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European Community Water Law

Richard Macrory*

INTRODUCTION

In many countries the earliest environmental laws were concerned with the protection and allocation of water resources. Water pollution likewise formed the subject of some of the first items of environmental policy in the European Community (EC). These early Community measures have developed into an impressively large body of law, consisting at present of over twenty major legal instruments. No single organic Community law regulates water pollution. Rather, a spectrum of laws governs various aspects of the aquatic environment. These laws adopt differing policy approaches and rely on diverse legal structures.

To date, Community legislation has taken the form of directives rather than regulations, and has therefore left considerable discretion to Member States as to the means of implementing the legislation within national legal and administrative standards. The directives themselves vary substantially in the amount of discretion they accord to Member States. I would suggest that the development of principles under which that discretion can be reviewed and challenged by Community institutions will be a critical area of legal development over the next decade. Some substantive case law from the European Court of Justice indicates emerging principles of Member State discretion; a number of these decisions are discussed below.

For the purposes of this paper, I treat the main Community water pollution laws under four headings:

(i) Water Uses and Water Quality Objectives;
(ii) Pollution Discharges Including Dangerous Substances;
(iii) Specific Processes; and
(iv) Product Standards.

The implementation of Community laws, of course, takes place at a national level, and in the final section of the paper I present the example of the United Kingdom to illustrate the very real impact that Commu-

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1. As of May 1, 1992, there were 22 main directives concerning water pollution; 18 directives and 2 regulations concerning air pollution (including vehicle emissions); and 9 directives relating to waste disposed of on land.
nity law has had on the structure and administration of water management laws in one Member State.

I
WATER USES AND WATER QUALITY OBJECTIVES

Four of the main Community water pollution laws set environmental quality objectives for water bodies based on the uses made of the water. In this context, an environmental quality objective is a "set of requirements which must be fulfilled at a given time, now or in the future, by a given environment or . . . part thereof." Though the four Community laws adopting this approach mandate the standards of water quality to be achieved, they are notable for the discretion they grant to individual Member States.

This discretion arises in three important ways: Member States enjoy considerable latitude in identifying the waters within their territory to which the requirements apply. In addition to mandatory requirements, each law contains guideline values that Member States are urged but are not formally obligated to achieve. Finally, even when Community legislation imposes mandatory requirements, the laws define only the "end" to be achieved, and not the means for doing so. How to achieve the results is a decision left to Member States.

The four Community laws that impose water quality objectives are as follows:

A. 1975 Surface Water for Abstraction of Drinking Water Directive

Member States are required to take the necessary measures to ensure that surface water intended to be used as drinking water meets a detailed range of standards provided in the Directive. The Directive lists standards for three categories of water, reflecting different degrees of water purification and treatment. The standards contain nearly 50 parameters, each divided into mandatory values (Imperative 'I' values), which are obligatory, and guide values (Guide 'G' values), which Member States "shall endeavor to respect." Member States have the discretion to fix more stringent standards than those defined in the Directive. The Directive also requires Member States to draw up systematic plans

4. Id. art. 2, at 27.
6. Id. art. 6, at 28.
of action to improve surface water quality, though these provisions are worded rather loosely. An accompanying directive, passed by the Community in 1979, discusses in detail the methods of sampling surface waters and sets minimum annual frequencies for water sampling and analysis.

B. 1976 Quality of Bathing Water Directive

This Directive specifies various physical, chemical, and microbiological parameters (including total coliforms), and as with the previous directives, divides these into minimum mandatory requirements and guideline values. In addition, the Directive imposes detailed sampling requirements. The Directive gives Member States ten years from its notification (December 10, 1975) to achieve compliance, though Member States may grant derogations “in exceptional circumstances.”

Three features of the form and structure of the Bathing Water Directive are worth emphasizing:

(i) The Directive broadly defines “bathing water” to include not only water in which bathing is explicitly authorized by Member States, but also water in which bathing is not prohibited and “is traditionally practiced by a large number of bathers.” Although Member States exercise discretion in the designation of their bathing waters for the purposes of the Directive, the definition of ‘bathing water’ is drafted in quasi-objective terms. This means that when a Member State fails to identify a particular stretch of water as bathing water to which the Directive applies, its decision can be called into legal question by the Commission on the basis of contrary factual evidence concerning the amount of bathing that actually takes place there. This is a significant mechanism to prevent abuse of discretion by Member States. Nevertheless, considerable disparities remain among Member States over the number of beaches identified for the purposes of the Directive.

7. Id. art. 4.2, at 27.
9. See, e.g., id. arts. 3-5, Annexes I, II, at 45, 47-53.
11. Id. arts. 3.2 - 3.3, at 2.
12. See id. art. 6, Annex, at 3, 5-7.
13. Id. arts. 4.1, 4.3, at 2. The Member State must communicate the derogation to the Commission of the EC “as soon as possible and not later than six years” following notification.
14. Id. art. 1.2(a), at 2.
15. See id.
16. To take the example of the United Kingdom, in December 1987, the U.K. Government notified the Commission of only 27 bathing waters falling within the criteria of article 1.2(a); this list excluded such well known resorts as Blackpool. The Commission disapproved the restrictive methodology used by the United Kingdom, and following the threat of legal proceedings, the United Kingdom communicated a further list of 362 bathing waters. See NIGEL HAIGH, EEC ENVIRONMENTAL POLICY AND BRITAIN 66-68 (2d rev. ed. 1989) [here-
(ii) The Directive requires each Member State to submit a comprehensive report to the Commission on the quality of its bathing waters four years after notification of the Directive, and "at regular intervals thereafter." Few Community water laws require that Member States prepare detailed and regular reports; however, a recently agreed-upon directive imposes consistent reporting requirements on member states relating to a variety of environmental directives. This Directive has amended article 13 of the Bathing Water Directive to require annual reports. This requirement has significantly strengthened the Commission's ability to review Member State compliance, and has created a flow of information to the public that keeps the issue of bathing water quality alive within Member States.

(iii) The Bathing Water Directive does not specify what steps a Member State must take when a particular stretch of bathing water fails the mandatory requirements. For example, should bathing be prohibited completely while the water is in breach, or is the provision of warning signs sufficient? Further, should this be an issue of Community law, or should the Member State have full discretion to choose a response?


These Directives are structurally similar; both specify various water quality requirements (with mandatory 'I' values, and suggested guideline 'G' values) based on a range of physical and chemical parameters, including temperature, dissolved oxygen, and Biological Oxygen Demand (BOD), among others. They also set minimum sampling frequencies. The first Directive concerns fresh waters which "support or become capable of supporting" freshwater fish, while the second concerns coastal and brackish waters that support shellfish life.

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18. The absence of a reporting requirement is, for example, a great weakness of the 1975 Drinking Water Directive. For a discussion of that Directive, see supra notes 3-9 and accompanying text.
20. Id. art. 3, at 49.
23. Freshwater Fish Directive, supra note 21, art. 3, at 2; Shellfish Directive, supra note 22, art. 3, at 48.
25. Freshwater Fish Directive, supra note 21, art. 1(4) at 2.
In contrast to the Bathing Water Directive, both of these directives explicitly give Member States the power to designate the waters within their countries to which the directive applies. Member States must submit a detailed report to the Commission following a specified period after such designation (5 years for Freshwater fish and 6 years for Shellfish), and at regular intervals thereafter. On its face, the power to designate gives Member States unfettered discretion and a way to avoid the obligations of the directives. However, in an important judgment in 1988, the European Court of Justice held that it would be contrary to the aims of the directives if Member States failed to address the task of designation. This judgment should improve the traditionally low rate of designation of water bodies by Member States.

II

POLLUTION DISCHARGES INCLUDING DANGEROUS SUBSTANCES

The next group of directives stresses pollution prevention through the control of discharges of dangerous substances into water bodies.

A. 1976 Framework Directive on Discharge of Dangerous Substances

This is perhaps the most fundamental of the water pollution directives. Although the Directive itself does not contain specific standards of any sort, it lays down a framework of controls and provides for the development of detailed subsidiary directives. The subsidiary directives in turn set specific emissions standards for a wide range of chemical substances.

The 1976 Framework Directive divides groups of regulated substances into two lists. List I, the so-called "black list," contains eight groups selected for their toxicity, persistence, and tendency to bioaccumulate; these include mercury, cadmium, and several carcinogens. List II, the "grey list," embraces eight groups of substances that are considered harmful to the aquatic environment but whose discharge can "be

27. See supra notes 14-16 and accompanying text (discussing limitations to Member State discretion in designating bathing waters).
28. Freshwater Fish Directive, supra note 21, art. 16, at 4; Shellfish Directive, supra note 22, art. 14, at 49. As amended by a recent Directive, these articles now require Member States to send to the Commission reports at intervals of three years. Environmental Reporting Directive, supra note 19, art. 2(1), Annex I, at 48, 51. The first report will cover the period 1993-95 inclusive, and must be submitted within nine months of the end of that period. Id. at 49.
31. See id. art. 6, at 25-26.
32. See infra notes 58-61 and accompanying text.
confined to a given area” and need not be completely eliminated.34 The Commission has identified 1500 individual substances that could fall on the black list.35 In 1983, the Council of Ministers placed a priority on the investigation of 129 substances from this list.36 The size of the priority list alone indicates the extensive scope of the Directive and the challenges involved in applying it.

Two different pollution control regimes are provided for List I and List II substances, with the basic aim being to “eliminate pollution” by List I substances and to “reduce pollution” by List II substances.37 For List I substances, the Directive requires that all discharges into inland surface, coastal, groundwater, and territorial water bodies be authorized by a “competent body” within each Member State.38 Authorizations must specify emission standards to be met by the discharger.39 The Directive further provides that subsequent directives may specify “limit values” for particular List I substances.40 Generally expressed as maximum concentrations, these limit values are based on a substance’s toxicity, persistence, and tendency to bioaccumulate.41 Limit values are occasionally expressed as unit of pollutant per unit of good produced.42 All limit values are intended to “tak[e] into account the best technical means available” for pollution control.43 Where Community-wide limit values have been issued,44 any standards contained in individual authorizations must not exceed those values, though Member States may apply more stringent standards should they wish.45

Securing agreement to the 1976 Framework Directive was a particularly controversial process, not least because the United Kingdom strongly resisted the proposed “Limit Value” approach for List I substances. The U.K. argued that it was illogical to set standards without reference to the varying capacities of the different receiving environments and that to require the same emission standards for discharges into fast-flowing, high volume waters as into small, ecologically sensitive rivers made neither economic nor scientific sense.46 During the political debate

34. Id. at pmbl., para. 6, at 23-24 & Annex, at 28-29.
38. Id. art. 3.1, at 25.
39. Id. art. 3.2, at 25.
40. Id. art. 6.1, at 25.
41. Id.
44. See id. arts. 3, 6, at 25, 26 (describing how Community-wide limit values are promulgated).
45. Id. arts. 5, 10, at 25, 26.
46. See, e.g., The Rhine and the Thames, THE TIMES (London), Oct. 15, 1975, at 13,
leading up to the agreement on the Directive, a number of myths were promulgated. Chief among these was the characterization of Limit Values as *uniform* emission standards, as opposed to *minimum* standards; this error still appears in current British legal writing on the Directive.

Beyond the myths, profound philosophical differences in policy approaches towards pollution control underlay much of the rhetoric and many of the technical arguments over the Directive. One view emphasized the physical capacity of the environment to absorb and disperse potential pollutants without risk, provided that the discharges take place under regulated conditions; in addition, this school of thought demanded scientific justification before burdening industry with pollution controls. Proponents of the Directive were less absorbed with the need for scientific proof, and were more interested in minimizing, and ideally phasing out, chemical discharges into the environment, especially those involving toxic substances.

The European Community eventually reached a compromise with the U.K. The final version of the Directive requires the Community to set environmental quality objectives for List I substances (i.e., the amount of the substance that is permitted in the receiving waters) in addition to Limit Values. A Member State may adopt the quality objective approach rather than using limit values provided it can demonstrate to the Commission that the relevant quality objective (or that contained within any other more severe Community Directive) is being met and continuously maintained. So far, only the United Kingdom has opted for this approach. The Directive requires that the Commission report to the Council of Ministers instances "where it has had recourse to the quality objectives method," a phrase which implies that the Commission must formally approve the Member State's decision to pursue water quality objectives. The Commission has made no such notification to the Council, and therefore as a matter of strict legal interpretation, the U.K. system is arguably not yet sanctioned under Community law.

which was published the day the Council of Ministers was due to consider the Directive and which set forth the U.K. Government's position and arguments on the Directive.

47. *See Nigel Haigh, Manual of Environmental Policy: The EC and Britain* 3.10 (1992) [hereinafter Haigh 2].
48. *Id.* at 3.8.
49. 1976 Framework Discharge Directive, *supra* note 30, art. 6, at 25. Like limit values, quality objectives were to be based primarily on a substance's toxicity, persistence, and tendency to bioaccumulate. *See supra* note 41 and accompanying text.
50. *Id.* art. 6.3, at 26.
The limit value approach applies only to List I substances for which daughter Directives have been agreed upon. For any of the vast majority of substances for which there is as yet no such directive, and for all List II substances, the Directive only requires Member States to establish procedures for authorization of discharges. Emission standards attached to any such authorization must meet quality objectives established by either the Community or Member States. No quality objective for a List II substance has yet been established by the Community. Control of water quality objectives therefore largely rests with the Member States. The Directive also requires that each Member State establish programs to reduce pollution of waters by List II substances and communicate summaries of the programs to the Commission. Only a small number of Member States have as yet complied.

Although the majority of the key Community water directives are in fact based on a quality objective approach, the limit value/quality objective dispute is of fundamental importance to the design of water pollution legislation. It has been convincingly argued that both approaches have strengths, and that they should be combined effectively to provide a minimum limit value applicable in all instances, together with a quality objective for the receiving waters. It remains to be seen whether this merging of approaches will be achieved.

B. Dangerous Substance Subsidiary Directives

Member states agreed to only six subsidiary directives between 1982 and 1988. These directives prescribed limit values and quality objectives for 13 List I substances, of which several are pesticide-related chemicals. The substances included mercury, cadmium, HCH (including Lindane), pentachlorophenol (PCP), DDT, carbon tetrachloride, aldrin, HCBD, chloroform, dieldrin, endrin, isodrin, and HCB. The time taken to secure agreement for such a small proportion of the total

53. See id. art. 7, at 26.
54. See id. art. 7.3, at 26.
55. The Commission has so far proposed a directive specifying quality objectives (relating to freshwater capable of supporting fish-life, sea, and sediments and shellfish) for one List II substance, Chromium. See Proposal for a Council Directive on Water Quality Objectives for Chromium, 1985 O.J. (C 351) 33. The draft Directive has not yet been agreed to by the Council of Ministers.
59. See supra note 58 (listing the substances covered by each subsidiary directive).
number of List I substances did not augur well for the full implementation of the Directive.

In response, the Community in 1986 promulgated a directive aimed at speeding up the agreement of subsequent daughter directives. The 1986 Directive establishes provisions that apply to every List I substance once values for that substance are set. A further proposal, currently under discussion, would allow subsequent values and objectives to be agreed upon by qualified majority voting at the Council of Ministers. A number of Member States have not welcomed this departure from the requirement of unanimity. If the Maastricht Treaty, which extends qualified majority voting into many other areas of environmental policy, is ratified, this proposal may arouse less opposition.

C. 1980 Protection of Groundwater Against Pollution Caused by Dangerous Substances Directive

This Directive seeks specifically to protect groundwater, but follows the 1976 Framework Discharge Directive in dividing substances into a black list and a grey list, although the lists attached to the two directives do not precisely match. Under the Groundwater Directive, Member States must prohibit all direct discharges of black list substances into groundwater and must take appropriate measures to prevent indirect discharges. Direct and indirect discharges of grey list substances must be limited to prevent pollution of groundwater.

Given that the Directive expressly encompasses both direct and indirect discharges, and that it absolutely prohibits certain discharges, the obligations it imposes on Member States are potentially very large. The Directive’s requirements have yet to be satisfactorily transposed into na-
tional legal and administrative systems. As recently as February 1991, the European Court of Justice held that Germany had failed to properly transpose the Directive into national law.69 Similarly, the United Kingdom has only recently made clear to local administrative authorities that waste disposal licenses must prohibit any disposal of List I substances onto land.70 The U.K.'s action followed a Community investigation triggered by a local complaint.71

D. 1991 Nitrate Directive72

This Directive seeks to protect waters from nitrate pollution from agricultural sources, and represents a significant advance in Community water pollution policy in that it targets a non-industrial and indirect source of pollution. By the end of 1993, Member States must identify waters that are or could be affected by nitrate pollution.73 Lands that drain into these identified waters and that "contribute to pollution" must be designated as vulnerable zones.74 Member States must then within two years draw up action programs to prevent further pollution and to reduce existing levels of nitrates.75 These plans must include measures mandated by the Directive, such as rules concerning fertilizer application and livestock manure storage.76 For instance, the Directive requires Member States to impose an annual limit of 170 kilograms of nitrogen per hectare, with provision for higher derogations in specified circumstances.77 Member States have four years in which to implement these action plans.78 Outside of vulnerable zones, the Directive requires Member States to draw up Codes of Good Agricultural Practice intended to protect all waters from nitrate pollution.79

Agreement to the Directive was won only with difficulty, though the text of the Directive is less rigid than some Member States had feared it might be. As with the Directive on Urban Waste Water Treatment discussed below,80 Member States retain considerable discretion in the identification of areas of water subject to nitrate pollution and in the designation of vulnerable zones. Nonetheless, the drafting of criteria in quasi-objective terms will give some leverage to the Commission to monitor and control abuse in the process. The Directive requires the Com-

71. See HAIGH 2, supra note 47, at 4.7.4.
73. Id. art. 3.1, at 3.
74. Id. art. 3.2, at 3.
75. Id. art. 5, at 3-4.
76. Id. Annex III, at 7.
77. Id. Annex III, ¶ 2, at 7.
78. Id. art. 5.4, at 3.
79. Id. art. 4, at 3.
80. See infra notes 90-98 and accompanying text.

III

SPECIFIC PROCESSES

A. Titanium Dioxide Directives

The First Environmental Action Programme identified three groups of industries that warranted particular attention in the development of Community pollution control policy: paper and pulp, iron and steel, and titanium dioxide manufacturing. Community legislation has only been agreed upon for the titanium dioxide manufacturing industry; directives regulating the production of titanium dioxide passed in 1978, 1982, and 1989. The three Directives require Member States to establish programs to reduce and eventually eliminate pollution caused by waste from industries that produce titanium dioxide. Though the directives adopt a "multi-media" approach, and are thus not confined to water pollution, they clearly encompass aquatic discharges.

The 1989 Titanium Dioxide Directive sparked an important legal dispute between the Council of Ministers and the Commission. The European Court of Justice issued its decision in June 1991. Essentially, the Council maintained that the Directive was aimed primarily at environmental protection and should have been based on article 130S of the EEC Treaty, which requires unanimous voting. The Commission argued that the correct base was article 100A since the Directive harmonized industrial effluent standards that might otherwise inhibit the common market; article 100A requires only qualified majority voting. The Court, favoring the Commission's view, argued that the Treaty of Rome (and especially article 130R, which provides that environmental...
protection shall be a component of all community policies) envisaged that environmental protection could be pursued by harmonization measures.89


This important Directive, agreed upon in 1991, contains requirements for the discharge of sludge and for the collection, treatment, and discharge of urban waste water and biodegradable wastes from certain industrial sectors. The Directive requires that waste water be subject at a minimum to secondary treatment.91 A timetable mandates that each Member State ensure implementation of secondary treatment by a specific deadline.92 The deadlines vary between the years 2000 and 2005, depending on various factors including population of certain areas within a Member State.93 The Directive establishes criteria under which Member States shall identify sensitive water bodies; water discharged into these water bodies must be even more stringently treated than discharges covered by the provisions outlined above.94 Conversely, less stringent treatment may be applied where waters are discharged into less sensitive areas, coastal waters, and where the population sizes are below specified thresholds.95

The discretion given to Member States to identify sensitive and less sensitive areas could prove a significant area of dispute. The criteria provided in the Directive are expressed in quasi-objective terms (as was the case with the Bathing Water Directive). In the case of sensitive areas, a critical factor is whether the water is "found to be eutrophic" or "may become eutrophic if protective action is not taken."96 The term "eutrophic" is given a broad definition in non-numerate terms.97 The United Kingdom Department of the Environment has already issued a consultation developing the concept in more detailed practical terms, using a combination of Organisation of Economic Cooperation and Development (OECD) standards (developed only for still waters) and more subjective factors.98 Clearly, it will be important to ensure a measure of

91. Id. art. 4, at 41-42.
92. Id. art. 4.1, at 41.
93. Id.
94. Id. art. 5, Annex II, at 42, 51.
95. Id. art. 6, Annex II, at 42, 51.
96. Id. Annex II, § A(a), at 51.
97. Id. art. 2(11), at 41.
consistency among Member States in how they approach the process of identification.

IV
PRODUCT STANDARDS—1980 DRINKING WATER QUALITY DIRECTIVE

This Directive establishes standards applicable to all waters supplied for direct human consumption (drinking water) or for use in the food industry. The standards are based on a wide range of parameters, and contain both minimum standards and recommended guide values. Minimum standards must be met by all Member States within five years of notification of the Directive. Guide values were derived from contemporary World Health Organization guidelines; a number of them (notably the single figure for all pesticides) have given rise to considerable scientific controversy. There are provisions for derogations from both minimum and guide values in certain cases.

One feature of this Directive that distinguishes it from, say, the Bathing Water Directive, is the absence of any requirement that Member States report regularly to the Commission on the state of their drinking water. Commission investigations are initiated only in response to complaints from members of the public. This has made it particularly difficult for the Commission to monitor achievements and violations within Member States.

The Directive imposes substantial obligations on Member States to achieve the prescribed standards. Since it concerns a discrete product delivered to all members of the public, the Directive has attracted considerable political and public attention. The Commission has taken various infringement actions against Member States. Under current Commu-
nity enforcement policy, actions may relate to specific water supplies that fail to meet the standards prescribed.

To take one example of a proceeding that reached the Court of Justice, Commission v. Belgium\textsuperscript{106} concerned in part the failure of water supplies in one town to meet the lead standards in the Directive.\textsuperscript{107} The Belgian Government raised in its defense the costs and practical difficulties of constructing treatment works, but the Court rejected this argument in a strongly worded statement of principle:

\begin{quote}
\[U\text{N} \text{Etat membre ne saurait exciper des difficultés pratiques ou administratives pour justifier le non-respect des obligations et des délais prescrits par les directives communautaires. Il en va de même pour les difficultés financières qu'il appartient aux États membres de surmonter en prenant les mesures appropriées}.\]
\end{quote}

This principle applies throughout the environmental field, save where a particular directive makes a specific exception.

The Directive itself provides no specific civil remedies for individual consumers whose drinking water fails to meet the standards, but Community standards can influence national legal principles on environmental liability. In a recent British case, groundwater used by a water supply company was contaminated both by chemical spills and leaking settlement tanks used by an industrial company over a long period prior to the mid-1970's.\textsuperscript{109} Resting its judgment on levels of awareness and knowledge, the court found no liability in negligence or nuisance on the grounds that the consequences of the spillages were not reasonably foreseeable.\textsuperscript{110} Further, the court declined to apply the principle of strict liability for hazardous activities\textsuperscript{111} on the grounds that, in the light of

\begin{footnotes}
\begin{enumerate}
\item[107.] Id. at 2841, 63 C.M.L.R. at 38.
\item[108.] Id. "A Member State will not be excused by practical or administrative difficulties from justifying the failure to respect obligations and deadlines prescribed by Community Directives. Likewise, Member States have the responsibility to take appropriate measures to overcome financial difficulties.” (translation by editors).
\item[110.] Cambridge Water Co., reprinted in Strict Liability, supra note 109, at 100. The Court of Appeal reversed the judgment in respect of nuisance liability on the grounds that the defendants had interfered with the plaintiff's natural rights and should be held liable for all damage naturally flowing from their actions. Cambridge Water Co. Appeal, LEXIS Transcript, supra note 109.
\item[111.] See Rylands v. Fletcher, L.R. 3 E & I App. 330 (1868), aff'd L.R. 1 Ex. 265 (1866)
\end{enumerate}
\end{footnotes}
British case-law, no "non-natural" use of land was involved. In determining the appropriate scope of the right of a landowner to receive water in its "natural" state, the trial court turned to EC Drinking Water Standards. The court observed that no evidence suggested that the level of pollution in the water supplies was injurious to health. Nonetheless, the court concluded that the source of water supply, is now, by reason of the Directive and [UK] Regulations and with effect from July 1985, unfit to be supplied for use for one of its primary purposes, human consumption. To my mind it is unimportant that such standards might be thought to be arbitrarily set, or to be variable. It is a commonplace that acceptable standards in many fields vary over the years as scientific knowledge enlarges.

V IMPLEMENTATION ISSUES IN THE UNITED KINGDOM

The obligations contained in the Community Water Directives have had considerable impact on the structure of U.K. administrative and national law in this field. It is worth stressing a number of the points at issue in order to illustrate the types of pressures that Community law can impose on Member States. Clearly, the specific forms of pressure felt will differ from Member State to Member State depending on each State's existing law and administration in this field.

Between 1973 and 1989, the water industry in Britain and Wales was largely the responsibility of public sector bodies, operating at arm's length from government ministries but under their overall financial control. In England and Wales, there were ten regional water authorities which handled almost the whole water cycle within their regions, encompassing water abstraction, water supply, sewerage treatment, and pollution control. Unlike authorities with comparable responsibilities in other countries, the British authorities had both operational and regulatory responsibilities. The British system effectively integrated functions discussed in Percy H. Winfield, Sr. & John Anthony Jolowicz, Winfield and Jolowicz on Tort 426-27 (12th ed. 1984).

112. Cambridge Water Co., reprinted in Strict Liability, supra note 109, at 97. See also Read v. Lyons, 2 All E.R. 471 (1946) (construing the rule of Rylands v. Fletcher in a case involving an explosion at a munitions factory). In Cambridge Water Company, the Court of Appeal threw some doubts on whether this was a real qualification but did not reach the matter: "The court may have to consider on a future occasion both whether it is bound to hold there is a condition or qualification and if so what it means." Cambridge Water Co. Appeal, LEXIS Transcript, supra note 109.


115. Id. at 90.


117. See Water Act, 1973 (Eng.) discussed in Macrory, supra note 116, at 78-79.
related to the whole water cycle within single administrative bodies, and observers hailed it as a model for the field.  

British pollution control at the time was distinctive in that legislation provided a framework of pollution controls but was almost silent as to precise standards or objectives to be achieved. The determination of environmental goals was left largely to the discretion of individual water authorities. Central government ministries provided guidance to local authorities, but since the water authorities were ultimately under the direction of the government, instructions were transmitted through informal and often unpublished guidance and directions, rather than through formal legal channels. Following agreement of the early tranche of Community water directives, the United Kingdom generally appointed these water authorities as the competent bodies to carry out the duties imposed by the directives. The first signal of legislative change was the appearance of more formal "circulars" providing guidance to the authorities on the goals to be achieved. These circulars often included the full text of the relevant Community directive. Although not formal laws, the circulars were at least widely published and readily available, unlike previous administrative directions.

In the early 1980's the Conservative government proposed privatizing the water authorities as part of its general program of transferring major state enterprises to the private sector. Both the authorities and the government initially supported the idea of privatizing the water authorities intact: in the interests of integrated water management, the water authorities would retain both their operational and regulatory functions. It was recognized that in the future the government would have to use legal means to impose policies on the privatized water authorities since the informal public sector relationship would no longer exist. Explicit environmental goals and standards were therefore proposed to be expressed in national law for the first time. Nevertheless, the idea of privatized bodies carrying out both operational and regul-

119. Macrory, supra note 116, at 82.
120. For example, the 1975 Drinking Water Directive, supra note 3, was implemented through a letter of instruction sent from the Secretary of State to all Water Authorities on June 17, 1977. See Haigh 1, supra note 16, at 36.
121. See Haigh 1, supra note 16, at 25-126 (discussing U.K. implementation of EC directives involving water standards).
122. See supra note 51.
124. Id. ¶ 19.
125. Id. ¶¶ 85-87.
126. Id.; United Kingdom Dep't of the Env't, Discussion Paper — The Water Environment: The Next Step (1986) (further discussing these proposals).
tory functions caused considerable political controversy. The government at first resisted any change in its original plans, but it was then pointed out that it was doubtful whether, as a matter of EC law, privatized water authorities — even acting under an explicit legal framework — could act as the "competent authorit[ies]" called for by the water directives. Legal advice confirmed this doubt. The government subsequently withdrew its original plans and eventually implemented a revised form of privatization. In 1989, the operational functions of the water authorities (water supply, sewerage disposal, etc.) were privatized, while a new national public body, the National Rivers Authority, acquired the regulatory functions of the old authorities (licensing, monitoring, etc.). With some justification, the government now views the National Rivers Authority as a crucial new instrument of environmental administration in the U.K. Had it not been for issues of Community law, the Authority would likely never have been created.

Alongside the creation of the new administrative structure for water pollution control, the government has, since 1989, issued a mass of new legal instruments detailing environmental standards and objectives applicable in the water field. This formalization of water policy in the United Kingdom might eventually have taken place in any event. Nonetheless, the existence of EC legislation on the subject undoubtedly speeded the process up, and influenced much of the substantive content of the national laws. As a result of EC laws, the legal structure of British water policy has been completely transformed in the last decade. The substantial body of law that now exists has in turn stimulated a dramatic new interest in the subject by both academics and practitioners within the legal profession in Britain.

Community law lies at the heart of a major legal challenge currently being mounted by Friends of the Earth against one aspect of government policy. When privatization of the water authorities took place, it was clear that in many areas the EC standards for drinking water were not being met. Where this was the case, the 1989 Water Act empowered the government to accept formal "undertakings" from the newly privatized water suppliers showing how they intended to achieve compliance and

128. Joint Opinion of Francis Jacobs QC and Murray Shanks, October 7, 1986. Francis Jacobs was subsequently appointed Advocate General at the European Court of Justice.
over what period. These undertakings are published documents, backed by legal sanctions, but can be seen as representing derogations for the bodies concerned. Friends of the Earth took legal action against the government, claiming that acceptance of the undertakings was illegal. Under Community law, the United Kingdom is bound to meet the standards contained in the 1975 Drinking Water Directive. Friends of the Earth argued that the government violated the Directive when it allowed extraneous factors (such as the financial viability and attractiveness of the privatized bodies) to influence its approach toward achieving compliance. In other words, Friends of the Earth argued, the use of undertakings as a legal instrument for enforcement ran contrary to the requirements of Community law.

In the test case challenging the undertakings granted to one of the privatized water authorities, the High Court granted Friends of the Earth leave to seek judicial review. However, shortly before discovery was to begin in early 1991, the undertakings were substantially revised and tightened, rendering the initial action otiose. Friends of the Earth sought judicial review against the revised undertakings. In April 1992, following an appeal against an initial refusal of leave, the High Court granted leave. Whatever the eventual outcome of the case, the action illustrates the extent to which Community law and legal principles can now substantially influence the nature of national administrative law actions.

VI
INTERNATIONAL AND REGIONAL AGREEMENTS

The European Community is not yet a truly federal system, and does not possess exclusive legal competence in all areas of environmental policy. Member States still possess considerable independence in interna-

133. R v. Secretary of State for the Environment ex parte Friends of the Earth, Ltd. and Andrew Lees. The original action was commenced in November 1989. [hereinafter Friends of the Earth] (citation not available).
134. The Commission recently brought an infringement proceedings action against the U.K. for its failure to comply with nitrate and lead standards in some areas. Case 337/89, Commission v. United Kingdom (Nov. 25, 1992), available in LEXIS, Europe Library, EC-CASE file (holding that the U.K. had infringed the Community standard for nitrate, but not for lead). Action has also been taken against other Member States, including France, Germany, Belgium, Luxembourg, Spain, and Italy, for failure to comply with the Directive.
135. Friends of the Earth, supra note 133, Notice of Application for Leave to Apply to Judicial Review, Ground 5A.
136. Id., Ground 2.
137. Decision of Mr. Justice Rose, November 28, 1989.
138. R v. Secretary of State for the Environment ex parte Friends of the Earth, Ltd., Queen’s Bench Division (April 1, 1992) available in LEXIS, ENNGEN Library, Cases File. The decision has yet to come to trial.
tional relations, and the extent to which the Community has competence to enter into international environmental agreements is a matter both of legal principle and pragmatic negotiation. In many instances, both the Community (usually acting through the Commission) and Member States have participated in international negotiations on a shared basis, leaving the precise boundaries of their respective areas of competence undefined. In the field of water pollution, the Community has been a party to a number of important international and regional agreements concerning water pollution, including the 1974 Paris Convention on the Prevention of Marine Pollution from Land-Based Sources, the 1976 Barcelona Convention for the Protection of the Mediterranean Sea Against Pollution, and the 1976 Rhine Conventions. The Commission has observer status under the 1972 Oslo Convention on Dumping in the North Sea and North-East Atlantic and in 1977 was authorized by the Council to open negotiations on behalf of the Community in respect of its competence under the 1974 Helsinki Convention for the Protection of the Baltic Sea. The Community was a signatory to the 1982 Law of the Sea Convention.

VII
SOME CONCLUSIONS

The water pollution policies of the Community have been highly ambitious, and an impressive body of substantive law has now been created. There are areas, though, where little progress has been made, mainly because of political unwillingness of Member States. The development of specific Community legislation in the field of marine pollution provides a clear example: Member States have, to date, been unwilling to cede competence to the Community. Also, Community water law has

146. See LUDWIG KRÄMER, EEC TREATY AND ENVIRONMENTAL PROTECTION § 1.18, at 7-8 (1990). The Commission has twice made proposals for a Directive on the dumping of
focused on pollution, and no policies have yet been developed concerning the exploitation and preservation of water resources. This is likely to be an environmental issue of increasing importance in the future, especially in connection with groundwater. At the end of 1991, EC Environment Ministers agreed on broad principles for the development of a Community groundwater protection policy, with a commitment to the implementation of an action program by the year 2000.\textsuperscript{147} Priority areas included the development of general rules and permits for water abstraction and measures to improve the efficiency of water use, particularly in areas where water is scarce.\textsuperscript{148} These developments represent a substantially new focus for Community water policy.

The implementation of Community law within Member States is primarily a responsibility for Member States, but ensuring that this takes place is a key task for the Commission. It will continue to be so for as long as national awareness of Community law and the availability of national legal remedies to ensure compliance remain at an underdeveloped level. Provisions in the directives that have been agreed upon (particularly relating to monitoring and reporting) often have not assisted in the process of reviewing compliance. Until recently, the Community has devoted too much effort to creating and developing new legislation and too little to securing compliance with existing obligations throughout the Community. Some signs encourage optimism: the Community's 1991 agreement to a directive\textsuperscript{149} that improves and standardizes Member State reporting on compliance with environmental directives represents a positive step. On the other hand, the Commission, in a recent overall review of the application of Community environmental law in Member States, took another perspective:

Only three Member States have notified measures relating to shellfish waters falling within the scope of Directive 78/659/EEC; four Member States have notified measures in respect of Directive 79/923/EEC.

Not one Member State has notified measures relating to the quality objectives set for the substances on List II in Directive 76/464/EEC, and at least 10 Member States have failed to notify their clean-up programs. Reports to the Commission on the application of List I measures are the exception rather than the rule and do not provide a reliable picture of the effective application of the Directive.\textsuperscript{150}

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\textsuperscript{148} Id.

\textsuperscript{149} Environmental Reporting Directive, \textit{supra} note 19.

Nevertheless, the impact of Community law in this field remains considerable. In the U.K., certainly, it has proved a major influence on the current structure of law and administration. Its impact can perhaps best be summarized by a quotation from one of Britain's former judges, Lord Denning, who was perhaps the first British senior judicial figure to appreciate the impact that Community law would in general terms have on U.K. law. In an early 1975 case he likened EEC law to an "incoming tide" flowing up the estuaries of the British common law system.\textsuperscript{151} Five years later he extended the analogy, and though his opinion concerns equal pay for men and women, its sentiments are wholly appropriate to the field of water pollution:

\textit{[T]he flowing tide of Community law is coming in fast. It has not stopped at the high water mark. It has broken the dykes and the banks. It has submerged the surrounding land. So much so that we have to learn to become amphibious if we wish to keep our heads above water.}\textsuperscript{152}

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\textsuperscript{152.} Shield v. Coomes, 1 All E.R. 456, 462 (1979).