be published for the public view for a

²¹⁹ Marleen van Rijswijk and Herman Havekes, *Waterrecht in Nederland*, (Kluwer 2010), p. 48

²²⁰ Water Act art 4

²²¹ The main waters under national management are pointed out in Annex II of the Water Decision (Bijlage II van het Waterbesluit)

²²² The national water plan can be viewed at: <http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2009/12/01/nationaal-waterplan-2009-2015%5B2%5D.html>, accessed at 2011-10-

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²²³ Water Act art 4 (1)

²²⁴ Ibid

²²⁵ Water Decision art 4 (5) para 1 (b)

²²⁶ Water Decision 4 (6) para 4

period of six months.²²⁷ Before drafting the water plan, the Ministry consults the representatives from the Provinces, Water Authorities and the Municipalities, respectively the competent authorities of other states than the Netherlands in the river basin districts.²²⁸

On a regional level, strategic regional plans (Regionale Waterplannen) are drawn up by the Provincial Executive.²²⁹ The strategic plans will contain the main elements of the water policy and the associated aspects of the provincial spatial policy.²³⁰ In these plans, the provinces designate the water bodies in the regional water courses as artificial, heavily modified or natural.²³¹ In earlier water legislation the task of designating was left to the Water Boards. According to the legislator the change is made because the assessment of water bodies is connected with the setting of norms, which should be performed at a national level.²³² The Water Boards presents a suggestion for the designations of water bodies, which in practice still give those lots of power in the area.²³³ Once a regional plan has been established by the provinces, the regional plan has to be submitted to the Ministry.²³⁴ The regional water plans further contain an operational plan, which includes the drawing of programmes of measures.²³⁵ As for the case of the national water plan, the regional plan is not aimed at creating legal consequences.²³⁶

The Water Boards are responsible for establishing an operational management plan (Beheerplan) for the water courses they are responsible.²³⁷ In the case of regional waters, such a plan shall take into account the regional water plan regarding those regional waters and, where there is or could be a relationship between the water systems concerned, must guarantee the co-ordination of the management plans with other water authorities. The management plan shall include a program of measures and provisions that, supplementary to and elaboration of that included in the national or regional plan regarding the measures necessary for the development, operation and protection of national or regional waters respectively, including the corresponding timetables for such.²³⁸

All plans under the Water Act will be revised every six years²³⁹ and have to become subject to public consultation.²⁴⁰ The municipalities have tasks in the field of urban water management and are in charge of drawing up water sewage plans.²⁴¹

²²⁷ Water Decision 4 (1) para 1

²²⁸ Water Decision 4 (4) para 1(a-c)

²²⁹ Water Act art 4 (4)

²³⁰ Ibid.

²³¹ Water Decision art.4 (9) para 1

²³² TK 2006-2007, 30 818, nr 3 p. 36-37

²³³ Interview with Diedrik van de Molen, Utrecht 2010-04-23.

²³⁴ Water Act art 4 (5) para 1 pt 2

²³⁵ Water decision art 4 (9) 1

²³⁶ TK 2006-2007, 30 818, nr 3

²³⁷ Water Act art 4 (6) Para. 1

²³⁸ Water Act art 4 (6) para 2

²³⁹ Water Act art 4 (8)

²⁴⁰ Water Act art 4 (3) and (5)

²⁴¹ EMA art 4 (8)

In December 2009, the Dutch Cabinet adopted the national water plan. This plan outlines the policy that will be implemented in the period 2009 to 2015 and is based on the integrated water act that went into force on 22nd December of 2009.

The following picture shows all water plans and which level they are decided upon:

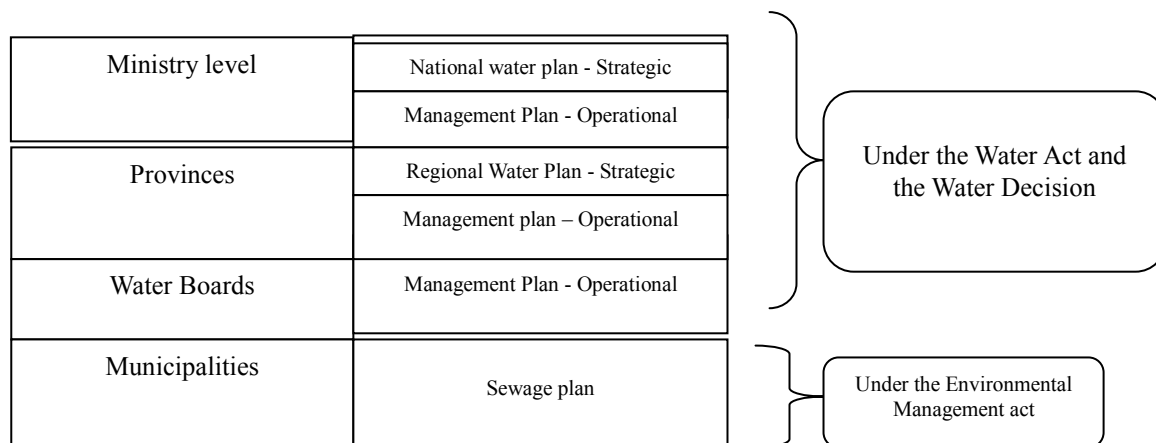


Fig 4. Simplified picture over the operators and their competence in the Dutch water management, source: the Water Act, chapter 4.

4.3 The objective of a good water status

4.3.1 Good water status and its relation to environmental quality standards

The Dutch interpretation, on how to interpret the WFD’s good water status obligation and how the interpretation can affect the realization of other environmental objectives of the WFD, has been a long and ongoing discussion.

The objective of achieving a good water status in 2015 is mentioned neither in the Environmental Management Act nor in the Water Act. However, the Water Act recognizes that one of the purposes and objectives of the act is to protect and improve the chemical and ecological status of the water systems, which is the same wording as in the WFD.²⁴²

The objective of achieving a good water status for water bodies in 2015 is elaborated in the Order in Council that will establish the environmental quality standards for all Dutch water bodies. In the Order in Council it is stated that “*when establishing the national water plan, the management plan for the national waters, a regional water plan or a management plan for the regional waters, it is for each competent authority and the surface water bodies within their territory to observe the following objective: as*

²⁴² See Water Act art 2 (10) and WFD art 4 (5)

*of December 22, 2015 a good surface water state is reached.*²⁴³ [author's own translation].

The Dutch legislation recognizes the environmental quality standards as tools to be used towards the realization of the objective of a good water status.²⁴⁴ This can be seen in this simplified schedule of the relationship between the objective of a good water status and environmental quality standards.

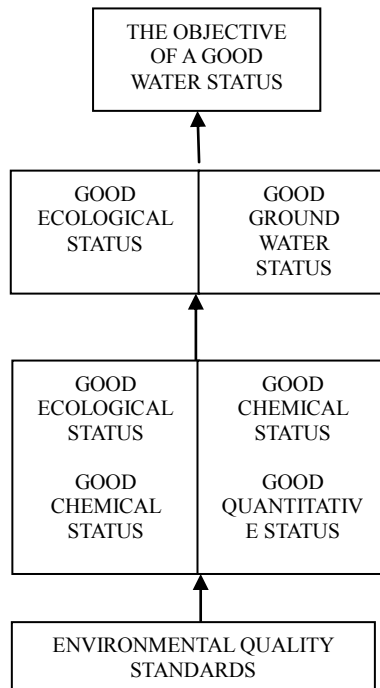


Figure 5. The relationship between the objective of a good water status and national environmental quality standards in Dutch water policy

²⁴³ Order in Council on Environmental Quality Standards for Waters art 4 (1)

²⁴⁴ E-mail conversation between Author and Marjolein Van Rijswijk, May 2010

4.3.2 Good water status – an ultimate environmental objective or a requirement for long-term measures?

There has been a long discussion on whether the good status obligation should be seen as an obligation of result or as an obligation of best efforts.²⁴⁵ The legal qualification can have consequences for the implementation of the WFD. If a member state uses best effort as legal qualification for the good status obligation, it is obliged to use the most suited measures and to do its best to reach the objective.²⁴⁶ If obliged measures are taken, without the result being achieved, the member state has still fulfilled its obligation. Since the Member States are obliged to use suitable measures to reach a wanted result, there is nothing that implies that a member state that uses best efforts as legal qualification would not be serious in its work to reach environmental objectives.²⁴⁷ If instead the legal qualification for the good status obligation is an obligation of result, it is crucial that the aimed result is achieved within the set time limit.²⁴⁸ In the Netherlands, legal experts are of the opinion that the good water status obligations are obligations of result and suggest qualifying the environmental objectives as limit values.²⁴⁹ The Dutch government considers the good status obligations to be obligations of best efforts and that the environmental objectives can be qualified as limit values.²⁵⁰

4.4 Environmental quality standards as legal instruments

4.4.1 Environmental quality standards in Dutch legislation

The Environmental Management Act, EMA, which is the most central act in the field of environmental law in the Netherlands, provides the legal basis for the establishment of environmental quality standards. The standards are laid down in an Order in Council “*in the interests of environmental protection, and so far as this is more than provincial concern, requirements may be laid down by Order in Council regarding the quality of parts of the environment from a date to be stated therein.*”²⁵¹ [Authors own translation].

The preparatory work for this act describes the concept of environmental quality standards as “*requirements concerning the quality of parts of the physical environment, indicating which condition the concerning parts should have reached within a determined timeline.*”²⁵² The standards are set on a national level. However, it is also possible to establish environmental quality standards based on a Ministerial Order or a

²⁴⁵ Van Rijswick and Havekes, *WATERRECHT IN NEDERLAND* 198

²⁴⁶ Van Rijswick and Havekes, *WATERRECHT IN NEDERLAND* 198

²⁴⁷ Ibid 198

²⁴⁸ Ibid 199

²⁴⁹ Interview with Marleen van Rijswick and Andrea Keessen, Utrecht University (Utrecht, 22 January 2010)

²⁵⁰ Interview with Marleen van Rijswick and Andrea Keessen, Utrecht University (Utrecht, 22 January 2010) and see also Nota van Toelichting bij Besluit kwaliteitseisen en monitoring water 2009

²⁵¹ EMA art 5 (1) para 1

²⁵² TK 1999-2000, 27 023, nr 3

Provincial Order if the particular interest in question is on a provincial level.²⁵³ This possibility has not been used in the Netherlands so far. An environmental quality standard can only be established in an Order in Council for a maximum of eight years.²⁵⁴

The EMA recognizes the distinction between the two legally binding environmental quality standards, namely, limit values and guiding values. The Order in Council laying down the standards, will state whether the established environmental quality standards are regarded as limit values or guiding values.²⁵⁵ A limit value states the quality which must at least have been achieved at a time specified in the Order in Council and which, once it has been achieved, must at least be maintained.²⁵⁶ A guiding value requires the quality which should as far as possible be achieved at a time specified in the Order in Council.²⁵⁷ Once the quality is achieved it should be maintained as far as possible. Therefore, when the authorities are establishing water plans they have to observe any limit value and take any guiding value into account.²⁵⁸

The difference between limit and guiding values is that deviation from a guiding value is possible and when this does appear, a duty of motivation is applied.²⁵⁹ In practice, this means that when an exercising authority is establishing a water plan or decides on programmes of measures, they have to take the relevant applicable environmental standard into account. If it concerns a guiding value, deviation is possible in certain situations. The legislator did not further explain what these important reasons might be. Compliance with the WFD however requires that only the exceptions mentioned in the WFD can be invoked.

When establishing environmental quality standards for the Dutch water quality, question was if they should be legally qualified as limit or guiding values. Since it was considered that the WFD establishes an obligation of result as legal qualification for the good status obligation it was advised that limit values should be used. The Dutch government wanted to make use of the exemptions in the WFD, which was considered impossible if limit values according to the EMA were used.²⁶⁰ According to the EMA, only guiding values offer the possibility to deviate from a set standard.²⁶¹ To make sure it would be possible to make use of the exemptions in WFD, the environmental quality standards were qualified as guiding values. It was assumed that this choice would lead to needed flexibility according to the Dutch legislator.²⁶²

Since the implementation of the WFD, Dutch legislators have wanted to amend the EMA to better comply with the terminology of the WFD.²⁶³ In 2010, a third type of

²⁵³ EMA art 21 (6) and 5 (4) and (5)

²⁵⁴ EMA art 5 (1) para 5

²⁵⁵ EMA art 5 (1) para 3

²⁵⁶ EMA art 5 (1) para 3 (a)

²⁵⁷ EMA art 5 (1) para 3 (b)

²⁵⁸ EMA art 5 (2) para 1

²⁵⁹ EMA art 5 (2) section 4

²⁶⁰ Interview with Diedrik van der Molen, (Utrecht, 23 April 2010)

²⁶¹ See EMA art 5 (1) and (2)

²⁶² TK 2009-2010, 32 427, nr 2

²⁶³ TK 2009-2010, 32 427, nr 2

standard which would conform better to EU-legislation was established. When the new type of “EU standard” is used, the Dutch authorities can only deviate from the standard, if this is in accordance with the specific EU law.²⁶⁴ It is assumed that this amendment in the legislation will lead to greater clarity and legal certainty. The amendment is not intended to make any difference in terms of rights and obligations and does not require any additional burden on authorities and business.²⁶⁵

4.4.1.1 The no-deterioration principle

The EMA establishes the legal basis for the principle of no-deterioration of the existing quality of the environment. No-deterioration should occur, concerning the quality of all waters, unless this is caused by one of the reasons mentioned in the exemptions laid down in article 4 in the WFD.²⁶⁶

The assessment for deterioration of water quality will not be rated at the start of every planning period, starting in 2009.²⁶⁷ Therefore, in 2015, it will be assessed if any deterioration of the water quality has occurred, compared to the situation in 2009. This is in order to prevent the status assessment from being influenced by occasional circumstances.²⁶⁸ What is argued and implemented by the Dutch legislator is that the chemical status is not allowed to deteriorate at all. Concerning the no-deterioration of ecological status, the situation is more complicated, since the status is divided into different status classifications. No-deterioration could therefore mean that some deterioration could be allowed, as long as the status of the water does not reach a new lower status class. In the Netherlands, deterioration will be assessed across status class and per water body.²⁶⁹ This does not mean that every minor change in the water quality, such as a barely measurable increase of a specific substance in the surface water, has to be considered as deterioration.²⁷⁰

An interesting question related to the principle of no-deterioration is whether deterioration can be compensated through improvements elsewhere in the river basin district. The Order in Council does not mention whether the deterioration in a specific water body can be offset by improvements in other water bodies or in the whole river basin district. However, the explanatory note of the legislation is discarding the possibility of the legislation to be interpreted this way. Deterioration of the status class of a single water body can under certain circumstances be allowed if it would lead to a significant improvement of the water quality elsewhere in the river basin district.²⁷¹ Since the EMA strictly prohibits any deterioration, some uncertainty on whether the Order in Council lives up to the EMA exists.

²⁶⁴ EMA 5 (1) para 3 (c) and TK 2009-2010, 32 427, nr 2

²⁶⁵ TK 2009-2010, 32 427, nr 2

²⁶⁶ EMA art 5 (2) (b)

²⁶⁷ Order in Council on Environmental Quality Standards on Water art 16 (1)

²⁶⁸ Nota van Toelichting bij Besluit kwaliteitseisen en monitoring water 2009, p.33

²⁶⁹ Order in Council on EQS for Waters art 16 (1) and (2) in conjunction with EMA art 5 (2) (b) (4)

²⁷⁰ Nota van Toelichting bij Besluit kwaliteitseisen en monitoring water 2009, p. 33

²⁷¹ Ibid, p. 3

It is in the EMA indicated that “*if in an area where an environmental quality standard applies, the environmental quality is better than the quality that occurs in the environment, the quality applies instead of the requirements required*”.²⁷² As a result from the application of the environmental quality standards, the quality of the environment can never be impaired. It is still to be answered if this view is supported by the no-deterioration in the EMA.

4.4.2 Environmental quality standards in the field of water law

As previously described, the legal basis for establishing environmental quality standards is found in the Environmental Management Act. The environmental quality standards for the water bodies within the Dutch river basin districts and the monitoring obligations is regulated in detail in the Order in Council on Environmental Quality Standards for Water and Monitoring Water (Besluit van 30 november 2009, houdende regels ter uitvoering van de milieudoelstellingen van de kaderrichtlijn water (Besluit kwaliteitseisen en monitoring water 2009)), based on the EMA.²⁷³ The legal standards based on the Water Act for the quality of water, both good ecological and chemical status, refer directly to Article 4 of the WFD.²⁷⁴ Here standards are laid down for both chemical and ecological water statuses.²⁷⁵

The legislator has chosen to establish guiding values as environmental quality standards.²⁷⁶ As a consequence of the amendment of the EMA, the current Order in Council will have to be amended in accordance to the EMA.²⁷⁷ This is because, as recently explained²⁷⁸, the EMA only used to provide for the two different legal qualifications of environmental quality standards. As the EMA is now formulated, the legal qualification for the Order in Council for Water Quality Standards (since based on EU legislation) will be based on the amended type of standard.²⁷⁹ It is assumed that the amendment will not lead to any practical changes. Is rather a formal change that makes the Dutch legislation to conform better to EU terminology and provide for legal certainty.

Guiding values - legal status

The environmental quality standards are legally qualified as guiding values which means that there may deviations from the requirements but only on the ground of the possibilities laid down in WFD Art 4, which have all been transposed into the Dutch legislation.²⁸⁰ These deviations have to be motivated. Since the quality standards have been established in accordance with EU legislation and deviations may only occur

²⁷² EMA art 5 (2) para 3

²⁷³ EMA art 5 (2) (b)

²⁷⁴ Water Act art 2 (10)

²⁷⁵ EMA art 5 (2) (b) and Water Act art 2 (11)

²⁷⁶ See for example: Order in Council on Environmental Quality Standards for waters art 5 and 6

²⁷⁷ TK 2009/10, 32 427, nr 2

²⁷⁸ See section 4.4.1

²⁷⁹ EMA art 5 (1) para 3 (c)

²⁸⁰ Order in Council on Environmental Quality Standards for Waters, art 2

according to set European legislation it could, however, be more relevant to talk about limit values, in a European law context. As mentioned in the section above, the Order in Council on Environmental Quality Standards will shortly be changed to comply with the new amendment in the EMA.

Environmental quality standards– Status Classification

The good ecological status concerns all waters classified as natural, and not for those classified as artificial or heavily modified.²⁸¹ The lowest class established for the chemical and ecological status will determine the overall status for the surface water body.²⁸² There are two classes for chemical status; good or not good.²⁸³ There are five classes for the good ecological status (for natural water bodies); very good, good, moderate, insufficient and bad.²⁸⁴ There are four classes for ecological potential (for artificial or heavily modified the water bodies), good, moderate, poor or insufficient.²⁸⁵

The process of the status classification can be viewed in this simplified schedule:

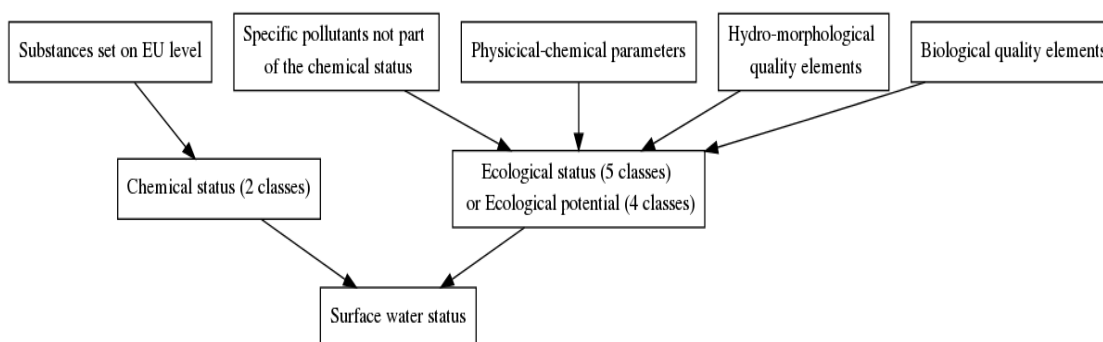


Figure 6: Simplified schedule of the status classification for surface water bodies. Source: Explanatory Note on Order in Council for Environmental Quality Standards for Waters

Environmental Quality Standards- Surface water bodies

When establishing the national water plan, the management plan for the national waters, a regional water plan or a management plan for the regional waters, each respective appointed authority has to keep the following environmental quality standard into account; by the 22nd of December a good surface water status will be reached.²⁸⁶ A good status for surface water bodies implies that both the chemical and the ecological status of the water body have to be classified as good.²⁸⁷

²⁸¹ Order in Council on Environmental Quality Standards for Waters art 6 (1)

²⁸² Order in Council on Environmental Quality Standards for Waters, art 16 (3)

²⁸³ Order in Council on Environmental Quality Standards for Waters, art 16 (3)

²⁸⁴ Order in Council on Environmental Quality Standards for Waters, art 16 (5)

²⁸⁵ Order in Council on Environmental Quality Standards for Waters, art 16 (5)

²⁸⁶ Order in Council on Environmental Quality Standards for Waters, art 4 (1)

²⁸⁷ Order in Council on Environmental Quality Standards for Waters, art 4 (2)

Ecological status

The good ecological status is determined by generally defined standards for biological elements (such as fish) and their general physical-chemical quality (including specific pollutants that are not part of the chemical status) and hydro-morphological characteristics (such as flow). Here the Dutch legislation refers directly to the definitions in the WFD.²⁸⁸ The quality requirements in the WFD and the environmental quality standard “good ecological status” are guiding values.²⁸⁹

Chemical status

Good chemical status for surface water bodies is exclusively determined by substances established on Union level.²⁹⁰ These environmental quality standards established on EU level together with the environmental quality standard “good chemical status” are legally qualified as guiding values according to the Dutch legislation.²⁹¹

Ground waters

When establishing a regional water plan, each respective appointed authority has to keep the following guiding value into account; that by the 22nd of December 2015 a good ground water status will be reached.²⁹² Both the WFD and the European Framework for Groundwater²⁹³ bodies contain provisions related to ground water bodies within the Union. For a Dutch ground water body to be able to reach the status good it has to reach a good quantity status as well as good chemical status.²⁹⁴

The environmental quality standard “good chemical ground water standard”, those environmental quality standards from the Groundwater Directive transposed into the Order in Council²⁹⁵ and those threshold values set on national level²⁹⁶ are all guiding values.²⁹⁷ The environmental quality standard “good quantitative status” and the threshold values in WFD are guiding values.²⁹⁸

²⁸⁸ Order in Council on Environmental Quality Standards for Waters, art 6 and WFD Annex V section 1.2 tables 1.2.1 to 1.2.4

²⁸⁹ Order in Council on Environmental Quality Standards for Waters, art 4

²⁹⁰ See Order in Council on Environmental Quality Standards for Waters, art 5, Annex I and Directive 2008/105/EC of the European Parliament and of the Council of 16 December 2008 on environmental quality standards in the field of water policy, amending and subsequently repealing Council Directives 82/176/EEC, 83/513/EEC, 84/156/EEC, 84/491/EEC, 86/280/EEC and amending Directive 2000/60/EC of the European Parliament and of the Council

²⁹¹ Order in Council on Environmental Quality Standards for Waters art 4 and 5

²⁹² Order in Council on Environmental Quality Standards for Waters, art 7

²⁹³ Directive 2006/118/EC of the European Parliament and of the Council of 12 December 2006 on the Protection of groundwater against pollution and deterioration

²⁹⁴ Order in Council on Environmental Quality Standards for Waters art 7 Annex II, table 2

²⁹⁵ Order in Council on Environmental Quality Standards for Waters Annex II, table 1

²⁹⁶ Order in Council on Environmental Quality Standards for Waters art 7, Annex II table 2

²⁹⁷ Order in Council on Environmental Quality Standards for Waters art 7 and 9

²⁹⁸ Order in Council on Environmental Quality Standards for Waters and WFD Annex V

4.4.2.1 Environmental quality standards in relation to the Water plans

Environmental quality standards are exclusively used for designing the water plans on different levels in the Dutch water management.²⁹⁹ The environmental quality standards will create no further significant obligations than for the authorities establishing the water plans. This means that the specific environmental quality standards are inapplicable when it comes to individual decision-making such as discharge permits and admission decisions for pesticides or biocides. This is due to earlier bad experiences with a stronger link between the environmental quality standards and granting individual permits concerning the environmental quality standards for air quality.³⁰⁰ Since the water plans will transform the environmental quality standards into the package of required measures in the plans, linking the environmental quality standards to individual permits is unnecessary.³⁰¹ However, the Dutch legislation requires that water plans are taken into account, when decisions are being made, such as granting water permits.³⁰²

4.4.3 Environmental Quality Standards and their effect on the application on building and planning legislation

The relationship between the Water Act and the Spatial Planning Act

In the Netherlands, no general form of integration has been established with other policy fields. The environmental quality standards are explicitly not linked to the adoption of spatial plans because established environmental quality standards are exclusively linked to the authorities that will adopt the water plans.

Although no form of general integration is established in the Water Act, policy co-ordination is established towards the Spatial Planning Act (Wet van 20 oktober 2006, houdende nieuwe regels omtrent de ruimtelijke ordening (Wet ruimtelijke ordening)). For this purpose, the Water Act states that the national water plan shall contain the main elements of national water policy and the associated aspects of national spatial policy.³⁰³ The spatial aspects of the water plan will also constitute a structural plan (struutuurvisie).³⁰⁴ The structural plan contains the main features of the proposed development of the spatial planning.³⁰⁵ The authority responsible for establishing the specific water plan explicitly indicates what they consider necessary to be done within the area of spatial planning, in order to realize the environmental quality standards in the water policy.³⁰⁶ The same goes for the regional waters, where the Provincial Executive establishes regional water plans containing the main elements of the water

²⁹⁹ Nota van Toelichting bij Besluit kwaliteitseisen en monitoring water 2009, p. 11

³⁰⁰ Nota van Toelichting bij Besluit kwaliteitseisen en monitoring water 2009, p. 15.

³⁰¹ Nota van Toelichting bij Besluit kwaliteitseisen en monitoring water 2009, p. 11 and Interview with Mr Didriek Van der Molen, Utrecht, 10-04-23

³⁰² Water Decision art 5 (2) para 3 and art 6 (1) (a)

³⁰³ Water Act art 4 (1) para 1

³⁰⁴ Water Act art 4 (1) para 1

³⁰⁵ Spatial Planning Act art 2 (3)

³⁰⁶ Nota van Toelichting bij Besluit kwaliteitseisen en monitoring water 2009, p. 24

policy to be pursued in the province and the associated aspects of provincial spatial policy. In terms of spatial aspects, these plans will also constitute structural plans (struatuurvisies) as referred to in the Spatial Planning Act.³⁰⁷

In this context it is important to note that this integration takes place on the planning level, and that these plans are not legally binding, except for the local spatial plan. Therefore, it is more justified to talk about this integration as a policy instrument than a legal instrument.³⁰⁸

Spatial decisions and “the water test”

The Order in Council on Spatial Planning (Besluit van 21 april 2008 tot uitvoering van de Wet ruimtelijke ordening (Besluit ruimtelijke ordening)) is implemented for the enforcement of the Spatial Planning Act and plays an important role for the integration of the two policy areas.

The Order in Council on Spatial Planning provides an opportunity for the authority taking spatial planning decisions, for example local municipal spatial plans, to perform consultations with the water authorities concerning relevant water issues.³⁰⁹ This arrangement in the legislation ensures that the initiator which is the authority responsible of drawing up detailed plans, usually a municipal governing body makes contact with the responsible water management body. In several cases this will be the Water Authorities or/and Rijkswaterstaat, depending on if it concerns national or regional water bodies and/or the Provincial Office if the matter concerns groundwater.³¹⁰

It is expected that the competent water authority will indicate how the spatial planning may affect the water management and if so, how these consequences could be prevented or mitigated, or what criteria should satisfy the further elaboration for establishing the spatial plans.³¹¹ The water authority is here given a chance to indicate whether the spatial decision complies with water objectives such as current environmental quality standards. It is, therefore, the responsibility of the water manager to give a spatial translation to the mentioned criteria and the municipal governing body can assume that the water manager indicates what measures needs to be taken to prevent that the water quality will be put at risk.³¹²

When the adoption of the spatial plan will take place, it is also expected that the water manager will do active thinking with the municipality in the work of developing the spatial plans. At this stage the water manager and the authority drawing up the spatial plan should consider whether more research is needed for the possible impact of the proposed plan on the water quality if this is not already done in the water plan taken into account.³¹³

³⁰⁷ Water Act art 4 (4) para 1

³⁰⁸ Interview with Marleen van Rijswijk, Utrecht University, 2010-01-22

³⁰⁹ Order in Council on Spatial Planning art. 3 (1) para 1

³¹⁰ Nota van Toelichting bij Besluit kwaliteitseisen en monitoring water 2009, p.24

³¹¹ Ibid

³¹² Ibid, p. 25

³¹³ Ibid

The water authority will give its final opinion and advice on the final design for the detailed plan.³¹⁴ If the spatial decisions have been given a final opinion by a water manager, the municipal governing body can assume that no negative effects will occur for the water quality and the objectives given for the water policy, such as environmental quality standards given in the Order in Council for Environmental Quality Standards.³¹⁵

The Order in Council on Spatial Planning determines that a decision on a detailed plan for a municipality has to be accompanied with an explanatory note describing which considerations, due to water management, was taken into account when adopting the decision and what the outcome was from the consultations held on the earlier stage.³¹⁶ The note has to contain the advice given by the water manager and when the advice is not complied with, the municipality has to motivate why.

The water test can by its interaction between policy areas help the objectives in the water plans to be realized. It is, however, a horizontal measure and which does not have a binding function and serves only its purpose if there is a close link of co-operation between the two different policy areas. The fact that the water test does not have a binding force makes the instrument relatively soft.³¹⁷

³¹⁴ Ibid

³¹⁵ Ibid

³¹⁶ Order in Council on Spatial Planning art 3.1.6 para 1 (b) and (c)

³¹⁷ Interview with Marleen Van Rijsvick, Utrecht University, 2010-01-22

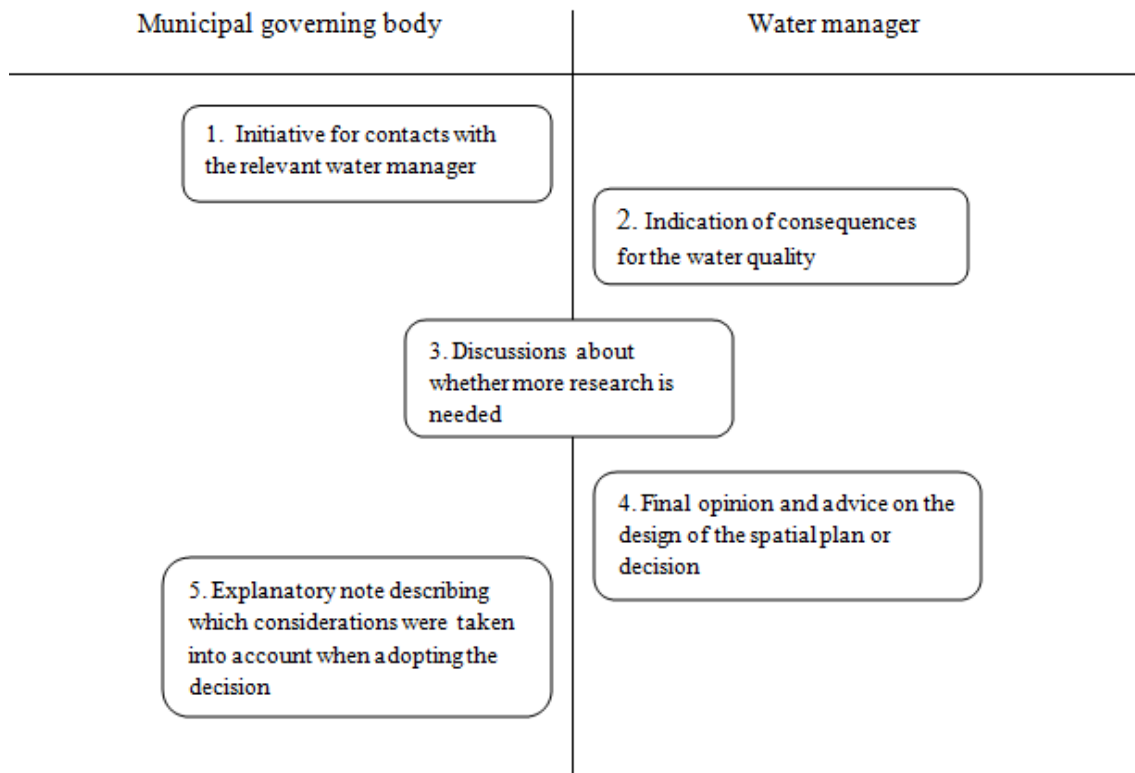


Figure 7: Simplified schedule: the Water test Source: the Water Act, the Spatial Planning Act and the Order in Council on Spatial Planning

4.4.4 Environmental quality standards and their effect on the application of the Water Act

This section of the thesis will put focus on the legal opportunities for the water managers in the Netherlands to enforce the standards regarding individuals and activities affecting the water environment.

4.4.4.1 Examination of permits, authorizations or exemptions for licensed activities

One of the important features of the Water Act is that many activities are governed by general regulations rather than individual permits. General regulations will show in advance what is permitted and what is not. It is, however, not possible to lay down all details in general regulations and the water legislation has its own permit system regulated in the Water Act which has introduced the new integrated single water permit. The water permit can be provided by the Ministry of Infrastructure and the Environment for the national waters and for regional waters by the Water Boards.³¹⁸

³¹⁸ Water Act art 6 (2)

When granting a permit to an activity, the granting authority has to take the all the relevant plans (the national water plan, the regional plans and the management plans) into account.³¹⁹ The term *take into account* does not share the same meaning as when guiding values have to be taken into account when establishing the water plans. In this case the term refers to a duty of motivation when deviation occurs.³²⁰

The Water Act contains the relevant provisions for granting permits for all activities in the Dutch water systems, where the permit system is based on the principle that all activities are prohibited unless authorization in form of a permit is granted for such activity.³²¹ Despite the fact that the water permit system is built on the principle of duty of authorization needed for all activities, certain activities are taken away from this duty, like performing maintenance and some smaller activities.³²² If a certain activity have dispensation from the obligation to hold a permit or does not have general rules³²³ prescribed for it, that activity still need to comply with the general duty of care. This duty of care means that anyone who makes use of a surface water body wherefore no permit is authorized and no general rules is prescribed for, shall be responsible for that such actions are carried out with no negative consequences for the safe and effective use of the surface water body and no negative consequences for the ecological status for the surface water body.³²⁴

A permit may be subject to restrictions or regulations and practices in violation of the permit are prohibited.³²⁵ There are also exemptions for a lot of activities that do not need to have a permit.

The Water Act provides for opportunities to refuse permits for certain activities that are in conflict with the purpose of the water legislation in the Netherlands since the act is stating that... "*a permit shall be refused if its issue would be incompatible with the objectives referred to in 2.1*".³²⁶ The objectives here referred to are among others the protecting and improving of the chemical and ecological status of water systems and allowing the water to fulfill societal functions.³²⁷ The wording *shall* indicate a strong duty for the competent authority not to give permits to activities that would harm the purposes of the Water Act. This stipulation is new in the water legislation and is an important improvement since it is referring especially to the interest of improving a water body's status. It is therefore yet to be seen how this rule will be applied by the authorities in practice. A water permit is denied if such provisions complied to the permit are incompatible with the objectives of protecting and improving both chemical and ecological status of the water systems.³²⁸

³¹⁹ Water Decision art 6 (1) (a) and the Water Act art 4 (1), 4 (4) and 4 (6)

³²⁰ Nota van toelichting Waterbesluit

³²¹ Water Act art 6 (2) para 1

³²² Water Act art 6 (7)

³²³ For more information on the general rules and their application: Memorie van Toelichting – Regels met betrekking tot het beheer en gebruik van watersystemen (Waterwet) TK 2006-2007, 30 818, nr 3

³²⁴ Water Decision art 6 (15) para 1 (a-c)

³²⁵ Water Act art 6 (20)

³²⁶ Water Act art 6 (21)

³²⁷ Water Act art 2 (1)

³²⁸ Water Act art 6 (21)

4.4.4.2 *Withdrawal of permits and prohibition of further activity*

The Water Act not only provides for the legal basis to refuse permits to activities that would be in conflict to the purpose of the act but also provides for a legal basis for the competent authority to withdraw a permit of an already permitted ongoing activity in some cases. The Water Act here states that a competent authority *may* revoke a permit in whole or in part if the permit has not been used for three consecutive years and *shall* revoke a permit in whole or in part “*in the event of circumstances or fact as a result of which the activity or activities for which the permit was granted is or are no longer considered permissible, taking into account the objectives and interests referred to in sections 2.1 and 6.11*”.³²⁹ The reasons here stated are the same as for the case when refusing a permit in the first place.

One question when examining the Dutch legislation on permits on the water law area is whether these legal possibilities are directly applicable if an environmental quality standard might be exceeded.

4.5 *Programmes of measures as legal instruments*

4.5.1 *Drafting and presentation*

The WFD does not request any particular format for the implementation of the programmes of measures in the national legislation. The Dutch environmental policy and legislation has its legal basis in the Dutch Constitution, where the Constitution charges the Government with the protection and improvement of the environment.³³⁰

The EMA provides general rules and grants permits although, regarding water legislation, the new Water Act plays an important role when granting water permits. The water plans, on different levels, play a great role in the Dutch water management. In the Netherlands a Programme of Measures can be found in the national water plan and the regional water plans as well as management plans drafted by central authorities, the provinces and the water authorities.³³¹ The measures that according to the legislation have to be laid down in the national water plan and the regional water plans are measures provided for in the WFD, the Directive for flood risks³³² and the Groundwater directive³³³³³⁴ The management plans have to at least contain the measures provided in

³²⁹ Water Act art 6 (22) pt 2

³³⁰ Constitution Act art 21

³³¹ Water Decision art 4 (6), 4 (11) and 4 (16) and Water Act chapter 4

³³² Directive 2007/60EC of the European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks

³³³ Ground Water Directive

³³⁴ Water Decision art 4 (6) para 1 (a-c) and art 4 (11) para 1 (a-c)

the WFD and in the Directive for flood risks.³³⁵

All the measures together constitute the programmes of measure in the Dutch water management.³³⁶ A summary of all measures taken are included in the river basin management plans and specific information can be found in the Annex to the river basin management plans.³³⁷ The drafting of programmes of measures are also found in the management plans at different levels where additional measures are described, expect for the more general ones taken at a national level. The programmes of measures are overall very concrete and detailed.³³⁸

The WFD determines that measures in the Programmes of measures have to be operational within 3 years after 2009.³³⁹ This statement is also implemented in the Dutch legislation, which states that the measures under the WFD concerning programmes of measures laid down in national water plans, regional water plans and management plans are operational within three years.³⁴⁰

4.5.2 Strategic or legally binding documents?

It is not mentioned specifically in Dutch legislation which governing body that control and enforce the programmes of measures. But since they are all part of the water plans It is only indicated that they have to be laid down in the water plans at different levels. Nor is it indicated which body is responsible for that the programmes are being followed and what will happen if they are not. What is clear is an obligation for each authority is obliged to carry out the measures in the RBMP's (and underlying plans) as far as they are responsible for it.³⁴¹ This means that the Programmes of measures in the plans are only binding for the authority that established the particular plan, and not for other authorities. A programme of measures cannot be appealed.³⁴²

When it comes to individuals and operators it must be stressed that these actors can never be obligated to act in a certain way just because the bare existence of programme of measures. Instead the enforcement of programmes is carried out strictly under the framework for water plans at different levels. When issuing permits in the Dutch water systems, the granting authorities have to take into account the water plans (containing the programmes of measures).³⁴³

To sum up, under Dutch law, programmes of measures will be binding in relation to national and municipal authorities (that established the water plan) since they have to

³³⁵ Water Decision art 4 (16) para 1 (a-c)

³³⁶ Water Decision art 4 (16) para 3, 4 (11) para 2, 4 (16) para 2 and 8 (1)

³³⁷ See for example the River basin management plan for Maas that can be found online at: http://www.helpdeskwater.nl/onderwerpen/wetgeving-beleid/kaderrichtlijn-water/uitvoering/nationaal/item_27248/, 2010-11-10

³³⁸ E-mail conversation between Author and Marjolein Van Rijswick, May 2010

³³⁹ WFD art 11

³⁴⁰ Water Decision art 4 (6), 4 (11) para 2, art 4 (16) para 2 and art 8 (1)

³⁴¹ Interview with Diedrik van de Molen, Utrecht 2010-04-23

³⁴² Interview with Mr Diedrik van de Molen, Utrecht 2010-04-23

³⁴³ Water Decision art 6 (1) (a)

act and comply with the substantial requirements in the programmes of measures, but not against private citizens and other environmentally important players.

5 Conclusions

The water legislation captured in the WFD adopts a holistic approach reflected in the river basin approach which aims at protecting and enhancing the water status of all water bodies in the Union regardless of water type or structure. Looking at the natural boundaries instead of the administrative or geographical ones is assumed to lead to more efficiency and better water quality throughout Europe. However, one has to bear in mind that the directive is just a framework and much is left to the Member States to decide regarding the implementation into the national legislation.

This following chapter will contain the analysis and comparison of the countries' different legal implementation of the main objects of the WFD. The chapter will be divided into sections following the structure set out above in which the key issues were described.

5.1 *The objective of a good water status*

There has been a discussion in both Sweden and the Netherlands on how the good status obligation should be interpreted and what legal status the objective should be given. As this thesis shows, the question is strongly related to the setting of environmental quality standards and their establishment and legal status.

5.1.1 **The objective in the national legislation**

The WFD states that all surface waters and ground waters must have attained at least good water status in 2015. To be able to reach this objective, several measures must be taken by the Member States. Besides the good status obligation, Member States must prevent deterioration from the current water status.

The WFD is not clear in explaining the legal status of the good water status obligation. Chapter 2 expressed that the WFD does not clearly indicate whether the objective of a good water status shall be considered as binding or not. There is strong evidence that the objective, at least in some parts, shall be considered as a binding environmental quality standard – for example the fact that Member States shall take all measures necessary in order to prevent deterioration of the water status.

The good status obligation itself has not been implemented in the Swedish legislation. Instead, the focus has been on designing national environmental quality standards compatible with the Directive. According to the Regulation on the Water Management, the five water authorities in Sweden shall establish quality requirements for all types of water bodies. These requirements will be formulated in such a manner that the current water status cannot be deviated from and that the water bodies will have reached at least a good water status by the 22nd of December 2015. Since the WFD is lacking in guidance on how to understand the WFD's objective of a good water status in relation to set environmental quality standards, it was for some time unclear how this should be interpreted. At the time the water authorities established the environmental quality

standards, a solution for where the quality requirements are seen as legal tools to reach the objective of a good water status was chosen.

In the Netherlands, the objective of achieving a good water status is elaborated on in the Order in Council that establishes the environmental quality standards for the Dutch water bodies. The objective to reach good water status is established as a type of environmental quality standard, namely a guiding value that needs to be observed when establishing the water plans. The environmental quality standards are, as in Sweden, seen as legal tools to reach the objective of a good water status. To some extent, the objective of a good water status is also used in the Water Act. It is stated that the purpose of the Water Act is to protect and improve the chemical and ecological status of water systems. Therefore, the good status obligation is used in two ways in the Dutch legislation; partly as an environmental quality standard and partly as an overall objective with Dutch water legislation.

In Sweden, the objective of good water status is considered to be binding for the Swedish authorities. This is also the case in the Netherlands. The legal status of the objective set in both Sweden and the Netherlands must be considered to be rather soft and the aim of striving for good status cannot be seen as having a legally binding function. Both in Sweden and the Netherlands, the authorities in charge of giving out permits to operators influencing the environment cannot base binding decisions addressed to individuals only on the good water status obligation. In Sweden the authorities must take into account the objective through the establishment of environmental quality standards which may affect the operators in the end. In the Netherlands, a similar procedure is used when authorities refer to the objective of good water status when establishing the water plans on different levels.

5.1.2 Good water status – an ultimate environmental objective or a requirement for long-term measures?

Since the WFD does not further clarify what a good water status implies, there has been a struggle in Sweden to interpret the term and establish a level of ambition. However, it has been concluded that the environmental objective of a good water status should be seen as an overall and absolute requirement and contains an obligation of result. Whether the set standards in the different Member States' legislation is in conformity with the TFEU and with the purpose of the WFD will not be clear until it has been brought up by the European Court of Justice.

Until this year there was still uncertainty on the how objective of good status should be interpreted in the Dutch water legislation. With the adaption of the new Water Act and its Order in Council on environmental quality standards it has become clear that the Dutch legislator views the objective as an obligation of best efforts, although different opinions on this subject tend to appear in legal discussions. In this sense, it might also be more relevant to talk about the objective as being a requirement for long-term measures rather than an ultimate objective than will be achieved within the set time-frame.

The following table shows the implementation of the good water status obligation in the WFD.

Table 1. Summary table: the objective of a good water status

The objective of a Good Water Status	SWEDEN	THE NETHERLANDS
Is the concept “environmental standard objective” used in the legislation?	No	Yes, in the Water Act and the Order in Council that establishes EQS
Can the environmental standard objective be considered as <i>directly</i> binding in relation to national authorities?	Yes	Yes
Can the environmental standard objective be considered as <i>directly</i> binding in relation to individuals and entities?	No	No
Do the states consider themselves as bound to meet the objective within prescribed time frames?	Yes	Yes

5.2 Environmental quality standards

5.2.1 The relationship between environmental quality standards and the environmental standard objective

Both Sweden and the Netherlands have chosen to use the environmental quality standards as tools for achieving the objective of good water status.

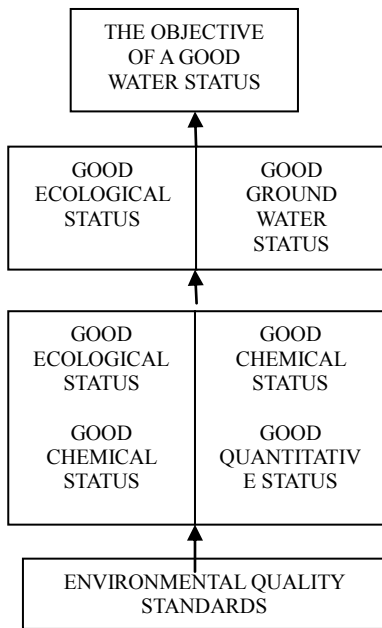


Figure 8: The relationship between the objective of a good water status and the national environmental quality standards in Dutch and Swedish legislation

5.2.2 Construction

An important question is how the environmental quality standards relate to ecological status, chemical status and quantitative status. In Sweden, environmental quality standards indicate ecological, chemical and quantitative status and demand at least good water status to be reached by the years 2015-2027. If no exceptions are used, a status of at least good has to be reached. Surface waters are assessed by chemical and ecological parameters and ground waters are assessed by chemical and quantitative parameters.

In Dutch law, the environmental quality standards are laid down in an Order in Council based on the Water Act and will prescribe environmental quality standards for ecological, chemical, and quantitative status.

It is very important to note that the environmental quality standards do not directly have

an impact on specific decisions like individual permits, in neither the Netherlands nor Sweden.

5.2.3 The adoption of environmental quality standards

In Swedish law, environmental quality standards are adopted at a regional level by the national water authorities' water delegations (vattendelegationer). In the Netherlands, the responsibility for establishing environmental quality standards has been placed on a national level. When introducing the Water Act, it was decided that such important decisions should be handled on a national level.

The following table shows how Sweden and the Netherlands have implemented environmental quality standards in their respective legislation.

Table 2. Summary table on environmental quality standards

Environmental Quality Standards (EQS)	SWEDEN	THE NETHERLANDS
Are EQS used as part of implementing the objective of a good water status?	Yes	Yes
Are EQS expressed in words or in numeric values?	Words	Words
Are there any EQS that describe the ecological status?	Yes	Yes
Are there any EQS that describe surface water chemical status?	Yes	Yes
Are there any EQS that describe groundwater chemical status?	Yes	Yes
Are there any EQS that describe quantitative status?	Yes	Yes
Are the EQS adopted on a national level?	No (regional water authorities)	Yes

5.2.4 Legal function

The most important legal function of the environmental quality standards in both the Swedish and in the Dutch legal system is to control authority decisions on permits, both while supervising already ongoing activities and while deciding on the water plans on different levels.

Spatial planning and environmental quality standards play a great part in fulfilling the objective of a good water status. In Sweden, environmental quality standards must be observed and followed when deciding on any kind of municipal planning while the County Administration Boards are required to control if decided plans meet the

standards.

In the Netherlands, no form of general integration with other policy areas has been established. Therefore there is no formal legal obligation regarding competences in other policy areas to take the water quality standards into account. When it comes to environmental quality standards and their role in building and planning issues in the Netherlands, it is expected that the Water Act will provide for better policy integration. Only the authority that established a water plan has to take the environmental quality standards into account when taking a decision on a national level. Since the national water plan was established together with the Minister of Housing, Physical Planning and Environment, this Minister also has to take environmental quality standards into account when decisions are taken at a national level. These plans are not legally binding which is why the policy co-ordination is more of a policy instrument than a legal instrument.

On a municipal level, when decisions are taken on for example regarding urban planning, there is a possibility for the municipal governing body to initiate discussions with the responsible water manager for the water body in question. The water manager will indicate how the spatial planning will affect the quality of the water and how these consequences can be avoided. Before the final adoption of the spatial plan, the water authority will give its final opinion. When adopting the spatial decision, the authority taking this decision must justify any derogation from the advice in its decision. In this way, environmental quality standards can influence spatial decisions in a non-binding way.

5.2.5 Legal status

Both Sweden and the Netherlands have concretized the objective of a good water status by establishing environmental quality standards.

In Sweden, there are several kinds of established environmental quality standards, or quality requirements, as they are referred to in the Order in Council that lays down the quality standards in the water policy area. After some time of uncertainty it was decided that since the quality requirements are based on EU law and that these standards can be said to express the objective of the WFD, they should be of binding nature, namely limit values.

The Dutch environmental quality standards are legally qualified as guiding values. This means that there may be deviations from these requirements but only if the deviation is in line with Art 4 of the WFD. These deviations have to be motivated. However, since the environmental quality standards have been established in accordance with EU legislation and deviations may only occur according to set EU law, it is, however, more relevant to talk about limit values in a European law context.

5.2.5.1 Environmental quality standards and new activities

The legal status of the environmental quality standards has been a hot topic since the entrance of the WFD. It must be kept in mind that also of great importance is how the environmental quality standards are being operationalized. The programmes of measures play a big role in the enforcement.

In Sweden, a former rule on the examination of new activities in relation to environmental quality standards was recently removed and replaced. The new formulation contains a requirement for an overall assessment of consideration in all situations, not only for new activities. Higher requirements for an activity can be set if needed to comply with an environmental quality standard, but this only applies to those standards that are legally qualified as limit values. If a programme of measure is established in order to comply with the standard, this shall be used as guidance for the judgment of which requirements can be required in a permit. Even if an activity or measure can be expected to contribute to an environmental quality standards not being met in a non-significant way, it can still be allowed. It can be allowed if the activity or measure is compatible with a programme of measure established to comply with the standard, is subject to conditions of taking or paying for compensating measures that will enhance the possibilities to comply with the norm to a not insignificant extent, or despite that it will hamper the possibilities to comply with an environmental quality standard short term or in a small geographical area, it can be assumed that the activity will increase possibilities to comply with the standard on a longer term or in a larger geographical area. However, these possibilities presented by the legislator, only concerns environmental quality standards qualified as limit values.

First of all, when granting a permit to an activity, the granting authority has to take all the relevant plans, namely the national water plan, the regional plans and the management plans into account.³⁴⁴ Since the legislation uses the wording has to *into account* and not has to *observe*, the possibility to deviate from an established water plan is rather free because only a duty of motivation is applied.

In Dutch law there is a certain rule that prevents permits from being granted for new licensable activities that contribute to an exceedance of an environmental quality standard. Contrary to Swedish legislation, the Dutch, is strict and forces the deciding authority to refuse a permit in such cases. For situations where permits are not given, even though the situation is a bit more unclear, it is assumed that the authorities have the legal possibility to intervene and stop such activity.

5.2.5.2 Currently permitted activities

In case an environmental quality standard is exceeded or is likely to be exceeded, there are various possibilities for a regulator to intervene against a granted permission. In Swedish law, essential prerequisites for such a procedure is to review the question of

³⁴⁴ Water Decision art 6 (1) (a) and the Water Act art 4 (1), 4 (4) and 4 (6)

permitted production volume or other similar provision, which otherwise concerns the scope of activities and the proposed conditions will not be so restrictive that the business no longer conducted or that it substantially more difficult. Another basic requirement is that a violation actually should have taken place. Therefore, only a risk of breaching a norm does not constitute a sufficient basis for reconsideration. In the event of a regulator of not being able to review of the granting of the authorization, uncertainty also exists on what prospects there are in order to revoke the permit. This is because it is not explicitly clear whether an overrun or a risk of breaching an environmental quality standard provides a legal basis for such a restrictive measure.

Contrary to Swedish legislation, the Dutch law offers a clear opportunity for the competent authorities to revoke a permit that would lead to an environmental quality standard not being met. Although, in this case, the legislation is not clear whether only a risk is enough for the authorities to step in and take action. It is only clear that the legal opportunity exists.

The following table shows an overview of the enforcement of the environmental quality standards.

Table 3. Summary table: legal effect of the application of EQS

Environmental Quality Standards (EQS)	SWEDEN	THE NETHERLANDS
Is there a duty for authorities/municipalities to observe EQS when deciding on questions on land use and spatial planning?	Yes	No
Is there a duty for the examination authority to observe EQS when examining a permit?	Yes	Yes
Are there <i>specific</i> rules that will prevent permits being granted for <i>new</i> authorities contributing to an EQS being exceeded?	Yes, but with certain exceptions	Yes
Are there rules preventing that permits are given to <i>current</i> activities contributing to an EQS being exceeded or are at risk of being exceeded?	No, but EQS should be observed	Yes
Can/must a permit contributing to an EQS being exceeded or at risk of being exceeded be <i>reviewed</i> ?	Yes, but only under certain circumstances	Yes
Can permits contributing to an EQS being exceeded be <i>revoked</i> ?	In principle, no	Yes
Are there any legal opportunities to take action against non licensable activities contributing to an EQS being exceeded or at risk of being exceeded?	Yes	Yes

5.3 Programmes of measures

5.3.1 Construction

The programmes of measures play a big role for the implementation of the environmental quality standards and in achieving the objective of a good water status. The level of ambition of the programmes can give a good indication of how the implementation of environmental quality standards is going and whether the countries are willing to take strong measures to reach the objectives. The Member States are left with rather free hands to choose how the practical work will be carried out as long as the objectives are met. This entails that the legislation can guarantee enforcement of the set measures.

Both Sweden and the Netherlands use basic measures and additional measures to fulfill the requirements in the WFD. In the Netherlands a Programme of Measures can be found in the national water plan and the regional water plans as well as management plans drafted by central authorities, the provinces and the water authorities. Sweden has chosen to enforce compulsory as well as additional measures.

5.3.2 Adaption of the programmes

The programmes of measures are adopted at different levels in the Dutch water management. Additional measures are described for each water body, apart from the general measures that are taken at a national level in the river basin management plans. In Sweden, the programmes of measures are established either by the government or by the authority or municipality as prescribed by the government.

5.3.3 Legal status

The WFD mentions little about the legal function and status of the programmes. It has instead been left for each member state to decide and to see what proper administrative arrangements should be made. In Sweden, the programmes have a binding function towards the authorities but not towards individuals. This is also the case in the Netherlands. In both countries, the measures have to be operational within three years, as demanded by the WFD.

In Swedish legislation, it is indicated that, it is for the water authority that has established the measures to enforce them. How far this responsibility actually stretches is more difficult to tell, since the legislation does not indicate which legal actions are to be taken if measures are not being complied with. Based on what now has been stated, it must be said that it remains rather unclear what the binding obligation consists of and what legal status these programmes actually have. It seems more relevant to talk about the programmes as being strategic documents rather than being legally binding plans of action.

It is difficult to make an assessment of the actual legal status of the programmes of

measures in the Netherlands. This is due to the fact that the measures are incorporated in the big number of plans that exists on many levels in the Dutch water management. The legal status is therefore deemed to be the status of the plan it has been included in. Each authority is obliged to carry out the measures in the river basin management plans and all the other underlying plans as far as they are responsible for it.

The following table contains a summary on how the programmes of measures are implemented into the Swedish and Dutch legislation.

Table 4. Summary table: programmes of measures

Programmes of Measures	SWEDEN	THE NETHERLANDS
On what level are the programmes of measures decided?	Regional (Water Delegations)	National and Regional
Are all basic measures in the WFD expressed in the legislation?	Yes	Yes, referring to the WFD
Can the programmes of measures be considered to be material binding upon national authorities?	Yes	Yes
Are there sanctions or others means to use if there are failures?	No, but the County Administrative Board review detailed plans	No
Can the programmes of measures be considered to be binding upon individuals and operators	No	No

5.4 Concluding remarks

The WFD has the potential to serve as an important tool in efforts to achieve the objective of a good water status in Europe. Like many other environmental directives and directives in other areas, the WFD limits itself to outline general rules, frame work provisions and basic requirements. The advantage of such regulation technique is that individual Member States can develop their legislation with regard to specific national, regional and local conditions. As stated in the preamble of the WFD, different

circumstances and union needs require special solutions and it is neither possible nor appropriate to treat all water bodies in the same way. But disregarding the multiple implementation opportunities there is a good water status obligation that Member States need to comply to. However, there is a risk that the vague wording could create problems, especially if the Member States interpret the Directive's aims in different ways. Since the goal of a directive is to achieve a certain result, it does not suffice for a member state to take only selective steps towards achieving WFD objectives. The legislation must guarantee that it can enforce measures needed to comply with demanded results in the WFD.

To tackle the unclearness of the good water status obligation, Member States use different techniques. For example, we have seen in this thesis how Sweden interprets the good status obligation as an obligation of result and how the Netherlands interprets it as best efforts. However, in the practical work, this does not mean that the Netherlands is less willing to take strong measures to achieve the objective. What instead might be of importance, other than defining the legal status of the good water status obligation, is level of ambition of the programmes of measures. Both Sweden and the Netherlands consider that the authority that establishes the measures should ensure they are being operationalized within three years. In both Sweden and the Netherlands, programmes are binding towards authorities but the legislation is lacking regarding indication of legal actions for when the measures are not enforced. This has consequences for the implementation of the environmental quality standards.

Before the objectives for the specific water bodies can be set, the Member States need to designate surface water bodies on the basis of their ecological quality. Water bodies can be assigned as normal (natural), heavily modified or artificial. The designation will have consequences for the good status objective since only natural water bodies have to achieve good ecological status. Heavily modified or artificial classified water bodies only need to achieve good ecological potential. This has consequences for the good status obligation. This is because the Member States are relatively free in designating current water status.

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