



POSITION PAPER

**"Prevention of water
deterioration" duties**

**European Community
Water Framework
Directive (2000/60/EC)**



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A. THE PURPOSE OF THIS POSITION PAPER

1. There are conflicting opinions about the date on which the “prevention of water deterioration” duties in Articles 1, 4.1.a.i and 4.1.b.i of the Water Framework Directive (WFD) become, or indeed became, legally binding on Member States. Some suggest they have been binding from the date on which the Directive entered into force – 22nd December 2000. However, others contend the obligations need not be complied with until the programme of measures required under Article 11 of the WFD is established (22nd December 2009), or even when it is made operational (22nd December 2012¹).
2. The need for clarity on this issue has gathered urgency as a result of a number of major water infrastructure projects planned across the EU. These include the Spanish National Hydrological Plan (the “SNHP”) and the extension of the inland waterway component of the Trans-European Networks for Transport (TENs-T) to EU candidate countries (the maps for which are attached to the EU Accession Treaty). The SNHP has a number of components, the largest being a water transfer of 1, 050 cubic hectometres per year from the Ebro River Basin to another four river basins of the Spanish Mediterranean coast. The project is to be funded by up to a third from the EU Regional Development and Cohesion Funds and will impact upon a large number of sites designated for nature conservation under EC law. In WWF’s view, it will lead to a significant decline in the water quality and ecological status of the Ebro river basin.
3. This position paper analyses duties concerning the prevention of deterioration of water status in the WFD². The aim of the paper is to clarify WWF’s position on (1) the date on which the “prevention of water deterioration” duties in Articles 1 and 4.1 became, or become, legally binding on Member States in the generality, and (2) the position with regard to major water infrastructure projects, such as the SNHP. In order to address these issues, a number of reference sources have been considered including the language and context of the Treaty of the European Community (TEC), the language and negotiating history of the WFD, and relevant case law from the European Courts of Justice (ECJ).

B. THE WATER FRAMEWORK DIRECTIVE IN THE WIDER CONTEXT - THE FACTS SUPPORTING THE PRINCIPLE OF DETERIORATION PREVENTION

4. In contributing to the debate, a number of general points must first be made. The WFD was borne of the sad state of European waters and the lack of effect that Community legislative measures, thus far adopted, have played in preventing water deterioration. In this respect, it should be stressed that “*Water is not just another commercial item – it is a part of our heritage, and must be protected, defended and treated as such.*”³ This is the justification for accepting the need to preserve, protect and improve aquatic ecosystems in the first place – and, in the second, for using them sustainably⁴. It means that if the priority is protection - and in order to achieve that protection it is essential to maintain aquatic ecosystems in good condition - our first objective and the principle behind our actions is to prevent all deterioration in aquatic ecosystems.

¹ Article 11(7) of the WFD

² European Parliament and Council Directive 2000/60/EC, dated 23rd October 2000 which laid down a community action framework on water policy DO L 327 22/23/2000 p.1

³ 1st Recital, Directive 2000/60/EC.

⁴ “The purpose of this Directive is to establish a framework for the protection of inland surface waters ... which prevents further deterioration and protects and enhances the status of aquatic ecosystems and ... promotes sustainable water use based on a long-term protection of available water resources.” Article 1 Directive 2000/60/EC.

Multi-focus activity in environmental protection

5. Environmental protection as regards water, as in other areas, hinges on the following lines of action: prevention, maintenance and improvement. These lines of action focus on the need to prevent environmental damage before it happens, to understand, value and care for aquatic ecosystems and to restore and optimise the conditions of those systems.
6. These areas of activity take concrete form as a range of objectives itemised in Article 1 of the WFD and a series of obligations itemised in Article 4 of the WFD. Hence, the general objective of “preventing further deterioration” (1.a) corresponds to the obligation to “apply the necessary measures” to prevent a deterioration in the state of surface water (4.1.a.i), groundwater (4.1.b.i) and, by extension, in protected areas (4.1.c). On the other hand, the general objective of “protecting and improving” (1.a) corresponds to the obligation to protect, improve and regenerate surface water bodies (4.1.a.ii), groundwater bodies (4.1.b.ii) and, by extension, those in protected areas (4.1.c) and to protect and improve (not to regenerate) artificial and heavily modified water bodies (4.1.a.iii).
7. There is one final further cause of action that is complementary to those listed in paragraph 6 above. This is the “progressive reduction” in pollution caused by priority substances and the “progressive reduction” in pollution caused by priority hazardous substances in the aquatic environment (1.c) and in groundwater (1.d), which correspond to the obligation to apply the measures necessary to achieve these objectives in surface water (4.1.a.iv) and by extension in protected areas (4.1.c), as well as in groundwater, by reversing any significant and sustained upward trend in any pollutant (4.1.b.iii). This final cause of action does not arise automatically from the implementation of the basic approaches stated in Article 4.1. However, it has become relevant, and has achieved the status of a separate cause of action because of the very seriously polluted condition of our waters. It has, however, been weakened somewhat as the adjective “progressive” means that no deadline is implied.

The “prevention of water deterioration” as an objective and a principle

8. The prevention of water deterioration in the WFD is both an objective and a principle, and implies a legal obligation to implement the same, as we shall see below.
9. As an objective of Community water policy, the prevention of water deterioration arises from the Community objective of “conservation”. It should be borne in mind that the major objective of Community environmental policy is the conservation, protection and improvement of the quality of the environment⁵. This is a very broad objective and permits almost unlimited action on the part of the Community⁶. It is no accident that the Treaty uses the terms conservation, protection and improvement. WWF takes this as intended to stress the fact that the protection of the environment⁷ includes its conservation and improvement, as well as other types of activity. Hence the term “conservation”⁸ (“préservation”⁹ in French or alternatively

⁵ Article 174.1 TEC

⁶ Ludwig Krämer, *Derecho ambiental y Tratado de la Comunidad Europea (Environmental Law and the European Community Treaty)*, Marcial Pons, Barcelona, 1999, p.82.

⁷ The use of the term protection in a comprehensive manner in respect of environmental conservation is accredited in the actual text of the Treaty founding the European Community in Articles 2, 6, 30, 95 and 176

⁸ Dictionary of the Royal Academy of the Spanish Language, 2001: Conservation. (from the Lat.Conservatio, -onis). F. Action and effect of conserving. And to conserve. (From the lat. Conservâre). Tr. To maintain something or to ensure the sustainability thereof. U. t.c. prnl. 2. To keep somebody alive and unharmed. 3. To continue the practice of customs, virtues and the like. 4. To carefully protect something. 5. To make preserves (food)

“preserving”¹⁰ in English) implies a specific way of protecting something involving the maintenance of the condition in which the natural medium exists, and which absolutely prohibits deterioration.

10. As a principle, it shares the same characteristics as the prevention principle, expressed in Community terms as “preventative action”¹¹. The prevention principle is founded on the economic dictum that it is cheaper to prevent damage than it is to remedy it, particularly in view of the fact that much environmental damage is irreversible. This principle seems to have originated in old international law prohibiting the causing of harm outside the national borders¹², and has gained strength from more definitive texts relating to international environmental protection¹³ plus a variety of international treaties relating to the environment¹⁴. Environmental policy¹⁵ has been important from the founding of the European Community until the present day¹⁶. As regards content, the preventive principle requires action to be taken at an early stage and, if possible, before damage has actually occurred¹⁷. It requires an activity that does or will cause damage to the environment in violation of the standards established under specific rules of law to be prohibited. This principle has been considered as of overriding importance in every effective environmental policy, since it allows action to be taken to protect the environment at an earlier stage. It is not longer primarily a question of repairing damage after it has occurred¹⁸. In the case of water, this principle implies that prevention should begin by avoiding deterioration in the condition of the water. It is clear that the principle of prevention of water deterioration is a principle that is intended to inspire a range of applications and will be mandated by a higher authority¹⁹.
11. The obligation to prevent water deterioration is in the founding Treaty, where the preservation of the environment and the principle of the prevention of environmental damage are also laid

⁹ Dictionnaire Robert: preservation n. f. Action or means of preserving. Ad to preserve v. tr. To guarantee, to shelter or save something (from danger or evil)

¹⁰ The New Oxford Dictionary of English, 2000: Preservation noun [mass noun] the action of preserving something: the preservation of the city’s green spaces. Food preservation. The state of being preserved, especially to a fine degree : in a fine state of preservation. –ORIGIN late middle English: via Old French from medieval Latin praeservatio(n-), from late Latin praeservare “to keep”

¹¹ “Community policy on the environment...on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay...” Article 174.2 TEC

¹² Arbitration decisions dated 16th April 1938 and 11th March 1949 in the *Trail Smelter* case between the USA and Canada, RIAA, vol. III, p.1965

¹³ Principle 21 of the Stockholm Declaration, United Nations Conference on the Human Environment, Stockholm, June the 16th, 1972, UN, Doc. A/CONF. 48/14/Rev.1; and Principle 2 of the Rio Declaration, United Nations Conference on Environment and Development, Rio de Janeiro, June the 14th, 1992, UN Doc. A/CONF. 151/Rev.1

¹⁴ For example the Preamble and Article 14 on the Convention on Biological Diversity, Rio de Janeiro, June the 5th, 1992, and Preamble; Articles 2 and 9 of the UNECE Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, February the 25th, 1991; Article 3 of the United Nations Framework Agreement on Climate Change, New York, May the 9th, 1992; and Article 2 of the Vienna Convention for the Protection of the Ozone Layer, Vienna, March the 22nd, 1985

¹⁵ Section II of the first European Communities Action Programme on the Environment adopted by a Declaration of the Council of the European Communities and the representatives of the governments of the Member States meeting at the Council of November the 22nd, 1973, OJ C 112, 20-12-1973

¹⁶ Subsection 5 and Article 2 of the Sixth Community Action Programme on the Environment adopted by Decision 1600/2002/EC of the European Parliament and the Council dated July the 22nd, 2002, OJ L 242, September the 10th, 2002

¹⁷ Philippe Sands, *Principles of International Environmental Law*, Manchester University Press, Manchester and New York, 1995, p. 195.

¹⁸ Ludwig Krämer, *EEC Treaty and Environmental Protection*, (1990), p.61.

¹⁹ Maurice Kamto, "The new principles of international environmental law ", *Revue juridique de l'Environnement*, 1-1993, p. 14

down (174 TEC). This implies the establishment of a general obligation that includes, among other things, the duty to interpret Community Law in a manner that favours effectiveness. This duty is based on the primacy of primary Community Law over derived Community Law and could be invoked as soon as the founding Treaty was established.

12. The prevention of water deterioration is also a specific objective of Community water policy as laid down in the WFD. Article 1.a unequivocally prevents “further deterioration” of aquatic ecosystems.
13. This objective implies a general obligation to prevent all further deterioration in aquatic ecosystems (1.a) and a specific obligation to implement measures to prevent deterioration in the condition of surface water (4.1.a.i), groundwater (4.1.b.i) and, by extension, in protected areas (4.1.c), in the programmes of measures.
14. What emerges from these obligations is that Member States have an unavoidable duty to adopt all measures necessary to achieve the required result, but they are free to choose the ways and means to do so (249 TEC)²⁰.

C. THE LANGUAGE OF EC DIRECTIVE 2000/60/EC

Opening preamble

15. The Opening Preamble of a Directive sets the context for its aims and objectives – indeed the European Courts often rely on the Recitals as an aid to interpretation.
16. A number of Recitals in the WFD refer to the duty to maintain existing standards of water quality. Recital 11 refers to Article 174 of the EC Treaty and the Community’s policy on the environment being “...to contribute to pursuit of the objectives of preserving, protecting and improving the quality of the environment...and to be based upon the precautionary principle...”. Recital 19 states that “*the [WFD]...aims at maintaining and improving the aquatic environment in the Community. This purpose is primarily concerned with the quality of the waters concerned...*”. Recital 25 seeks to ensure that “...*deterioration in the status of waters is prevented at Community level...*” and Recital 26 states that “...*Where good water status already exists, it should be maintained...*”.
17. Recital 32 recognises there may be grounds for exemptions from the requirement to prevent further deterioration if the failure is the result of unforeseen or exceptional circumstances (so-called *force majeure*). However, it is clear these exemptions are to be viewed as a departure from the *status quo*.
18. Recital 51 confirms the aim of the implementation of the Directive is to achieve a level of protection of waters at least equivalent to that provided in certain earlier acts – which will be repealed once the relevant provisions of the WFD come into force. Similarly, Recital 53 refers to the fact that full implementation and enforcement of existing environmental legislation for the protection of waters should be ensured.
19. Collectively, the Recitals of the WFD seek to maintain a standard of water quality at least equivalent to that existing under present EC law.

²⁰ Decisions of 2nd February 1977, *Verbond van Nederlandse Ondernemingen*, 51/76, Rec. p. 113, para 22; of 26th February 1986, *Marshall*, 152/84, Rec. p. 723, para 48; of 24th October 1996, *Kraaijeveld and others*, C-72/95, Rec. p. I-5403, para 55; and of 18th December 1997, C-129/96, Rec. p. I-7411, para 40.

Article 1 – the purpose of the WFD

20. Article 1 of the WFD states “*The purpose of [this] Directive is to establish a framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater which:*
- (a) *prevents further deterioration and protects and enhances the status of aquatic ecosystems.....;*”
21. The reference to “*further deterioration*” suggests the WFD aims to prevent any further deterioration from the earliest possible date. Note that if such a duty became binding on Member States at a later date, such as 2009 or 2012, this would contradict obligations under EC Directives already in force (see paragraph 18).
22. However, in addition to prohibiting a further deterioration in water quality, Article 1 introduces a separate, and wide-reaching, duty on Member States. From the very beginning, the WFD makes a distinction between the need to prevent the deterioration of purely physico-chemical and chemical parameters **and** the need to protect and improve the functioning of aquatic ecosystems. The implications of this important distinction will become apparent.

Article 4.1 – the “prevention of water deterioration” duty

23. Article 4.1 sets out the “Environmental objectives” Member States must attain as follows:
- "In making operational the programme of measures specified in the river basin management plans:*
- (a) *for surface waters*
- Member States shall implement the necessary **measures to prevent deterioration of the status of all bodies of surface water**, subject to the application of paragraphs 6 and 7 and without prejudice to paragraph 8;*
-
- (b) *for groundwater*
- Member States shall implement the measures necessary to prevent or limit the input of pollutants into groundwater and **to prevent the deterioration of the status of all bodies of groundwater**, subject to the application of paragraphs 6 and 7 and without prejudice to paragraph 8 of this Article and subject to the application of Article 11.3.j;*
-” (own emphasis added).
24. Note that Article 4.1 links the requirement to prevent the deterioration of water quality with the need to protect the status of surface and groundwater.

Measures required under Article 4.1

25. The chapeau of Article 4.1 makes reference to the “programme of measures” defined in Article 11.2 of the WFD. These include “...*“basic” measures specified in paragraph 3 and, where*

necessary, “supplementary measures”....”. Article 11.3 of the WFD lists 12 “basic measures” (a-1), the first of which includes measures required to implement Community legislation for the protection of water. “Supplementary measures” are those measures designed and implemented in addition to the basic measures, with the aim of achieving the objectives established pursuant to Article 4. Part B of Annex VI contains a non-exclusive list of such measures. The programme of measures therefore includes measures requiring immediate effect, such as the duty to maintain existing standards of water quality, and measures requiring compliance over a longer timescale, i.e. when the programme of measures is established (2009) or made operational (2012).

26. Article 4.1.a requires Member States to “...implement the necessary measures to prevent deterioration of the status of all bodies of surface water....”. Similarly, Article 4.1.b requires Member States to “...implement the measures necessary to...prevent the deterioration of the status of all bodies of groundwater...”. As has been pointed out by the RSPB²¹, whilst there is obviously a link between the non-deterioration duty and the duty to make operational the programme of measures, the difference in wording lends support to the view that the legislators intended to make a distinction between them. This is supported by the view that it would be incompatible for the “prevention of water deterioration” duties to run from 2009 or 2012 given the obligation on Member States to maintain standards of water quality under existing EC Directives.

Failure to prescribe timetables

27. The “prevention of water deterioration” duties imposed on Member States by Articles 4.1.a.i and 4.1.b.i are unusual in that there are no timetables expressed for them. This contrasts with the other environmental duties in Article 4.1 including:

Article 4.1.a.ii;

Article 4.1.a.iii;

Article 4.1.b.ii; and

Article 4.1.c.

For which compliance is required (at the latest) 15 years after the date of entry into force of the WFD.

Article 4.1.a.iv

For which a number of deadlines are given in Article 16.8.

Article 4.1.b.iii

For which compliance is required at the latest at least five years after the date of entry into force of the WFD (Article 17.4).

28. Had the drafters and/or decision-makers of the WFD specifically intended the date for compliance with the “prevention of deterioration” duties to be at any time after the date by which the transposition of the WFD is required, they would have stated that specific date, or made provision for the identification of a specific timetable. Furthermore, to link the deadline for member state compliance with the prevention of deterioration duties to the programme of

²¹ Royal Society for the Protection of Birds, 2001. Water Framework Directive (2000/60/EC) Legal interpretation of the “no deterioration in status” duty on Member States

measures timetable is not consistent with these duties and the way in which the WFD is drafted as a whole, as been highlighted by the RSPB²².

29. It is also important to note that the extension of deadlines possible under Article 4.4 does not apply to the “prevention of water deterioration” duties in Article 4.1.a.i and 4.1.b.i by virtue of Recital 32. This clarifies that the only form of deterioration which may occur is a temporary one arising from unforeseen or exceptional circumstances. Similarly, the possibility of achieving less stringent environmental objectives referred to in Article 4.5 does not apply to the “prevention of water deterioration” duties by virtue of 4.5.c and Recital 32.

Article 4.9 of the WFD

30. Finally, Article 4.9 of the WFD requires Member States to take steps to ensure that the application of the new provisions of Article 4 guarantee at least the same level of protection as existing Community legislation.

D. THE NEGOTIATING HISTORY OF ARTICLE 4.1 OF THE WFD

31. The content of debates, early draft texts of a Directive and the opinions of relevant bodies can all be helpful in determining what a Directive is trying to achieve. In this situation we are somewhat restricted as the relevant sections of the WFD were subject to discussion by a Conciliation Committee. However, a substantial amount of the accessible negotiating history has been obtained and examined.
32. An early draft of Article 4 of the WFD Directive²³ required Member States to “...draw up and make operational within a comprehensive river basin management plan the programmes of measures envisaged as necessary in order to:
- a. *prevent deterioration of ecological quality and pollution of surface waters...by 31 December 2010;”*
 - b. *prevent deterioration of groundwater quality...by 31 December 2010;”*
33. Six months later²⁴, the Commission sought to clarify this by adding a new paragraph to Article 4(1) requiring Member States to:
- (e) *“comply with all requirements in other Community legislation for territorial and other marine waters....”*

As such, the Commission sought to ensure that a later deadline for some provisions of Article 4.1 would not allow a decline in water quality below the standard already required by EC law.

34. In June 1998, the Committee of the Regions²⁵ published its Opinion on the WFD. This Opinion confirmed the purpose of the Commission proposal was to “...prevent further deterioration and to protect and enhance the status of aquatic ecosystems...”. Most specifically, under Environmental objectives, the COR stressed that although the [WFD] directive “...sets an overall policy objective whereby Member States are to be able to meet the

²² Royal Society for the Protection of Birds, 2001. Water Framework Directive (2000/60/EC) Legal interpretation of the “no deterioration in status” duty on Member States, paragraph 15

²³ OJ C 184, 17/06/1997 P. 0020

²⁴ OJ C/1998/16/ 14.

²⁵ OJ C/1998/180/ 38 Paragraphs 3.2, 7.4 and 7.5

requirement for good surface and groundwater status by the year 2010...a deterioration of water quality is not acceptable. This also holds good for cases – to be found in many parts of the Community – where quality is better than the objectives set...”. Similarly, the COR stated that “The action programme for integrated groundwater protection and management aims to avoid further pollution, maintain the quality of unpolluted groundwater and, if necessary, restore polluted groundwater....”. The Committee was, therefore, clear in its view that the aim of the WFD was to prohibit any further deterioration in water quality.

35. In February 1999, the European Parliament²⁶ approved a number of amendments to the draft text of Article 4.1.a and 4.1.b of the Directive. The Parliament substituted “*protect, enhance*” for “*prevent deterioration*” in Paragraphs 4.1.a and 4.1.b and sought to extend the deadline for the achievement of good groundwater status in all bodies of groundwater from 2010 to 2015. Amendments number 42 and 45 introduced separate paragraphs requiring Member States to prevent deterioration in the status of all surface and groundwater, however, the Amendments did not specify a timetable with respect to either.
36. In June 1999, the Commission presented an amended draft of the Directive²⁷, again clarifying its aim to prevent the deterioration of the status of surface and groundwater and to require good surface and groundwater status by 31 December 2010.
37. In October 1999, the European Council adopted its common position on the draft WFD²⁸. The text of Article 4.1.a and 4.1.b suggests the Council were in favour of bringing the “prevention of deterioration” duties within a much longer timetable encompassing the achievement of good surface water and groundwater status. Article 4.1.a refers to “*preventing deterioration of ecological status and pollution of surface waters and restoring surface waters, with the aim of achieving ...good ecological potential and good surface water chemical status, at the latest 16 years after the date of entry into force of the Directive...*”. Similarly, Article 4.1.b refers to “*...preventing deterioration of groundwater status...with the aim of achieving good groundwater status...at the latest 16 years after the date of entry into force of this Directive...*”.
38. On 16th February 2000, the Parliament adopted 61 amendments to the common position adopted by the Council. These amendments included a shortening of the timetables to oblige Member States to comply with the provisions of Article 4.1 of the Directive at the latest 10 years after the date of entry into force. Extension beyond this date was limited to two further updates (of six years each) of the River Basin Management Plan. On this occasion, the Parliament also inserted a timetable relating to the deterioration of surface waters. Member States were required to “*prevent deterioration of all surface waters...from the date of entry into force of the Directive...*” (own emphasis added). There was, however, no timetable relating to the duty to prevent the deterioration in the quantitative and chemical status of groundwater.
39. In June 2000, the Commission gave an Opinion on the 61 amendments proposed by the Parliament in its second reading of the Directive²⁹. Whilst welcoming a good number of the Parliament’s amendments, the Commission expressed its disagreement with the provisions on the timetable for implementation. In particular, the Commission required more stringent specification of prevention of deterioration from the date of adoption of the WFD Directive. The modified proposal attached to the Opinion was explicit on this point, requiring Member States to “*prevent deterioration of the status of all surface waters...from the date of entry into*

²⁶ OJ C/1999/150/388 onwards

²⁷ COM/1999/271/FINAL

²⁸ OJ C/1999/343/ 1

²⁹ COM/2000/219/FINAL

force of this Directive..." and to "*prevent deterioration of the chemical and qualitative status of groundwater, from the date of entry into force of this Directive...*" (own emphasis added).

40. The Parliament's Report³⁰ on the joint text approved by the Conciliation Committee (August 2000) confirmed that conciliation was relatively difficult and that the discussion concentrated around Articles 1, 4, 11 and 16 of the Directive. The Report confirmed that Member States must take all necessary measures to prevent deterioration in the status of all bodies of groundwater.
41. However, at some point between August and December 2000, the reference to the requirement to prevent deterioration in surface waters from the entry into force of the Directive was also omitted. The text of the adopted Directive³¹ simply refers to the need to implement the necessary measures to prevent deterioration of the status of surface and groundwater, but remains silent as to a date from which these duties apply. As stated above, this is in contrast with the other provisions of Article 4.1 for which express timetables (either in the form of a specific timetable or through timetables to be identified in accordance with other Articles of the WFD) apply.
42. To summarise, it is clear that the EU institutions had quite widely differing views on when the "prevention of deterioration" duties should become binding on Member States. The Commission – at least in the later stages of negotiation – pressed for duties in relation to both surface and groundwater to become binding on Member States from the date on which the Directive entered into force. The Parliament seemed receptive to this deadline in relation to surface water, but reluctant to apply it to groundwater. Finally, it seems the Council were reluctant to identify a specific timetable for the duties to become binding, instead preferring to encompass them within a much longer timetable for the achievement of good surface water and groundwater status – which would become binding up to 16 years after the date of entry into force of the Directive.
43. The fact that the adopted text of the Directive did not include an explicit timetable for the "prevention of water deterioration" obligations to apply, but that specific timetables for the other provisions of Article 4.1 were retained, suggests that the Commission's view did not prevail in the final debate.
44. One might wonder why the Commission was anxious to ensure the relevant provisions of the WFD applied from the date of entry into force of the Directive. The reason goes back to the very purpose of the WFD as stated in Article 1. Unlike existing EC water legislation, the WFD takes us beyond the purely physico-chemical and chemical parameters of water bodies. It aims to prevent changes relating to water flow and morphological characteristics as well as negative changes in the biological composition and functioning of aquatic ecosystems, as these would impair ecological status. Whilst these may sound onerous obligations, and one which commentators may argue Member States could not comply with from December 2000, it is important to recognise that the WFD does not make "within status" deterioration unlawful (with the exception of bodies of water subject to Article 4.7). As such, there are no practical barriers to a start-date of 22nd December 2000. Furthermore, in reality we see evidence of this as, for example, Spain recognised that these provisions entered into force on the date upon which the WFD entered into force³².

³⁰ A5/2000/214/

³¹ OJ L/2000/327/ 1

³² See paragraph 59

E. SUBSEQUENT DEVELOPMENTS ON THE “PREVENTION OF WATER DETERIORATION” DUTIES OF THE WFD

45. The Commission has made at least two explicit statements as to the applicability of the “prevention of water deterioration” duties since the Directive’s adoption – both in support of the December 2000 deadline. The first was in a debate of the European Parliament³³ in 2001 during which the Commission asserted the strict non-deterioration clause of the Directive has applied since the Directive entered into force on 22nd December 2000, which “should prevent a repetition of past errors”.

46. Secondly, an extract of a letter from DG Environment to the Spanish Ambassador in Brussels³⁴ concerning the Spanish National Hydrological Plan states:

“ ...

In general, the “non-deterioration clause” can be considered as a principle of EC law which Member States have to respect following the entry into force of a Directive, even if certain other obligations become mandatory at a later stage...

Article 4 goes on to define the environmental objectives of the Directive and contains two non-deterioration clauses, respectively for surface waters in Article 4.1.a and for groundwaters in Article 4.1.b. It must be noted that this objective of deterioration prevention precedes the objective of achieving good status for the two types of water concerned.

...This non-deterioration principle is a major and prior step in the rationale of Directive 2000/60/EC. The prevention of any or further deterioration of the water status is essential to the aim of Directive 2000/60/EC, without prejudice to the different provisions on derogation.

Many provisions of Directive 2000/60/EC require that all existing obligations on water quality in pre-existing water legislation must be implemented until the Directive repeals them. Therefore, for all waters covered by the “older” Directives the no deterioration principle applies from 22nd December 2000....”

47. This letter again confirms the “prevention of water deterioration” duties are distinct from, and precede, the duty on Member States to achieve good status for surface and groundwater.

F. OTHER PUBLISHED MATERIAL ON THE “PREVENTION OF WATER DETERIORATION” DUTIES OF THE WFD

48. A paper published in elni Review³⁵ suggests the “prevention of water deterioration” duties have been binding since 22nd December 2000. This position is largely based upon the imposition of timetables for the other provisions of Article 4.1 and Article 11.7 and the Commission’s decision to progress legal action against a number of other Member States for non-compliance with up to 11 existing EU water-related Directives since December 2000. The fact that the Commission’s has commenced legal action in the period between the entry into force of the WFD Directive (22nd December 2000) and the repeal of the earlier Directives

³³ Commission statement at the Parliament's Plenary debate on “Water management” of 15th March 2001 following oral questions B5-0015/2001, B5-0020/2001, B5-0153/2001 and B5-0154/2001 by the different Parliamentary groups

³⁴ Letter from Catherine Day, Director General of the Commission’s DG Environment to the Spanish Ambassador in Brussels, 19th December 2002

³⁵ Ana Barriera, The Water Framework Directive and its Non-Deterioration Clause: Practical Implications for the Spanish Hydrological Plan, p. 36-39, in elni Review 1/2003

reflects the Commission's view that Member States remain under a duty to prevent a deterioration in water quality from December 2000.

49. The RSPB's position paper³⁶ rehearses a number of the arguments relied upon in this paper. However, the RSPB contend that, as a result of ECJ jurisprudence³⁷, the "prevention of water deterioration" requirements of the WFD will not become binding until the WFD is transposed into domestic legislation – 22nd December 2003. A number of cases are cited including *Commission v Spain* ("Santoña Marshes") in which the ECJ held that when a directive "...contains no indication of any specific time being allowed for the national authorities to fulfil the obligations laid down [in Articles 3 and 4], for which, in common with all the provisions of the directive, the necessary transposition measures had to be taken within the two year period prescribed by [Article 18 of] the directive...". Thus, when no specific timetable for an obligation is given, the date from which such duties apply is the date of implementation of the Directive. There have been no subsequent cases disproving the view of the ECJ on this matter.
50. The entry into force of a Directive triggers important legal effects (254.3 TEC). One of these is the obligation to abstain from adopting any measure that may threaten the achievement of the objectives laid down in the Directive. The obligation in question is a prohibition, or duty of abstention, as laid down in Article 10 of the TEC³⁸. This obligation has been laid down by the European Court of Justice, which held that Member States have a duty to abstain from adopting provisions that may seriously compromise the outcome prescribed by a Directive during the period of time provided for its transposition into national law³⁹. This is also true for the entry into force of the WFD on 22nd December 2000. Insofar as the protection and prevention of water deterioration is an objective – and, hence, a mandatory result requested by the WFD, Member States may not adopt any measures that will seriously compromise the said objective.
51. At the end of the transposition period on 22nd December 2003, the obligation to prevent the deterioration of all aquatic ecosystems (1.a) will become fully applicable. This prohibits Member States from either adopting or maintaining any measures, whether legislative or regulatory, which could negate the useful effect of the WFD⁴⁰. In addition, Member States must adopt all measures, whether general or particular, appropriate to ensure the fulfilment of the "prevention of water deterioration" objective, which cannot be reduced to the programme of measures by a parallel application of the legal doctrine⁴¹. In *Commission v Spain*, the ECJ held that the objectives of protection set out in the EC Birds Directive could not be achieved if Member States had to first comply with obligations arising under Article 4.4, i.e. the prior establishment of a Special Protection Area. Similarly, Member States will not be able to fulfil the objective set out in Article 1 of the WFD (the prevention of further deterioration in water status) in the next 9 years if the measures flowing from it in Article 4.1 will only come into effect when the programme of measures required under Article 11 (established in 2009⁴²) is made operational in 2012⁴³.

³⁶ Royal Society for the Protection of Birds, 2001. Water Framework Directive (2000/60/EC) Legal interpretation of the "no deterioration in status" duty on Member States

³⁷ Cases C-198/97 *Commission v Germany* (paragraph 35), C-56/90 *Commission v UK* and C-355/90 *Commission v Spain* (paragraphs 10-11)

³⁸ Decision of 10th January 1985, *Leclerc / Au blé vert (To the Green Meadow)*, 229/83, Rec. 1985, p.1, para 14

³⁹ Decision of 18th December 1997, *Inter-Environnement Wallonie ASBL v Région Wallone*, C-129/96, Rec. p. I-7411, para 41

⁴⁰ Case C-35/96 *Commission v Republic of Italy*, Rec. p. I-03851, para 53

⁴¹ See Case C-355/90 *Commission v Spain*, Rec. p. I-4221, para 22

⁴² The deadline for the establishment of the programmes of measures is 22nd December 2009 (11.7 WFD). On this date, Member States are under a specific obligation to include measures necessary to attain the objective of

G. THE “PREVENTION OF WATER DETERIORATION” DUTIES AND MAJOR WATER INFRASTRUCTURE PROJECTS: THE POSITION WITH REGARD TO THE SPANISH NATIONAL HYDROLOGICAL PLAN (SNHP) AS AN EXAMPLE

52. Legislation establishing the basis for the Spanish National Hydrological Plan (SNHP) was passed by the Spanish Parliament in July 2001 and entered into force in August 2001. The Plan has two parts: A new water transfer of 1, 050 cubic hectometres of water per year from the Ebro river to another four basins in the east of the country and, secondly, a “package” of 889 public works. The Ebro water transfer is the main bulk of the SNHP. In addition to the piping, it will require approximately 381 new water infrastructures and other works affecting all five river basins. The most environmentally damaging of these works are six new dams in the Pyrenees mountains. The impacts of this water transfer could ultimately include the total disappearance of the Ebro Delta (a proposed Special Area of Conservation under the EC Habitats Directive, a Ramsar site and the third most important wetland in Spain⁴⁴). It is WWF’s view that the SNHP will cause a very significant deterioration not only in the quality of water, but also in the overall ecological status of the five affected river basins.
53. The Commission also made a statement about the SNHP during the Parliament’s debate in March 2001. The Commission confirmed the SNHP is a general policy document, which will be followed by a large number of detailed projects. As such, the national plan is not comparable with a river basin plan under the WFD, for which a thorough analysis of the environmental impact and economic aspects must be completed before the end of 2004. The Commission again confirmed that a strict deterioration clause applies, and that impacts and measures that will cause deterioration of a water body are prohibited. The only exception to this is if Spain invokes one of the limited derogation clauses set out in Article 4.7, which in turn are subject to meeting a range of conditions, including the environmental impact and economic analysis mentioned above. The Commission stated that on the basis of these, only then would it be able to fully assess whether the operational measures under the SNHP comply with the WFD and other Directives, such as those protecting wild birds and habitats and species.
54. Article 4.7 states:
- “Member States will not be in breach of this Directive when:*
- *failure to achieve good groundwater status, good ecological status or, where relevant, good ecological potential or to prevent deterioration in the status of a body of surface water or groundwater is the result of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, or*
 - *failure to prevent deterioration from high status to good status of a body of surface water is the result of new sustainable human development activities*
- and all the following conditions are met:*

preventing deterioration in the programmes of measures (Article 11.7 in relation to Articles 4.1.a.i, 4.1.b.i and 4.1.c of the WFD).

⁴³ The deadline for making the programme of measures required under Article 11 operational is 22nd December 2012 (11.7 WFD). On this date, Member States have the specific obligation to ensure that all the measures laid down in the said programme are operational.

⁴⁴ Full report: http://ramsar.org/ram_rpt_43htm and Vid. Arrojo Agudo, Pedro: “El Plan Hidrológico Nacional a Debate”. Bakaez-Fundación Nueva Cultura del Agua Bilbao. 2001, Antoni y Curco, Antoni: “El delta del Ebro, un sistema amenazado”. Bakaez-Coagret. 1999

- (a) *all practicable steps are taken to mitigate the adverse impact on the status of the body of water;*
- (b) *the reasons for those modifications or alterations are specifically set out and explained in the river basin management plan required under Article 13 and the objectives are reviewed every six years;*
- (c) *the reasons for those modifications or alterations are of overriding public interest and/or the benefits to the environment and to society of achieving the objectives set out in paragraph 1 are outweighed by the benefits of the new modifications or alterations to human health, to the maintenance of human safety or to sustainable development, and*
- (d) *the beneficial objectives served by those modifications or alterations of the water body cannot for reasons of technical feasibility or disproportionate cost be achieved by other means, which are a significantly better environmental option*

55. Article 4.8 states:

“When applying paragraphs 3, 4, 5, 6 and 7, a Member State shall ensure that the application does not permanently exclude or compromise the achievement of the objectives of this Directive in other bodies of water within the same river basin district and is consistent with the implementation of other Community environmental legislation.

56. Article 4.9 states:

“Steps must be taken to ensure that the application of the new provisions, including the application of paragraphs 3, 4, 5, 6 and 7, guarantees at least the same level of protection as the existing Community legislation.”

57. The date of implementation of the WFD is 22nd December 2003. Following this date, if the Spanish Administration wishes to progress the SNHP it must demonstrate **all** of the following:

- 57.1 that it has taken all practicable steps to mitigate the adverse impact on the status of the body of water;
- 57.2 that it has justified the need for the Plan;
- 57.3 that the failure to meet environmental objectives is outweighed by the benefits of the Plan in terms of human health, safety or sustainable development;
- 57.4 that the benefits of the Plan cannot be achieved by alternative measures which are a significantly better environmental option;
- 57.5 that the SNHP does not permanently exclude or compromise the achievement of the objectives of the WFD in other bodies of water within the Ebro river basin district (Article 4.8);
- 57.6 that the SNHP is consistent with the implementation of other Community environmental legislation; and
- 57.7 that the application of provisions of the SNHP guarantee at least the same level of protection as existing Community legislation (Article 4.9).

58. As stated in paragraph 50 above, the Directive's entry into force on 22nd December 2000 imposed an obligation on Member States to abstain from adopting any measure which may endanger the objectives laid down in the WFD.
59. Finally, it is interesting to note as an aside that the Spanish Administration has stated that it is already bound by the duties under Articles 1, 4.1.a.i and 4.1.b.i of the WFD. One of the studies accompanying the SNHP states "*If a Member State decides to execute a water transfer, it would be necessary to consider the magnitude of its effects on the water ecological status and the principle of non-deterioration which implies that a water body cannot be of inferior ecological status from the moment the WFD enters into force...*"⁴⁵.

H. CONCLUSIONS

60. The "prevention of water deterioration" obligation arises from the Treaty itself, where the principles of environmental preservation and the prevention of environmental damage are laid down (174 TEC). This obligation is then enshrined in Community water policy via, for example, the WFD.
61. DG Environment (European Commission) has confirmed this point by stating that "*In general, the "non-deterioration clause" can be considered as a principle of EC law which Member States have to respect following the entry into force of a Directive, even if certain other obligations become mandatory at a later stage...*"⁴⁶.
62. The language of the WFD makes it clear that standards of water quality required under existing EC law must be maintained until relevant provisions of the WFD come into force. The only derogation from this duty exists in the form of unforeseen or exceptional circumstances (*force majeure*) outlined in Article 4.6 of the WFD.
63. Article 4.1 of the WFD sets out the environmental objectives the Member States must attain. The majority of these provisions are subject to express timetables (either in the form of a specific timetable or through timetables to be identified in accordance with other Articles of the WFD). By way of contrast, there are no express timetables for the status-related "prevention of water deterioration" duties in Article 4.1.a.i and 4.1.b.i to come into force. However, in order to achieve the purpose of the WFD as set out in Article 1, i.e. to prevent further deterioration in water status, WWF believes that these duties must apply from the earliest possible date.
64. WWF does not believe that these duties are linked to any of the other timetables within Article 4.1 - such as the date on which the programme of measures required under Article 11 is to be established (2009) or made operational (2012). This is because we are not referring to the "prevention of water deterioration" duties being "measures" but a "general objective" arising under Article 1 of the WFD (see above).
65. Moreover, it is important to note that Member States *could not* achieve the objective set out in Article 1 of the WFD (the prevention of further deterioration in water status) in the next 9 years if the measures flowing from it in Article 4.1 will only come into effect when the programme of measures required under Article 11 (established in 2009) is made operational in 2012. ECJ jurisprudence confirms that such an inconsistency is indeed unlawful. This is further supported

⁴⁵ "Documento de Análisis Ambientales", page 23

⁴⁶ Letter from Catherine Day, Director General of the Commission's DG Environment to the Spanish Ambassador in Brussels, 19th December 2002

in the fact that given the obligation on Member States to maintain standards of water quality under existing EC Directives, it would be incompatible for the “prevention of water deterioration” duties to run from 2009 or 2012.

66. Further support for the line of reasoning suggested above can be taken from an examination of the negotiating history of the Directive. During the latter stages of negotiation of the WFD legal text, the Commission pressed for the “prevention of water deterioration” duties in relation to the status of surface and groundwater to become binding on Member States from the date of entry into force of the Directive. The European Parliament, however, pressed for such a duty to apply to surface water but not, it would appear, to groundwater. The European Council was resistant to such duties in relation to either surface water or groundwater. The ensuing political machinations resulted in the omission of an express timetable for these duties to be complied with at all. It is clear, however, that the Commission was intent on establishing such duties from the earliest possible date. This has been confirmed by DG Environment’s⁴⁷ statement that *“This non-deterioration principle is a major and prior step in the rationale of Directive 2000/60/EC. The prevention of any or further deterioration of the water status is essential to the aim of Directive 2000/60/EC, without prejudice to the different provisions on derogation”*.
67. The “prevention of water deterioration” duties bring obligations over and above the duty to simply maintain standards of water quality under existing EC law. It is imperative that these duties to apply from the earliest possible date, a requirement recognised by the Commission up to now and which WWF fully supports. As these duties do not place onerous – or impossible obligations on EU Member States, WWF urges them to recognise them from the date of entry into force of the WFD - 22nd December 2000.
68. In any event, note that in the absence of an express timetable for Articles 4.1.a.i and 4.1.b.i, ECJ jurisprudence confirms that these duties become fully binding on Member States on the deadline for the transposition of the WFD – 22nd December 2003.
69. The position with regard to major water infrastructure projects such as the SNHP is clear. The Spanish Government is not only prohibited from allowing any deterioration in water quality below the standard already required by EC law, it is also prohibited – as a result of ECJ jurisprudence - from taking any measures liable seriously to compromise the objectives of the WFD. As the SNHP in its present form will bring about a significant deterioration in the water quality as well as in the ecological status of, amongst others, the Ebro river basin, the Spanish Government is prohibited from progressing it. Thus, WWF advises the Spanish Government to revise the basis for the SNHP.
70. Similarly, WWF advises other EU Member States to revise any existing or proposed water infrastructure schemes (e.g. the extension of the inland waterway component of the TENs-T to EU candidate countries) that could result in a deterioration of ecological status.

⁴⁷ Letter from Catherine Day, Director General of the Commission’s DG Environment to the Spanish Ambassador in Brussels, 19th December 2002