

## Pre-submission Draft

### **Aspirations and Realities under the Water Framework Directive: Proceduralisation, Participation and Practicalities**

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“ . . . EU environmental legislation has become more general in the last two decades, leaving more and more monitoring and implementation discretion to EU Member States. This has led to a situation that where a country or an administration . . . does not have the determination to provide for an appropriate protection of the environment, environmental law is not sufficiently precise and stringent to ensure this protection. And environmental organisations or citizen groups have not been granted effective rights to enforce the protection of the environment against an unwilling or passive administration.”

L. Kramer, 'The Environment and the Ten Commandments' [2008] *Journal of Environmental Law* 5, at p.6.

'In some instances, it may prove disproportionately costly or technically impractical to achieve in the short term the ambitious targets that are demanded. That is why some flexibility is built into the Water Framework Directive, but it is crucial that this flexibility is not abused.'

Foreword, House of Lords European Union Committee, 27<sup>th</sup> Report of Session 2006-07, *Water Framework Directive: Making it Work*, HL Paper 136 (2007).

### **The Water Framework Directive**

The European Community Water Framework Directive<sup>1</sup> must be placed somewhere near the 'high water mark' of Community environmental legislation both in terms of its general ambitiousness and in respect of its innovativeness in several respects. As it has been put, 'it is the most significant piece of European environmental legislation ever introduced'.<sup>2</sup> It adopts a holistic approach to the management of waters which takes account of the wider ecosystem and applies a hydrological management approach based upon River Basin Districts. The water management planning process is target-orientated insofar as it involves a sequence of actions directed towards the achievement of environmental objectives for all surface waters (including estuaries and coastal waters) and groundwaters within River Basin

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<sup>1</sup> Directive 2000/60/EC establishing a framework for Community action in the field of water policy, hereafter 'WFD'.

<sup>2</sup> T. Le Quesne and C. Green, *Can we afford not to? The costs and benefits of a partnership approach to the Water Framework Directive*, WWF (2005) p.4.

District Management Plans. The environmental objectives set out in the Directive are to be achieved within specified deadlines by means of programmes of measures for their realisation. Centrally important, is the objective of achieving good chemical and ecological status for all relevant waters by 2015, though account also needs to be taken of social and economic factors, and the general quest of securing sustainable development.

The achievement of the environmental objectives of the WFD is through a series of stages that are set out in the Directive. In outline, these involve transposition of obligations in national law, identifying competent authorities, undertaking initial 'characterisations' of waters and compiling registers of protected areas, undertaking monitoring programmes, identifying significant issues, producing draft and final River Basin Management Plans, and programmes of measures to realise the environmental objectives. All of these challenging water management planning tasks need to be undertaken in accordance with requirements to 'encourage' involvement 'all interested parties' in the implementation processes. The Directive may be seen as a testing ground for a multi-level approach towards environmental governance which seeks to extend decision-making as far downwards to individual citizens as is feasible.

The WFD is also set in a context of multi-level guidance that will have profound implications for the way it is implemented and the environmental benefits that will result. Many aspects of the Directive are of considerable technicality and it is important that common understandings of these are reached between member states. For that purpose, a Common Implementation Strategy has been established at European Community level, involving working groups of experts and stakeholders from member states producing a series of documents on key aspects of implementation of the Directive.<sup>3</sup> These documents are expressly stated to be 'non-legally binding', but are important in establishing a coherent application of key elements of the Directive across the member states. Within member states further guidance has been provided on particular aspects of the Directive. In the case of the United Kingdom, work on establishing common standards and conditions across the different jurisdictions, through the UK Technical Advisory Group on the Water Framework Directive. 'UKTAG' comprises representatives of agencies with responsibility for implementation of the WFD in different parts of the UK, bodies with responsibility for nature conservation and invited standing representatives on particular issues.<sup>4</sup> Although advisory in character, this guidance is important in securing a consistent approach to UK-wide implementation and in some respects is likely to provide the basis for statutory guidance on the national implementation of the Directive (discussed below).

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<sup>3</sup> See European Commission, Common Strategy on the Implementation of the Water Framework Directive (2001) and [http://circa.europa.eu/Public/irc/env/wfd/library?l=/framework\\_directive/guidance\\_documents&vm=detailed&sb=Title](http://circa.europa.eu/Public/irc/env/wfd/library?l=/framework_directive/guidance_documents&vm=detailed&sb=Title) for further CIS guidance documents.

<sup>4</sup> See *UK Technical Advisory Group (UKTAG) for Water Framework Directive Implementation: Terms of Reference* (2004) on UKTAG website at [www.wfduk.org](http://www.wfduk.org).

The ambitiousness of the WFD, adopted in 2000, is recognised in the timescale that has been set for the implementation, with an initial deadline of 2015 for meeting the key environmental objectives under the Directive. At the present, therefore, implementation is somewhere around the half-way stage along the timescale that has been set. Transposing legislation has been put in place, River Basin Districts and competent authorities identified, characterisation reports compiled, monitoring programmes in place, and consultation on significant issues and draft River Basin Management Plans underway.<sup>5</sup> The critical stages of finalising River Basin Management Plans and putting in place programmes of measures remain to be completed. At this 'half-way' stage it may be helpful to take stock of what has been done by way of practical implementation and to reflect upon what this shows about the challenges of implementing the Directive and its general approach. Are the original concerns about the enforceability of the Directive well founded? That is, that it is over ambitious in its objectives, insufficiently stringent in its legal formulation and too generous in the discretion that it gives to member states in respect of implementation.

### **Themes for Discussion**

The half-way stock taking exercise that is envisaged is capable of ranging far and wide into the multifarious topics raised by implementation of the WFD and, inevitably, some selectivity of key issues is needed.<sup>6</sup> Here developments are to be reviewed against two broader themes: proceduralisation and participation.

There is a general view that more recent European Community environmental law is characterised by its greater dependence upon procedural, rather than substantive, regulatory approaches. Procedural approaches involve the use of mechanisms that require member states to follow specified procedures, whilst not necessarily guaranteeing particular environmental quality outcomes. By contrast, earlier Community environmental legislation may be seen as emphatically substantive in requiring precisely specified standards for polluting emissions and environmental quality actually to be met. Failure to secure environmental quality requirements of this kind would amount to a breach of Community law, and enforcement has been strict in not allowing

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<sup>5</sup> See European Commission, *Towards Sustainable Water Management in the European Union: First stage in the implementation of the Water Framework Directive 2000/60/EC*, COM(2007) 363 and House of Lords European Union Committee, 27<sup>th</sup> Report of Session 2006-07, *Water Framework Directive: Making it Work*, HL Paper 136 (2007).

<sup>6</sup> For general academic literature on legal aspects of the Water Framework Directive see D. Matthews, 'The Framework Directive on Community Water Policy: A New Approach for EC Environmental Law' (1997) *Yearbook of European Law* 191; W. Howarth, 'Accommodation without Resolution? Emission controls and environmental quality objectives in the proposed EC Water Framework Directive' (1999) *Environmental Law Review* 6; D. Grimeaud, 'Reforming EU water law: towards sustainability' (2001) *European Environmental Law Review* 41-51, 88-97, 125-135; A. Farmer, 'The EC Water Framework Directive' (2001) *Water Law* 40; G. Kallis and D. Butler, 'The EU Water Framework Directive: Measures and Implications' (2001) *Water Policy* 125; W. Howarth and D. McGillivray, *Water Pollution and Water Quality Law* (2001) Ch. 5; and H. Unnerstall, 'The Principle of Full Cost Recovery in the EU Water Framework Directive – Genesis and Content' (2007) 19 *Journal of Environmental Law* 29.

defences in respect of circumstances within the control of a member state.<sup>7</sup> Procedural legislation is characterised by the absence of requirements of this kind. Provided that specified regulatory procedures are complied with, Community obligations are met, regardless of what level of environmental improvement or deterioration ensues as a result. The procedural approach is admirably consonant with the requirements of the EC Treaty for subsidiarity and for measures that do not go beyond what is required to achieve a desired objective,<sup>8</sup> but raise concerns as to whether it allows member states too much flexibility in their approach to environmental protection, with the consequence that Community-wide minimum standards for environmental quality are not realised.

In respect of the WFD, the balance between substantial and procedural requirements needs to be considered in the context of the approach to national implementation that has been evident so far. Certainly, the Directive illustrates many instances of the application of procedural mechanisms in water management planning, but also envisages that water planning should be conducted *purposively*. That is, water management plans of the kind provided for under the Directive are to be established for the purpose of actually meeting the environmental objectives of the Directive by the stated deadlines. To what extent does following the stipulated procedures ensure that the environmental objectives of the Directive will actually be met or to what extent is compliance secured simply by following those procedures irrespective of environmental outcomes?

A second theme, which to some extent is interwoven with proceduralisation, is participation the role of the public in the implementation of the WFD. Notably, the Directive goes beyond previous Community measures in the obligation that it imposes upon member states is to 'encourage' participation of all interested parties in water planning matters. Traditional forms of 'consultation' have been facilitative in enabling public representations to be made and taken into account in environmental decision making, but *encouragement* seems to envisage something beyond this. The procedural issue is about what this means in practice (what needs to be done to *encourage* public engagement rather than merely *enabling* it?). The associated substantive question is whether environmental decisions that are reached in this way are a means of securing genuinely better environmental outcomes, which are in the longer-term collective interest in realising sustainable development.

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<sup>7</sup> Illustrated by early cases before the European Court of Justice where the UK was found guilty of breaching water directives and circumstances within national control were not found to amount to a defence. See W. Howarth and D. McGillivray, *Water Pollution and Water Quality Law* (2001) s.4.15.

<sup>8</sup> Art.5 EC Treaty provides that 'in areas that do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale of effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.' See W. Wils, 'Subsidiarity and EC Environmental Policy: Taking People's Concerns Seriously' (1994) 5 *Journal of Environmental Law* 85.

## Proceduralisation

From the inception of the European Economic Community, under the Treaty of Rome of 1957, to the present, environmental law has evolved remarkably in both content and style. Over an initial period of perhaps three decades, up to the Single European Act of 1987, it may be seen to have arisen largely as an offshoot of the need to realise a common market. Early legislation was justified because of the environmental impacts of trade-related activities and primarily sought to harmonise minimum requirements for pollution control on the basis that pollution does not respect national boundaries. Following the 1987 Act, competence in respect of environmental action found a new justification in the quality of life of European citizens. As a consequence, a plethora of measures was adopted spanning environmental issues extending well beyond the compass of the single market. However, the general style of these measures followed a traditional regulatory approach of prohibiting environmentally unacceptable practices and/or requiring specified quality objectives or standards to be secured. Increasing attention has been drawn to the limitations of prohibitive, sometimes misleadingly dubbed 'command and control', approaches to environmental regulation. More recently, greater emphasis has been placed upon expanding the range of regulatory instruments that are in place to address environmental concerns. Numerous examples of regulatory prohibition of environmentally unacceptable activities remain the mainstay of Community environmental law. Nonetheless, the contemporary approach involves the appreciation that environmental governance may be better realised through the greater application of more flexible mechanisms for protection of the environment.

'Flexibility' in environmental governance is manifested in various forms which may involve education, information and economics, as alternatives to regulatory prohibition, in improving environmental quality. Another aspect of flexibility is to be seen as the increasing application of 'proceduralisation' in environmental legislation.<sup>9</sup> Although difficult to define precisely, 'proceduralisation' broadly involves the imposition of constraints upon those entrusted with environmental decision-making. These constraints prescribe the basis upon which decisions are to be made or the environmental management actions that must be taken, the factors to be taken into account at various stages of the decision-making process and the monitoring of the impacts, *without determining the final outcome of that process*. Hence, the setting of mandatory environmental standards at Community level, defined precisely for each environmental sector and activity, has been supplemented by regulatory mechanisms which set out the basis for action, but allow greater national and local flexibility and discretion in determining what particular outcomes need to be realised.

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<sup>9</sup> Generally see J. Black, 'Proceduralizing Regulation' (2000) *Oxford Journal of Legal Studies* 597, and (2001) 21 *Oxford Journal of Legal Studies* 33; J. Scott, 'Flexibility 'Proceduralization' and Environmental Governance in the EU' in J. Scott and G. De Burca (eds.) *Constitutional Change in the European Union* (2000); R. Macrory and S. Turner, 'Participatory Rights, Transboundary Environmental Governance and EC Law' [2002] *Common Market Law Review* 489; and M. Lee, *EU Environmental Law* (2005) Ch.6.

A fairly longstanding illustration of a procedural approach is to be seen in the requirements for environmental impact assessment of development projects that are likely to have a significant impact upon the environment.<sup>10</sup> More recently a comparable approach has been taken to the strategic environmental assessment of plans and programmes.<sup>11</sup> In each instance the object of Community legislation is that the relevant project or plan should be subject to scrutiny of its environmental implications before approval or adoption. Environmental assessment needs to be undertaken in accordance with procedures that allow for participation at all levels and for representations to be taken into account by the decision-making body. Most significantly, however, the need to adhere to specified environmental assessment procedures does not dictate the final decision. Providing that the procedures are correctly followed, there is nothing to prevent the approval of projects or plans that may result in significant environmental harm.<sup>12</sup>

Another illustration of proceduralisation is to be seen in the Community Directive on Integrated Pollution Prevention and Control<sup>13</sup> which requires member states to regulate industrial installations by applying the best available techniques to minimise the impacts of emissions upon the environment. Within the context of the Directive, 'best available techniques' is a profoundly open-ended concept and the normative imprecision of this leaves member states with a substantial freedom to interpret the concept as they see fit. In effect, this involves a de-centralisation of responsibility for substantive environmental decision-making, with Community legislation setting a procedural framework for the exercise of substantial discretion on environmental standards by the member states.<sup>14</sup>

For some, proceduralisation might be seen as a regrettable retreat from the vital need to harmonise minimum environmental standards at Community level, given the unwillingness of member states to take unilateral action for that purpose because it is regarded as undermining national competitiveness. However, proceduralisation has attractions to others who are concerned about the effectiveness and authoritarianism of past approaches to environmental legislation. Conventional regulatory approaches are seen as inappropriate to address persistent, complex or diffuse environmental problems and result in ever more intrusive, complex and inflexible rules.<sup>15</sup> In a climate of concern about the democratic legitimacy of the Community, the acknowledgement that environmental problems may be better addressed at a

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<sup>10</sup> See the Environmental Impact Assessment Directive (85/337/EEC as amended by 97/11/EC).

<sup>11</sup> See the Strategic Environmental Assessment Directive (2001/42/EC).

<sup>12</sup> W. Howarth, 'Substance and Procedure under the Strategic Environmental Assessment Directive and the Water Framework Directive', in J. Holder and D. McGillivray, Eds. *Taking Stock of Environmental Assessment: Law, Policy and Practice* (2007) 149.

<sup>13</sup> Directive 1996/61/EC.

<sup>14</sup> J. Scott, 'Flexibility 'Proceduralization' and Environmental Governance in the EU' in J. Scott and G. De Burca (eds.) *Constitutional Change in the European Union* (2000) and generally see J. Holder and M. Lee, *Environmental Protection, Law and Policy* (2<sup>nd</sup> ed. 2007) Ch.9.

<sup>15</sup> M. Lee, *EU Environmental Law* (2005) p.165.

de-centralised level has much political resonance.<sup>16</sup> Similarly, flexibility and proceduralisation may be seen as a sensible application of the need for subsidiarity in Community lawmaking in not going beyond what is needed to address particular concerns.

### **Public Participation in Environmental Decision-making**

Another aspect of flexibility and de-centralisation which has gained increasing emphasis over recent years is the general consensus in favour of public participation in environmental decision-making. Again, this may reflect the same concerns about democratic legitimacy and environmental authoritarianism that have been previously referred to. Nonetheless, the view that a more 'bottom-upwards' approach to environmental decision-making is preferable has gained increasing ground in various legislative initiatives. A better approach towards Community environmental governance is seen as one which is less hierarchical and involves greater sharing of environmental responsibility between the Community and its citizens.<sup>17</sup>

There are two key justifications for public participation in environmental decision-making. The first is that it is more democratic and the second that it will result in better decisions.<sup>18</sup> On the first point, the remoteness and technocratic character of Community legislative process, and the limited capacity of environmental groups or individuals to influence this, has long been recognised.<sup>19</sup> A more inclusive legislative approach, which is more in tune with the idea of subsidiarity, is one which allows individuals a greater say in the regulatory actions that impact upon them. Hence, legislation which provides greater flexibility in its implementation will be more responsive to local needs and individual concerns. In addition, it has been suggested that greater transparency in the establishment of legislative objectives will result in greater care being taken to implement regulatory measures in good faith.<sup>20</sup> Increasingly, the view is taken that public involvement is a means towards 'deliberative democracy' where opposing views about an environmental

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<sup>16</sup> M. Lee, 'Public Participation, Procedure and Democratic Deficit in EC Environmental Law' [2003] 3 *European Environmental Law Yearbook* 193.

<sup>17</sup> See, for example, the emphasis placed upon participation in the European Commission, *White Paper on European Governance* COM (2001) 428 and the European Parliament and Council Decision No.1600/2002/EC laying down the Sixth Environment Action Programme, Art.10 which requires environmental policy objectives to be pursued through extensive consultation and strengthened participation.

<sup>18</sup> Generally, see J. Steele, 'Participation and Deliberation in environmental Law: Exploring a Problem-solving Approach' (2001) *Oxford Journal of Legal Studies* 415; K. Getliffe, 'Proceduralisation and the Aarhus Convention: Does Increased Participation in the Decision-making Process Lead to More Effective EU Environmental Law?' (2002) 4 *Environmental Law Review* 104; and M. Lee and C. Abbot, 'The Usual Suspects? Public Participation under the Aarhus Convention' [2003] *Modern Law Review* 80.

<sup>19</sup> L. Kramer, 'The Elaboration of EC Environmental Legislation' in G. Winter (ed.) *European Environmental Law: A Comparative Perspective* (1996) 302 and S. Mazey and J. Richardson, 'Environmental Groups and the EC: Challenges and Opportunities', in Jordan, A. (ed.) *Environmental Policy in the European Union: Actors, Institutions, and Processes* (2002) 150.

<sup>20</sup> WWF, *WWF's preliminary comments on Public Participation in the context of the Water Framework Directive and Integrated River Basin Management* (2001) p.2

proposal are debated in a way that produces informed rational argument and reasons for a decision emerge that are likely to be widely accepted.<sup>21</sup>

The view that public participation will lead to better decisions, is premised upon the argument that the technocratic arguments of a kind that are likely to be presented by 'experts' neglect relevant factors that may be provided by others with non-expert backgrounds. For example, local residents might be in a better position to present information about the local perception of the impacts of a decision.<sup>22</sup> Moreover, representations from a wide range of participants may provide an input of relevant opinions and values that would be otherwise overlooked.<sup>23</sup> More broadly, public engagement in environmental decision-making might be seen as beneficial for reasons of environmental education, awareness raising and enhancement of 'environmental citizenship'.<sup>24</sup>

Against these claims for the merits of public participation there are counter arguments. In respect of the claim for enhancing environmental democracy, there is the concern that participation processes are capable of being hijacked by special interest groups which do not represent the 'general public' interest. For example, environmentally significant projects such as wind farms which are widely recognised to be of national and international environmental benefit, may have adverse local impacts, and local objections may be more prominent in deliberations than national benefits of a project. Similarly, the greater willingness and capacity of local residents to engage in participation than those with more remote concerns, has the potential to localise the debate at the expense of overshadowing wider and longer-term environmental considerations. 'Sustainable development' is generally seen to involve recognition of the rights of future generations to a satisfactory environment,<sup>25</sup> whereas the more immediate desires of present-day participants in environmental decision-making may fail to reflect this. Similarly, in relation to the argument that public participation results in *better* decisions, the evaluation of this depends upon the sense of 'better' that is at issue.<sup>26</sup> What counts as a 'better' decision in terms of reducing local impacts may be seen as the opposite of this in respect of its national or international implications or consequences for future generations.

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<sup>21</sup> J. S. Dryzek, *The Politics of the Earth: Environmental Discourses* (2<sup>nd</sup> ed. 2005).

<sup>22</sup> R. McCracken and G. Jones, 'The Aarhus Convention' (2003) *Journal of Planning and Environment Law* 803.

<sup>23</sup> J. Steele, 'Participation and Deliberation in environmental Law: Exploring a Problem-solving Approach' (2001) *Oxford Journal of Legal Studies* 415.

<sup>24</sup> A. Dobson, *Citizenship and the Environment* (2003) and C. Hilson, 'Greening Citizenship: Boundaries of Membership and the Environment' (2001) 13 *Journal of Environmental Law* 335.

<sup>25</sup> The widely cited definition from the World Commission on Environment and Development, *Our Common Future* (1987) at p.43 characterises sustainable development as 'development which meets the needs of the present without compromising the ability of future generations to meet their own needs'.

<sup>26</sup> See the review of literature on the benefits of active involvement in environmental decision-making in T. Le Quesne and C. Green, *Can we afford not to? The costs and benefits of a partnership approach to the Water Framework Directive*, WWF (2005) p.11.

At best, the overall balance of cost and benefits of public participation in environmental decision-making may be seen as ambivalent. It seems to presuppose that there is a 'general public interest' in the matter under decision and that a sufficient level of public engagement will allow this to emerge and be afforded prominence above the individual and group representations that may be advanced. The problem, of course, is the question of whether there is actually such a thing as the 'general public interest', as opposed to a range of individual and sectoral interests that may be presented to a decision-making body.

Setting aside these reservations, the general idea of 'public participation' is seriously ambiguous in relation to its practical implications. The form in which it is to be put into practice admits many possible degrees of involvement, from situations where the public are merely informed of the outcome of the decision making process to situations where they are given the full practical responsibility for taking that decision.<sup>27</sup> Somewhere between the two extremes lies the tradition of practice of 'consultation' that has been adopted in the United Kingdom for many years. This involves information about proposals for action by governmental bodies being placed in the public domain and members of the public and interest groups being invited to make representations for or against the proposals.<sup>28</sup> This is a long-established model for facilitating public participation, but it is not the only model or necessarily the best one.<sup>29</sup> The recent preference for public participation as an aspect of the movement towards greater flexibility in European Community environmental legislation, including the WFD, can be seen as opening up a wide range of practical options. The implications of these options need to be carefully considered, particularly in the light of how they may operate in practice.

### **The International Context on Participation**

In favouring public participation in environmental decision-making the European Community may be seen as acting within, and being influenced by, a wider international context on this issue. The key global international basis for participation in environmental decision-making is Principle 10 of the Rio Declaration from the United Nations Conference on Environment and Development of 1992.

'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have . . . the opportunity to participate in decision-making processes. States shall facilitate

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<sup>27</sup> S.R. Arnstein, 'A Ladder of Citizen Participation' (1969) 36 *Journal of American Planning Association* 216 and see WWF, *WWF's preliminary comments on Public Participation in the context of the Water Framework Directive and Integrated River Basin Management* (2001) p.3.

<sup>28</sup> See, for example, Environment Agency, *Working together: your role in our environmental permitting decision making* (2007) on the consultation processes adopted by the Agency in relation to environmental permitting decisions.

<sup>29</sup> T. Le Quesne and C. Green, *Can we afford not to? The costs and benefits of a partnership approach to the Water Framework Directive*, WWF (2005) p.11.

and encourage public awareness and participation by making information widely available . . .<sup>30</sup>

At a regional international level, these issues have progressed furthest in The United Nations Economic Commission for Europe's 'Aarhus Convention'.<sup>31</sup> Although preliminary reference is made to the democratic or improved decision-making justifications outlined above,<sup>32</sup> the main emphasis of the Convention is upon a human rights rationale for matters relating to public participation. Hence, the objective of the Convention states:

'In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of . . . public participation in decision making . . . in accordance with the provisions of this Convention.'<sup>33</sup>

Most pertinently, in relation to public participation concerning plans, programmes and policies relating to the environment,<sup>34</sup> it is provided that:

'Each party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework [requirements to allow reasonable time-frames to allow the public to participate effectively; at an early stage when all options are open; and ensuring that due account is taken of the outcome of public participation in the decision] shall be applied. The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention . . . .'<sup>35</sup>

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<sup>30</sup> Principle 10, *Rio Declaration*, United Nations Conference on Environment and Development (1992) available at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>. This principle has been reaffirmed in Johannesburg Declaration on Sustainable Development (2002) which states that sustainable development requires 'broad-based participation in policy formulation, decision-making and implementation at all levels'. See Johannesburg Declaration, Principle 26 available at [http://www.un.org/esa/sustdev/documents/WSSD\\_POI\\_PD/English/POI\\_PD.htm](http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POI_PD.htm)

<sup>31</sup> The United Nations Economic Commission for Europe Convention on Access to Information, Public Participation and Decision making and Access to Justice in Environmental Matters (1998). Adopted by European Environment Ministers meeting in Aarhus (Denmark) 25 June 1998, and entered into force 30 October 2001, available at <http://www.unece.org/env/europe/ppconven.htm>. See *The Aarhus Convention: An Implementation Guide* (2000) at <http://www.unece.org/env/pp/acig.pdf>. For commentary see J. Jendroska and S. Stec, 'the Aarhus Convention: Towards a new Era in Environmental Democracy' [2001] *Environmental Liability* 140 and W. Upton, 'The Human Factor: public participation, third party rights and Aarhus' [2003] *Environmental Law and Management* 219.

<sup>32</sup> A recital to the Aarhus Convention recognises that 'improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns'.

<sup>33</sup> Aarhus Convention Art.1.

<sup>34</sup> Although see also Art.6 on participation in decisions on specific activities and Art.8 on preparation of executive regulations and/or legally binding instruments, which may also have relevance to activities related to the implementation of the WFD.

<sup>35</sup> Art.7 Aarhus Convention.

'The public concerned' in relation to this obligation are defined to mean 'the public likely to be affected by, or having an interest in, the environmental decision making' and, for this purpose, environmental non-governmental organisations are deemed to have an interest.<sup>36</sup> The extent to which this definition encompasses the 'general public' is not as clear as it might be,<sup>37</sup> though the *Implementation Guide* to the Aarhus Convention envisages a wide interpretation of the 'public' and a 'ladder' of involvement whereby different groups of stakeholders are identified depending upon their level of involvement, ranging from the right to information through to direct decision-making.<sup>38</sup> However, the extent of 'the public concerned' is left largely to the discretion of the relevant public authority in identifying who should count as 'participants' for these purposes.

### **Public Participation under the Water Framework Directive**

In implementing the Aarhus Convention in European Community law, it is notable that amendments of certain environmental directives were necessary to secure full compliance with the public participation obligations under the Convention.<sup>39</sup> However, no amendments of this kind were thought necessary to meet the Convention obligations under the WFD, which was regarded as compliant with the Aarhus obligations on public participation. This is reflected in a recital to the Directive which states:

'To ensure the participation of the general public including users of water in the establishment and updating of river basin management plans, it is necessary to provide proper information of planned measures and to report on progress with their implementation with a view to the involvement of the general public before final decisions on the necessary measures are adopted.'<sup>40</sup>

If anything, the rather unqualified wording of this recital, which is couched in terms of *ensuring* public participation rather than merely facilitating it, seems to go beyond the Aarhus obligations in this respect. However, a similar emphasis upon the importance of public engagement is reflected in another recital which states:

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<sup>36</sup> Art.2(5) Aarhus Convention.

<sup>37</sup> M. Lee and C. Abbot, 'The Usual Suspects? Public Participation under the Aarhus Convention' [2003] *Modern Law Review* 80 at p.86, though it has been suggested that 'the public concerned' is a term that is wide enough to encompass not only those affected by a decision, but also those with an interest in it, which may be of a legal or factual kind, hence all member of the general public will probably come within the ambit of the 'concerned public', J. Adshead, 'Public Participation, the Aarhus Convention and the Water Framework Directive' (2006) 17 *Journal of Water Law* 185 at p. 190.

<sup>38</sup> Economic Commission for Europe, *The Aarhus Convention: An Implementation Guide* (2000) p.85 and 86.

<sup>39</sup> Directive 2003/35/EC of the European Parliament and the Council providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with the regard to access to justice Council Directives 85/337/EEC and 96/61/EC (OJ L 156/17 25 June 2003) amends provisions on public participation in the national permitting procedures on environmental impact assessment and integrated pollution prevention and control and introduces requirements for access to justice.

<sup>40</sup> Recital 46 WFD.

‘The success of this Directive relies on close cooperation and coherent action at Community, Member State and local level as well as on information, consultation and the involvement of the public, including users’.<sup>41</sup>

The same emphasis upon the importance of public engagement is found in the body of the WFD, where an obligation is placed upon member states to ‘encourage the active involvement of all interested parties’ in the implementation of the Directive. This duty applies in relation to the production, review and updating of river basin management plans, which must be published and made available for comment to the public.<sup>42</sup> Public participation, therefore, is envisaged as an essential requirement in all stages in the production of plans and specified documents relating to this must be published, with background documents and other information to be made available on request. A period of six months is to be allowed for comment on the documents, for the specific purpose of ‘allowing active involvement and consultation’.<sup>43</sup>

Given the essentially voluntary character of participation, it would be logically impossible to *compel* members of the public to engage in ‘participation’ on water management planning matters arising under the WFD. Nonetheless, the wording of the Directive comes as close to mandating member states to ensure that public participation takes place, insofar as is reasonably possible, and certainly fulfils Aarhus requirements in this respect.

The important questions are about how these obligations are translated into national law and how faithfully they are implemented in practice. The obligation to ‘encourage’ active involvement seems to suggest something beyond the ordinary elements of a consultation process, involving a ‘potentially much deeper form of participation, although there is little compulsion here’,<sup>44</sup> perhaps indicating a shift towards a model of ‘active citizenship’ in which power is shared between a wide range of stakeholders.<sup>45</sup> However, the obligation to encourage involvement falls short of a duty to ensure that this actually occurs and the WFD gives no further indication as to what kind of ‘encouragement’ is needed.

The Common Implementation Strategy Guidance on the WFD affirms that ‘participation’ involves more than mere consultation, so that ‘interested parties participate actively in the planning process by discussing issues and contributing to their solution’. The guidance also notes that, beyond

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<sup>41</sup> Recital 14 WFD.

<sup>42</sup> Art.14(1) WFD.

<sup>43</sup> Art.14(2) WFD.

<sup>44</sup> M Lee and C Abbot, ‘The Usual Suspects? Public Participation Under the Aarhus Convention’ (2003) *Modern Law Review* 80, at p.100. Similarly, respondents to national consultation on WFD ‘stressed that public involvement included, but did not stop at, providing information and consulting’. See Department for Environment Food and Rural Affairs, *Third consultation paper on the implementation of the EC Water Framework Directive (2000/60/EC)* (2003) para. 2.273.

<sup>45</sup> R Macrory and S Turner, ‘Participatory Rights, Transboundary Environmental Governance and EC Law’ (2002) *Common Market Law Review* 489, at p.505.

consultation, still higher levels of participation are shared decision-making and self-determination. 'Shared decision-making' implies that interested parties not only participate actively in the planning process, but also become partly responsible for the outcome. 'Self-determination' implies that at least parts of water management are handed over to the interested parties. The view taken in the guidance is that encouraging consultation should be considered the core requirement for active involvement. Although the latter two forms are not specifically required by the Directive, they may often be considered as best practice.<sup>46</sup>

## **Participation in WFD Transposing Legislation**

In relation to England and Wales, the main transposing legislation, The Water Environment (Water Framework Directive) (England and Wales) Regulations 2003,<sup>47</sup> provide fairly extensive requirements for public participation. In relation to activities relating to the establishment of environmental objects and programmes of measures for river basin management plans, the Environment Agency must 'take such steps as it thinks fit, or the appropriate authority may direct', to 'provide opportunities for the general public and those persons likely to be interested in or affected by its proposals to participate in discussion and the exchange of information or views in relation to the preparation of those proposals'. The Agency must also publicise its draft proposals and consult those persons on the proposals.<sup>48</sup>

Further provision is made in relation to public participation on river basin management plans, requiring public participation in the establishment of river basin management plans through publication of various matters relating to these plans 'in such manner as the Agency considers appropriate for the purpose of bringing it to the attention of persons likely to be affected by it'. Again it is to 'take such steps as it thinks fit, or the appropriate authority may direct, to provide opportunities for the general public and [listed statutory consultees] to participate in discussion and the exchange of information or views in relation to the preparation of the draft plan'.<sup>49</sup> Additional provision is made for the information that must be accessible to the public at its principal office of the Agency.<sup>50</sup>

Although there are differences in wording (the 'public', 'the general public' and 'persons likely to be interested') and significant discretion is afforded to the Environment Agency, the overall impression is that the England and Wales

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<sup>46</sup> European Commission, Common Implementation Strategy for the Water Framework Directive (2000/60/EC), Guidance Document No.8, *Public Participation in relation to the Water Framework Directive* (European Commission, 2003), para. 2.2.

<sup>47</sup> SI 2003/3242. See also the Water Environment (Water Framework Directive) (Northumbria River Basin District) Regulations 2003 SI 2003/3245 and the Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004 SI 2004/99.

<sup>48</sup> Reg.10(2)(b) Transposing Regs.

<sup>49</sup> Reg.12(2) Transposing Regs.

<sup>50</sup> Reg.18 Transposing Regs.

transposing regulations successfully give effect to the requirements for public participation set out in the WFD.<sup>51</sup>

## Participation in Practice

What the broad legal obligations on participation that have been recounted actually entail in practice is more difficult to interpret.<sup>52</sup> A general concern is that the practical challenges of engaging the wider general public may mean that a narrower 'stakeholder' or representative approach to participation is needed. Beyond that, many of the issues needing to be resolved in implementing the WFD are readily capable of being placed in complex scientific or technical methodological contexts, which will have the effect of marginalising participants from outside a narrow community of expert stakeholders. As the issues become more specific and specialised the pool of potential participants becomes progressively smaller, though the importance of decisions does not diminish, where, as often, 'the devil is in the detail'. The upshot of this is that, widespread 'participation' can mask the real distribution of influence in decision-making, where the most crucial decisions are eventually made by a handful of key players.<sup>53</sup> The danger of this is that meeting the formalities of 'public participation' in practice may be possible in a way that effectively defeats its purposes.

Discussion of how public engagement under the WFD is to be secured in practice is provided in the Environment Agency publication, *A Framework for Stakeholder Engagement* (2005).<sup>54</sup> This indicates the intention of the Agency to secure involvement of stakeholders at the different levels at which this needs to be undertaken. At a national level, a group of stakeholder organisations will be established to contribute to development of national programmes of measures and new regulatory mechanisms. At river basin district level, external input will be channelled through liaison panels, consisting of representatives of statutory bodies and other interest groups, co-operating on the preparation of district level river basin management plans. At catchment level, existing consultation arrangements are perceived to meet the need for engagement, with some flexibility to meet local circumstances. At a local scale, no formal arrangements are envisaged, though individuals and existing networks will be selectively engaged, where local issues arise. Alongside the proposals for engagement at national, district, catchment and

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<sup>51</sup> J. Adshead, 'Public Participation, the Aarhus Convention and the Water Framework Directive' (2006) 17 *Journal of Water Law* 185 at p.189.

<sup>52</sup> See the written evidence from the Foundation for Water Research, which expresses some critical views on the effectiveness of public participation under the WFD and response from Baroness Young, Chief Executive of the Environment Agency, House of Lords European Union Committee, 27<sup>th</sup> Report of Session 2006-07, *Water Framework Directive: Making it Work*, HL Paper 136 (2007) p.26 onwards. See also T. Le Quesne and C. Green, *Can we afford not to? The costs and benefits of a partnership approach to the Water Framework Directive*, WWF (2005) p.27, where it is maintained that that the model of stakeholder engagement proposed by the Environment Agency is inconsistent with government policy in other areas.

<sup>53</sup> W. Maloney and J. Richardson, *Managing Policy Change in Britain: The Politics of Water* (1995) 170 to 171.

<sup>54</sup> See also Environment Agency, *Water for Life and Livelihoods: A Framework for River Basin Planning in England and Wales* (2006).

local levels, the Agency will continue to draw on the expertise provided by statutory committees concerned with flood defence, environmental protection and fisheries, ecology and recreation.

These arrangements are broadly reaffirmed by the Department for Environment, Food and Rural Affairs and Welsh Assembly Government, in *River Basin Planning Guidance* (2006). This suggests that the Agency 'should see itself as the chair or co-ordinator of a group of key decision makers and deliverers which is responsible for investigating a set of collective problems and devising and negotiating solutions to them'. In effect the Agency's role is to 'organise the process'. In addition, the specific arrangements for engaging different groups of interested parties need to be put in place. As a minimum, this must comply with requirements for public consultation set out in WFD and transposing regulations and should involve establishing a liaison panel for each river basin district comprising representatives of key organisations likely to be affected. The essentially advisory role of the river basin district liaison panels should include discussion and negotiation about the content of the river basin management plan, scrutinising the ongoing river basin planning process; and tracking and pursuing progress with the implementation and enforcement of the plan and programme of measures. Membership of liaison panels should be tailored to the river basin district, but should include representatives of three broad types of organisation: regulators who are responsible for enforcing WFD measures; those responsible for delivering WFD measures; and organisations representing the sections of the public who will be affected by implementation. It is recognised that public consultation alone is unlikely to be sufficient and in addition, the Agency will need to ensure that there are appropriate arrangements in place which enable information about impacts, mechanisms and measures to be fed into river basin management plans from both the national and local levels.<sup>55</sup> Whilst the recognition of a need for something beyond public consultation is in accordance with the aim of 'encouraging' public engagement required by the WFD, the challenging task of putting in place 'appropriate arrangements' to secure this seems to be left entirely to the Agency's discretion.

### **Substance and Procedure in the WFD**

The arrangements for participation in the implementation of the WFD are entirely procedural in character, but may be seen as a component of an overall project that is more substantial in its environmental objectives. Returning to the first of the key themes of the paper, what can be learnt about the relative scope of substantial and procedural requirements of the Directive from the way in which implementation has been approached in practice? From the national perspective, what balance does it strike between 'soft' and 'hard' environmental requirements?

From the introductory observations on the scope of the WFD, it is clear that it contains a series of procedural regulatory and administrative tasks, relating to

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<sup>55</sup> DEFRA and Welsh Assembly Government, *River Basin Planning Guidance* (2006) Ch.11.

transposition, identifying competent bodies for river basin districts. Beyond that the exercise of river basin management planning may be characterised as a series of procedural requirements needing to be met by specified deadlines. However, the language of the Directive suggests that these tasks are not ends in themselves, but rather that they are means towards meeting the environmental objectives of the Directive. The search for substance involves closer examination of these.

On first impressions, the environmental objectives of the WFD appear to have considerable substantive content. A clear indication of this is in the environmental quality objective of the Directive that requires implementation by measures that prevent deterioration of the existing quality of surface and groundwaters.<sup>56</sup> 'Non-deterioration' in environmental quality is a clear example of a substantive environmental requirement insofar as a failure to achieve this would seem to provide a basis for infringement proceedings against a state in default.

Insofar as the WFD comprises a consolidation of previous Community water quality legislation, it has re-enacted important substantive water quality requirements deriving from those directives. The concern that adoption of the WFD might serve as a pretext for any weakening or removal of past water quality standards is met by an emphatic recital statement to the effect that 'the implementation of the Directive is to achieve a level of protection of waters at least equivalent to that provided in certain earlier acts . . .'.<sup>57</sup> The broad implication is that where an environmental quality standard has been provided for in a previous water directive, at least equally stringent requirements are imposed by the WFD. More specifically, where pre-existing legislation requires a quality objective or standard to be met, and this cannot be achieved by existing controls upon emissions, stricter conditions must be imposed to ensure the objective or standard is met.<sup>58</sup> In part, this has the consequence that environmental quality standards established pursuant to the Dangerous Substances Directive must be adhered to in implementing the WFD,<sup>59</sup> but the same approach applies to 'other' existing legislation setting relevant objectives or quality standards.<sup>60</sup> Beyond non-deterioration (below existing water quality standards) the WFD incorporates mechanisms for the adoption of further water quality standards for substances that have not been provided for under legislation. Hence, the 'framework' character of the Directive envisages additional measures being adopted against pollution of

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<sup>56</sup> Arts.4.1.(a).i and 4.1.(b).i WFD..

<sup>57</sup> Recital 51 WFD.

<sup>58</sup> Art.10.3 WFD, providing for a 'combined approach' to point and diffuse sources.

<sup>59</sup> Directive 76/464/EEC. The five 'daughter' directives to the Dangerous Substances Directive, setting environmental quality standards for specific substances, are listed in WFD, Annex IV.

<sup>60</sup> Although the WFD is not explicit as to what 'other' legislation is relevant here, it is possible that water quality standards provided for under the Agricultural Nitrates Directive (91/676/EEC) and the Drinking Water Quality Directive (80/778/EEC, as amended) might be examples that fall within this category.

water by individual pollutants or groups of pollutants presenting a significant risk to or via the aquatic environment.<sup>61</sup>

Although provision is made for the repeal of various directives,<sup>62</sup> where their coverage has been brought within the WFD, there is no suggestion that this involves any removal or reduction in stringency of water quality requirements. Indeed, the introduction of a 'combined approach' of requiring both emission limits and water quality objectives to be met<sup>63</sup> involves greater stringency as compared with the previous 'parallel approach' of allowing member states to meet *either* emission limits *or* water quality objectives.

On first impression, the need for waters to achieve 'good status' within a specified timescale has a strongly substantive feel to it. However, on closer scrutiny, this requirement has some significant procedural aspects which deserve careful examination. In the first place, the obligation upon member states is *not* a simple unqualified obligation actually to achieve good status of all relevant waters by a specified date. Critically, the wording of the Directive requires various actions to be taken '*with the aim of achieving*' good status by 2015.<sup>64</sup> If good status is an *aim* rather than a *requirement* of the Directive, then a member state would not be in breach if it failed to realise good status within the deadline, providing that it took the necessary actions.<sup>65</sup> Put bluntly, the timely achievement of good status is legally irrelevant. What is required is the taking of necessary actions, however ineffectual these may turn out to be. Arguably, if the *necessary* actions are taken they should logically produce the desired result of achieving good status. That may be the practical reality in some instances, but there can be no *guarantee* that the measures that are adopted will necessarily be effectual. The point remains that actual achievement of good status is not a substantive requirement. Putting in place measures is what is legally required and this is largely a procedural matter.

Another respect in which achieving good status seems to serve as an aspiration rather than a substantive obligation is because of the range of derogations, exceptions and defences which are allowed in relation to its realisation. These relate to artificial or heavily modified surface waters (which are only required to meet the lesser objective of 'good ecological *potential*'), phased achievement of objectives, less stringent environmental objectives temporary deterioration of water status, and new modifications of physical characteristics and sustainable development activities.<sup>66</sup> The cumulative effect of applying these exceptions may be that there are actually quite

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<sup>61</sup> Art.16.1 WFD, on strategies against pollution of water. See Decision 2455/2001/EC establishing the list of priority substances in the field of water policy and amending Directive 200/60/EC and COM(2006) 397 and COM(2006) 398 on proposals for a Daughter Directive on environmental quality standards for priority substances.

<sup>62</sup> Art.22 WFD.

<sup>63</sup> Art.10 WFD and see W. Howarth, 'Accommodation without Resolution? Emission controls and water quality objectives in the proposed EC Water Framework Directive' (1999) 1 *Environmental Law Review* 6.

<sup>64</sup> Art.4 WFD uses this form of words in relation to various categories of waters.

<sup>65</sup> See D. Grimeaud, 'Reforming EU water law: towards sustainability' (2001) *European Environmental Law Review* 41-51, 88-97, and 125-135.

<sup>66</sup> Under Art.4 WFD.

extensive bodies of water to which the good status requirement is not applicable. The extent to which this happens will depend significantly upon the exercise of discretion by the member states.

### **National Interpretation of the Derogations, Exceptions and Defences**

The extent of the national discretion that exists in interpreting and applying the environmental objectives of the WFD has only become apparent with the process of establishing formal guidance for implementing the Directive. National guidance of this kind for England and Wales is provided in the Department for Environment, Food and Rural Affairs, and Welsh Assembly Government, *River Basin Planning Guidance* (2006).<sup>67</sup> This constitutes statutory guidance<sup>68</sup> from the Secretary of State and the Welsh Ministers to the Environment Agency as to the ways in which its powers should be exercised in implementing the Directive.

The guidance notes the need for achievement of good status of water bodies by 2015 and preventing the deterioration of waters, and terms these the 'default objectives' of the WFD. It also sets out the circumstances where member states may deviate from achieving those default objectives and instead aim to achieve what are referred to as 'alternative objectives' (that is, extended deadlines, less stringent objectives, and different objectives for heavily modified or artificial waters, new modifications and sustainable development activities). Significantly, the alternative objectives, and the defences for failing to achieve objectives, are seen as mechanisms for considering other environmental, social and economic priorities alongside water management priorities and prioritising action over successive river basin planning cycles.

When formulating river basin management plans, it is advised that the Environment Agency 'should make full use of the alternative objectives. They are an integral part of the WFD objectives and their use should be a normal part of river basin planning'.<sup>69</sup> There may be good reasons for this advice in view of the general concern that the Directive should be implemented cost-effectively. Nonetheless, it seems capable of elevating what might have been thought to be exceptional derogations from the good status requirement into the norm. In effect, the Agency is being urged to avoid applying the good status requirement wherever it is possible to apply any of the alternatives. The practical effect of this is difficult to ascertain, but there is potential at least for what might have been regarded as the main objective of the Directive,

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<sup>67</sup> Available at the DEFRA website at <http://www.defra.gov.uk/environment/water/wfd/pdf/riverbasinguidance.pdf>. For commentary see Anon., 'Government formalises delaying tactics on water framework targets' (2006) 380 *ENDS Report* p.40.

<sup>68</sup> Under Reg.20(3) Water Environment (Water Framework Directive) (England and Wales) Regulations 2003; Reg.5 Water Environment (Water Framework Directive) (Northumbria River Basin District) Regulations 2003 and Para.16(2) of Schedule 1 to the Water Environment (Water Framework Directive) (Solway Tweed River Basin District) Regulations 2004.

<sup>69</sup> DEFRA and Welsh Assembly Government, *River Basin Planning Guidance* (2006) paras.4.17 to 4.19 and 9.6 to 9.9.

achieving good status, to be sidelined in the effort to bring waters within the criteria needed to *avoid* achieving good status.<sup>70</sup>

More recently, further indications have been provided as to the scope for derogation from the good status obligation in the DEFRA and Welsh Assembly Government *Consultation on River Basin Planning Guidance Volume 2* (February 2008). It is acknowledged from the outset that this document is written for a 'regulatory audience', rather than members of the public, and the strongly technical character of much of its content reflects this. Nonetheless, the aim is that the consultation will result in further statutory guidance to the Environment Agency as to the exercise of its powers in relation to the Directive. Although the exercise of these powers will affect a wide range of stakeholders, their representatives have been previously involved with the implementation of the WFD and, it is confidently asserted, 'are familiar with the issues and their complexities'.<sup>71</sup> The consultation document is also set in a context of various guidance documents formulated at European Community level, under the Common Implementation Strategy, and proposed guidance provided by the United Kingdom Technical Advisory Group and research studies undertaken at national level.

Key issues that are ranged over in the consultation, which will have significant implications for the application of the good status obligation in practice, concern standards (the adoption of classification guidance proposed by the UK Technical Advisory Group); objectives (the levels of certainty of these and the status of the preference for extending deadlines, rather than setting less stringent objectives); the incorporation of policy trends in river basin planning; Welsh issues; the meaning of 'technical infeasibility' as a basis for an alternative objective to good status; the account to be taken of distributional issues in assessing 'disproportionate cost' as a basis for alternative objectives; and whether the impact assessment for the WFD presents a fair picture of the expected costs and benefits.

Although the issues covered are complex and far-ranging a key focus is upon the consideration that needs to be given to the relationships between natural conditions, technical feasibility and costs and benefits when setting environmental objectives for particular waters. These considerations are seen as mechanisms for considering environmental, social and economic priorities alongside water management priorities, in accordance with the overall concern for sustainable development. Equally they raise critical issues about the extent to which good status will actually be realised in practice.

For example, the WFD requires member states to 'make judgements about the most cost effective combination of measures in respect of water uses to be included in the programme of measures'.<sup>72</sup> In response to this, Common

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<sup>70</sup> See Anon., 'Just 31% of rivers covered by water framework Directive' (2006) 379 *ENDS Report* p.19.

<sup>71</sup> DEFRA and Welsh Assembly Government *Consultation on River Basin Planning Guidance Volume 2* (February 2008) para.1, available at <http://www.defra.gov.uk/corporate/consult/river-basin/consultation.pdf>.

<sup>72</sup> Annex II(b) WFD.

Implementation Strategy guidance<sup>73</sup> has been provided and extensive national research has been undertaken on the principles to be applied in cost-effectiveness analysis under the WFD.<sup>74</sup> This methodology will be vitally important in determining the categorisation of waters and the justification for improvement measures. The upshot of the research on cost effectiveness methodology is that 'costs need to be phased significantly in order to achieve a proportionate implementation of the WFD, given the likely level of benefits' and 'a longer term adaptive approach to river basin planning will ultimately be more effective and cost-effective than a more ambitious initial approach given the current state of knowledge'.<sup>75</sup>

The WFD also provides for the good status objective not to be met for waters where this involves 'disproportionate cost' or where measures are 'disproportionately expensive'.<sup>76</sup> Again, this has been subject to research on the development of methodologies for determining 'disproportionality',<sup>77</sup> which has established guiding principles for disproportionate cost analysis. This rather technical guidance concerns matters such as the amount of evidence that is required in decision-making and the relevant geographic scale of decisions. It also emphasises a general presumption against putting monetary values on certain types of benefits which are not well understood, such as non-use values.<sup>78</sup> In general, disproportionality is seen to arise where the negative consequences (such as compliance costs, impacts on non-water outcomes and distributional issues involving where costs will fall and whether they will be affordable) outweigh the positive consequences (such as water status improvements). The problem here, as in many other environmental contexts, is the difficulty of quantifying the positive consequences of an action with any precision, given the likelihood that these will concern non-monetary environmental benefits. It might be thought that this is an area in which public estimation of the importance of a good quality water environment might be helpful in assessing its non-use valuation. The concern is that technical methodological solutions to assessment of non-use valuation are capable of giving insufficient weight to this.

Taking a step back from the technicality and detail which lies behind this consultation exercise, the critical question is about what it all means in terms of the realisation of good status for waters within the WFD. The obligation to achieve good status appears in a different light when viewed from the recent

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<sup>73</sup> Common Implementation Strategy, Guidance Document No.1 *Economics and the Environment: The Implementation Challenge of the Water Framework Directive* (WATECO) (2003).

<sup>74</sup> RPA Consortium, *Development of a Methodology to Determine the Cost-Effectiveness of Measures and Combinations of Measures for the Water Framework Directive* (2005) and ICF International, *Preliminary Cost Effectiveness Analysis of the Water Framework Directive* Revised After Stakeholder Review (December 2007) available on [www.wfdcrp.co.uk](http://www.wfdcrp.co.uk).

<sup>75</sup> DEFRA and Welsh Assembly Government *Consultation on River Basin Planning Guidance Volume 2* (February 2008) para.138 and 139.

<sup>76</sup> Art.4 WFD.

<sup>77</sup> Jacobs, *Report on guidance on evidence required to justify disproportionate cost decisions under the Water Framework Directive* (2007) available at [www.wfdcrp.co.uk](http://www.wfdcrp.co.uk)

<sup>78</sup> DEFRA and Welsh Assembly Government *Consultation on River Basin Planning Guidance Volume 2* (February 2008) para.148.

consultation paper. It is an obligation that is heavily qualified by national interpretations of economic considerations such 'cost-effectiveness' and 'disproportionate' cost, and these are addressed in a technical way that is capable of excluding broader public discussion of whether they serve to give sufficient priority to environmental improvement.

This is not to suggest that implementation of the WFD should be achieved in an extravagant way, or that it should neglect the need to balance environmental priorities against social and economic facts, as required by sustainable development. However, it is to suggest that key aspects of the WFD are being implemented in a highly technocratic way that is not readily available to public participation or scrutiny. The statement, at the commencement of the consultation document, that it was prepared for a 'regulatory readership' is tantamount to an admission of this. The concern is that critical issues in the implementation of the Directive are being re-characterised and determined in a way that is likely to be the exclusive preserve of a relatively small number of technically expert stakeholders.

On the other hand, this may show something important about the limits of public participation. Public participation presupposes that the issues at stake are issues on which the general public are likely to have opinions on which they will be willing to express a view. There is no difficulty about this where debate surrounds fairly tangible local impacts, but where they can only be addressed by those conversant with the language of the specialist disciplines that are involved, the likelihood of any productive public discussion is limited. The problem, for implementation of the WFD, is that its practical implications have been seen to be less dependent upon generalities and more upon particularities, the technicality of which places them outside the potential sphere of public participation. For those committed to the benefits and furtherance of public participation, this may be regarded as a matter of concern. For those initially sceptical about the value of public participation, or those practically engaged in ensuring that tasks under the WFD are achieved in a timely, practical and cost-effective manner, it may be seen as a recognition of the inevitable.

### **Concluding Observations**

Two concluding observations may be offered.

On public participation, the discussion has illustrated some of the incongruities between measures for public engagement which rest upon high ideals (democratisation and improved decision-making) and the realities of applying complex environmental legislation in a member state that is committed to doing the minimum needed to secure compliance with European Community obligations. It is simply too easy for the issues to move from the general concerns about the state of the water environment, on which members of the public are likely to have an opinion, to highly technical questions about operationalising methodologies that are the preserve of a relatively small number of specialists. It may be that public input may have an influence upon minor aspects of implementation, but many of the big issues

have been effectively placed outside public debate by the technicalities involved.

On proceduralisation, the WFD has elements of substantive content, but these are greatly overshadowed by the breadth of those areas where national discretion on implementation prevails. Realisation of the good status objective, which seemed to be a key purpose of the Directive, is capable of being subsumed in its importance to the need to *avoid* applying good status to waters wherever this is possible. Conceivably, the excessive exercise of national discretion in this way might be subject to scrutiny by the European Commission and perhaps proceedings before the Court of Justice, but it is far from clear in what circumstances intervention would be justified. The overall picture is that the 'new' content of the WFD (as opposed to those respects where it largely re-enacts pre-existing requirements) is strongly procedural. The aspects of national implementation practice that have been reviewed indicate that the procedural mechanisms under the Directive are likely to be exploited to the full in minimising the cost of implementation with commensurate limitations to environmental improvement.

The distance between aspiration and reality under the WFD is far greater than might have been anticipated from a reading of the text of the Directive.