



## Review

# Is existing legislation fit-for-purpose to achieve Good Environmental Status in European seas?



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## ABSTRACT

Recent additions to marine environmental legislation are usually designed to fill gaps in protection and management, build on existing practices or correct deficiencies in previous instruments. Article 13 of the European Marine Strategy Framework Directive (MSFD) requires Member States to develop a Programme of Measures (PoM) by 2015, to meet the objective of Good Environmental Status (GES) for their waters by 2020. This review explores key maritime-related policies with the aim to identify the opportunities and threats that they pose for the achievement of GES. It specifically examines how Member States have relied on and will integrate existing legislation and policies to implement their PoM and the potential opportunities and difficulties associated with this. Using case studies of three Member States, other external impediments to achieving GES are discussed including uses and users of the marine environment who are not governed by the MSFD, and gives recommendations for overcoming barriers.

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## Contents

1. Introduction	19
2. Reliance on existing directives to achieve GES	19
2.1. Water Framework Directive (WFD)	20
2.2. Urban Waste-water Treatment Directive (UWWTD)	20
2.3. Natura 2000 Directives	20
2.4. Integrated Maritime Policy (IMP)	22
2.5. Maritime Spatial Planning Directive (MSP)	22
2.6. Common Fisheries Policy (CFP)	22
2.7. Data Collection Framework	23
2.8. Spatial and sectoral barriers	23
3. Programme of measures – case studies	25
3.1. UK	25
3.2. Spain	26
3.3. Greece	27
4. Other challenges to achieving GES – Blue Growth	27
5. Summary and recommendations	29
6. Is existing legislation fit-for-purpose to achieve GES?	29
Acknowledgements	30
References	30

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## 1. Introduction

Europe has a long history of implementing legislation to protect the marine environment (Boyes & Elliott, 2014) and currently has over 200 directives, regulations and other forms of policy developed for the sustainable use of marine resources and for their conservation and protection (Beunen et al., 2009). The Marine Strategy Framework Directive (MSFD, Directive 2008/56/EC) was approved in 2008, by the European Parliament and the European Council, for 'establishing a framework for community action in the field of marine environmental policy' (European Commission, 2008). The Directive requires European Union (EU) Member States to join together in their commitment to protect, preserve and where practicable, restore the quality of the marine environment across Europe. The MSFD requires Member States to 'take the necessary measures to achieve or maintain Good Environmental Status (GES) in the marine environment by the year 2020 at the latest'.

The MSFD was developed in response to concerns that although existing legal instruments aim to protect the sea from some specific impacts, they are often sectoral, fragmented and spatially limited (Boyes and Elliott, 2014). Policies and legislation such as the Water Framework Directive (WFD, 2000/60/EC) and the Common Fisheries Policy (CFP, Reg (EU) No 1380/2013) are crucial to the management and protection of European seas. However policies such as the CFP only target specific pressures (e.g. effects of gear types in fisheries) resulting in a fragmented and sectoral approach (European Commission, 2016a). The MSFD is the most encompassing directive when dealing with the protection of the marine environment across Europe by combining a top-down prescriptive approach with a bottom-up approach (Borja et al., 2010). The former requires all Member States to establish mechanisms to achieve GES within a set of 11 key descriptors within their marine waters. The bottom-up approach reflects the framework directive, which allows all Member States the flexibility in how they create and deliver this protection. This is underpinned by the core EU principle of subsidiarity which allows decisions to be taken at the lowest level possible and closest to the citizen. The MSFD seeks to establish an integrated framework for the management of marine spaces, and enshrines in a legal framework the ecosystem-based approach for the management of human activities having an impact on the marine environment, integrating the concepts of environmental protection and sustainable use (Ounanian et al., 2012; Elliott, 2014). Hence, the MSFD is a unique directive in being the first piece of legislation applied across European regional seas that requires assessing the range of issues encompassing overall marine environmental sustainability (European Commission, 2008; Borja et al., 2010; Long, 2011; van Leeuwen and Kern, 2013; van Leeuwen et al., 2014).

The MSFD builds upon a range of mechanisms already implemented within estuarine, coastal and offshore systems across Europe (Borja et al., 2010). Mechanisms include the Regional Sea Conventions and European directives (e.g. the Habitats Directive, WFD), as well as international law such as the Convention for Biological Diversity. European policies such as the EU Biodiversity Strategy to 2020 (Article 5) requires Member States to undertake the Mapping and Assessment of Ecosystems and their Services (MAES) which builds upon the requirements of the MSFD (EEA, 2015). Like the MSFD, the main objective for all of these mechanisms is to achieve and maintain a good status for marine waters, habitats and resources, using an integrated ecosystem-based approach (Browman et al., 2004; Apitz et al., 2006; Elliott, 2011).

Despite a common obligation to implement the MSFD, there are numerous potential conflicting objectives between government departments within and between Member States sharing a regional sea (e.g. Borja et al., 2013; Cavallo et al., 2016). Several studies have highlighted the inherent barriers in the MSFD legal text to achieving GES. These include its nature as a framework directive, which allows Member States the freedom and power to interpret GES and its descriptor indicators in their own way thus satisfying subsidiarity while paradoxically creating differences in implementation (van Hoof, 2010; Rätz et al., 2010;

Breen et al., 2012; Long, 2012; van Leeuwen and Kern, 2013; van Leeuwen et al., 2014). It contains the vague wording of key definitions in the directive such as 'good environmental status' (Long, 2011, 2012; Breen et al., 2012; Thiel, 2013) which also, confusingly, uses the same acronym as Good Ecological Status in the WFD (Mee et al., 2008; Borja et al., 2010). It focusses on 'applying an ecosystem-based approach' (Atkins et al., 2013; van Hoof, 2015) which may lead to confusion by Member States, and the legal status and tight time-lines associated with implementation place demands on scientists and on decision makers to put in practice a multidisciplinary approach, and test the abilities of existing institutions to collaborate on delivering multi-sectoral objectives (Boyes et al., 2015). The efficacy of the directive allows many exceptions to not achieving GES (Article 14) (Long, 2011; Brennan et al., 2014; Boyes et al., 2015; Elliott et al., 2015) and there is confusion regarding the means of aggregating outputs to provide a holistic assessment of status (Borja et al., 2016). The lack of common interpretations may foster confusion and conflict between Member States, adversely affecting users of the marine waters (Morris et al., 2011; Breen et al., 2012; Ounanian et al., 2012). While differences in the implementation of directives can be accommodated if the whole implementation is within a Member State border, for example the EU Nitrates Directive, non-coherence across international and transnational boundaries can create difficulties. Some of the key legislative challenges of the MSFD are further detailed in Patricio et al. (2014a).

Boyes and Elliott (2014) illustrate the plethora of European marine legislation and the linkages between different instruments, the need for each sector to be covered and the potential for overlap. In taking this further, this review explores key maritime-related policies with the aim to identify the opportunities and threats that they pose for the achievement of GES in the context of the MSFD. It specifically examines how Member States have relied on and will integrate existing legislation and policies to implement the MSFD and the potential opportunities and difficulties associated with this. It also considers the activities outside the control of European legislation which may have an adverse impact on achieving GES (see also Elliott et al., 2015) and gives recommendations for overcoming these barriers.

## 2. Reliance on existing directives to achieve GES

Even though the MSFD is considered to be the most encompassing directive when dealing with the marine environment, its effectiveness of achieving GES seems to be directly related to the success of other EU legislation (van Leeuwen et al., 2012; Ounanian et al., 2012). The MSFD preamble states that Member States should establish and implement a Programme of Measures (PoM) which should accommodate existing Community and international requirements including the Common Fisheries Policy. Article 1(4) states that the MSFD 'shall contribute to coherence between, and aim to ensure the integration of environmental concerns into the different policies, agreements and legislative measures which have an impact on the marine environment' with additional text to ensure MSFD environmental targets are compatible with existing targets (Article 10). In particular monitoring programmes should build upon, and be compatible with existing monitoring requirements in the Habitats and Birds Directives (Article 11(1) & Article 13(4)), WFD, the Urban Waste-water Treatment Directive (UWWTD, 91/271/EEC) and the Bathing Water Directive (BWD, 2006/7/EC) (Article 13(2)). Article 13 states that the PoM should encompass relevant measures required under existing and planned EU legislation and other international agreements (e.g. the recently adopted Maritime Spatial Planning Directive (MSP, 2014/89/EU)). The Directive also states that Member States should 'ensure, as far as possible, compatibility with existing programmes developed at regional and international level with a view to fostering consistency between these programmes and avoiding duplication of effort, making use of those monitoring guidelines that are the most relevant for the marine region or subregion concerned' (Annex V(10)).

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