Ecosystem Services xxx (xxxx) xxx–xxx

Contents lists available at ScienceDirect

Ecosystem Services

journal homepage: www.elsevier.com/locate/ecoser

Barriers for the ecosystem services concept in European water and nature conservation law☆

Frederik H. Kistenkas[a,*], Irene M. Bouwma[b]

[a] Public Administration & Policy group (PAP) and Wageningen Environmental Research (Alterra), Wageningen University and Research (Wageningen UR), Droevendaalsesteeg 3, 6708PB Wageningen, The Netherlands

[b] Wageningen Environmental Research (Alterra), Wageningen University and Research (Wageningen UR), Wageningen, The Netherlands

ARTICLE INFO

Keywords:
Ecosystem services
EU law
Governance modes
Sustainable development
Water Framework Directive
Water law

ABSTRACT

In the 2015 River Weser case the Court of Justice of the European Union (CJEU) appears to demand a rather strict one-dimensional protection of water quality under the EU Water Framework Directive (WFD). Article 4 WFD, the very essence of this EU directive, should then be read as a strict water quality assessment on good ecological potential and other ecological WFD criteria. This jurisprudence could surely be welcomed as it secures blue environmental interests, but it may at the same time easily be encountered and criticized as a contradiction of modern EU policy documents on sustainable development and green or blue growth, as it may *de iure* subordinate socio-economic interests. It also may exclude clusters of ecosystem services; not only provisioning and cultural services, but also other not legally protected regulating services. Here, a CJEU-induced limited testing on only a few limited ecological criteria of Article 4 WFD might tend to resemble the one-criterion testing of the Natura 2000 habitats assessment and its possible shortcomings in terms of sustainable multi-functionality. In the derogation regimes of both WFD and Habitats Directive only overriding public interests may outweigh environmental objectives. In a recent 2016 case on hydropower the CJEU makes it clear renewable energy production can be such an overriding public interest, but still not all interests or ecosystem services do qualify to be part of a weighing process in the derogation stage. We should be aware this may contrast with current EU environmental policy documents like *Green Infrastructure* and *Blue Growth*. It would help if EU policy documents could be more explicit that sustainable development might be the default throughout Europe, but not necessarily in WFD waters and Natura 2000 sites.

1. Introduction

In the Call for Papers to this special issue (Mauerhofer and Kistenkas, 2015) current absence and hence a future role of ecosystem services in law finding methods was explicitly mentioned and linked to European nature conservation and spatial planning law. Here indeed innovative research is needed, but also European water quality law should not be forgotten. Recently a novel leading case was being ruled by the EU Court of Justice (CJEU) on the implications of the Water Framework Directive 2000/60/EC, hereafter the WFD. In its 2015 Weser-case (C-461/13) it was made clear any deterioration of the status of a body of water must be prevented, irrespective of any water plan or programme (CJEU, 2015). Authorisation for or licensing a specific project must be refused when for instance good ecological potential will be jeopardised and no derogation or exemption opportunities are brought forward. Here again, the court provides us with strong case law in favour of the environment by giving ecology the legal trump card. Likewise the court applied such a strict and perhaps even dogmatic approach earlier to the EU Habitats Directive Natura 2000 network in the 2013 Galway bypass-case (C-258/11) on a road scheme through a Natura 2000 site in which pre-defined conservation objectives seemed to be the only goal too, leaving aside socio-economic aspects (Kistenkas, 2014; CJEU, 2013). Only one ecological aspect (limestone pavement Natura 2000 habitat) had a legal prerogative, making profit and people related interests subordinate. Likewise, outweighing water quality objectives within a full balancing approach is apparently not the court's idea of a WFD water assessment. Indeed, here again ecological aspects strictly prevail over socio- economic aspects, but is this compatible with modern policy documents proclaiming sustainable and blue growth? And if not so, how could these opposites be accomodated into one sound environmental governance arrangement without counterproductive governance dissonants?

☆ Novel interpretations of the EU Water Framework Directive and EU Habitats Directive by the EU Court of Justice.

* Corresponding author.
E-mail address: fred.kistenkas@wur.nl (F.H. Kistenkas).

http://dx.doi.org/10.1016/j.ecoser.2017.02.013
Received 24 March 2016; Received in revised form 13 January 2017; Accepted 11 February 2017

Both cases are about EU environmental directives; the Weser-case gives us a judicial interpretation on the WFD whereas the Galway-case does the same on the Habitats Directive (HD). In European Union law a Directive is an enforceable legislative instrument (Chalmers et al., 2011). Directives are binding as to the result to be achieved, but they leave the choice as to form and methods used to implement it into domestic law to the discretion of the EU member states. Member states must transpose the obligations of the directive into national law (Chalmers et al., 2011). However, court law is still needed for interpretation questions, as legislative rules are not always clear or precise. Thus, the CJEU came to remarkable judgements recently on water and nature. These judgements might strongly influence the current practice of a more balanced approach in the decisions making processes of different actors. First we will analyze the Weser-case together with the most recent Schwarze Sulm-case and compare it to the Galway-case (paragraph 2). Then, the European Commission's sustainable development policy will be discussed (paragraph 3) and compared with current legislation and court law (paragraph 4). A discussion (paragraph 5) and conclusions follow (paragraph 6).

2. The EU court on dredging the river Weser

In 2015 the CJEU ruled a landmark decision on the WFD. At stake in the Weser-case C-461/13 of 1 July 2015 was a dredging project in the river Weser, a federal and economically important waterway, nearby Bremerhaven in the northern parts of the Federal Republic of Germany. The depth of its navigable channel had to be increased so that large container vessels could reach the port of Bremerhaven irrespective of the tide. The project was also connected with deepening of the vessel turning area in the port of Bremerhaven. The developer with obvious socio-economic interests here was the city of Bremen.

Most of the dredged material arising from the development and from maintenance of the river was proposed to be discharged into the outer and the lower Weser at locations that had already been used for that purpose. In addition to the direct effects of dredging and of discharging the dredged material, the projects at issue had other hydrological and morphological consequences for the sections of this river. In particular, current speeds would increase on a rising tide and on an ebb tide, tidal high water levels would rise, tidal low water levels would fall, salinity would increase in parts of the lower Weser, the brackish water limit in the lower Weser would move upstream and, finally, silting-up of the river bed would increase outside the navigable channel. The court ruled government authorisation for such deterioration should be refused. Any ecological deterioration of the status of a water body must be prevented and a weighing up between ecological interests and socio-economic interests cannot be inferred from the wording of Article 4(1) WFD.

We think, in essence, some quite clear and important novel lessons could be taken from this CJEU ruling. First of all, the WFD is a truly direct binding obligation, much more binding than was often thought among water lawyers throughout Europe. In paragraph 50 we now read that ‘any deterioration of the status of a body of water must be prevented, irrespective of the longer term planning provided for by management plans and programmes of measures‘. And this obligation to prevent deterioration ‘remains binding at each stage of implementation of Directive 2000/60 and is applicable to every surface water body type and status for which a management plan has or should have been adopted‘. As a member state one should ‘ refuse authorisation for a project where it is such as to result in deterioration of the status of the body of water concerned or to jeopardise the attainment of good surface water status, unless the view is taken that the project is covered by a derogation under Article 4(7) of the directive‘.

Any individual project should be directly tested on the binding WFD demands, not on abstract, less binding, quasi-legislative or more flexible domestic water plans or programmes. Irrespective of those abstract plans, authorisation for a specific project must be refused when for instance good ecological potential will be jeopardised. This means water licenses cannot be given any longer on the basis of a domestic long term water management plan only. Using long term water plans as an interface for easy licensing was clearly banned here. Such a practice was for instance always the case in Dutch water law (Kempen, 2016). This domestic water law has to be altered completely now. A specific project should be tested directly on the WFD qualitative objectives. An intermediate plan or programme might be helpful perhaps, but is surely not the direct or only testing criterion.

Again rather rigidly and strict, the CJEU also seems to reject a full balancing approach. Contrary to the member state submissions (in which Germany was certainly not alone), an interpretation of the weighing up of, on the one hand, the adverse effects on waters and, on the other, water-related economic interests, cannot be inferred from the wording of Article 4(1) of the WFD.

So, a weighing of economic and ecological interests is explicitly denied by the court under Article 4(1). Here, EU water law seems to follow EU nature conservation law, in which the habitats assessment of Article 6 Habitats Directive (HD) also did not give room for weighing according to recent CJEU rulings, notably the 2013 Galway-case (Kistenkas, 2014). In this Galway case C-258/11 (also cited as *Sweetman and Others*) traffic solutions could not outweigh the Natura 2000 conservation objective of limestone pavement habitat (i.e. habitat type H8240). Here, it was made clear that the Article 6 habitats assessment *de iure* is an one dimensional (i.e. a planet criterion only) test. Now also Article 4 WFD, just like the conservation objectives of the Natura 2000 habitats assessment, basically consists of such an one criterion test on limited ecological desiderata.

Like Article 6(4) HD (the Natura 2000 habitats assessment) also Article 4(7) of the WFD has a derogation regime, but here only some narrowed weighing of some limited interests is allowed (Kistenkas, 2014). Both derogation regimes make it clear only *overriding public interests* could be taken into account. So both assessments are not totally blind to socio-economic interests, but they should qualify as overriding and public ones or, in case of the HD Natura 2000 network, even as *imperative reason of overriding public interest*. It might be unclear whether all relevant ecosystem services could be given any attention in this exemption regimes. Both exceptive clauses do not give way to a full unhindered weighing process. Although the WFD seems to give more room for such a weighing: interests should be of overriding public interest (not imperative reasons of overriding public interest as in the HD) and above all the CJEU lately pointed out in the Schwarze Sulm-case (C-346/14) also the production of renewable energy through hydroelectricity can be such an overriding public interest as mentioned in Article 4(7) WFD. The construction of a hydropower plant on the Schwarze Sulm river in Austria (CJEU, 2016) caused deterioration of the water status, but here on the basis of a weighing under Article 4(7) WFD Austrian authorities were entitled to find that the project would give rise to benefits for sustainable development. Here, the CJEU advocates member states must be allowed a certain margin of discretion for determining whether a specific project is of overriding public interest. In this particular case the CJEU paid extra attention to the fact that promotion of renewable energy sources is justified in particular because the exploitation of those energy sources contributes to environmental protection and sustainable development and can also contribute to security and diversification of energy supply and make it possible to meet more quickly Kyoto targets. So, still such derogation regimes seem to allow only a weighing of limited interests. There may be now a margin of discretion and renewable energy may be indeed of overriding public interest, but what about all other interests? What about all other aspects or ecosystem services at stake?

We think the pre-defined conservation objectives of a Natura 2000 site or the environmental objectives of a WFD water body still remain preliminary and overriding and still own the trump card not easily taken away. There may be some secondary balancing with only overriding public interests, but pre-defined planet aspects may eventually