

Manual of European Environmental Policy

The following pages are a section from the Manual of European Environmental Policy written by the Institute for European Environmental Policy.

The Manual was published by Earthscan/Routledge from 2010 to 2012. It was designed as an on-line interactive reference work and annual printed versions were also produced.

This section is the text of the Manual as published in 2012. It is therefore important to note the following:

- The contents have not been updated since 2012 and no guarantee is given of the accuracy of the contents given potential subsequent developments.
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The Freshwater Fish (Fishlife) Directive

Formal reference 2006/44/EC (OJ L264 25.9.2006) Originally: 78/659/EEC (OJ L222 14.8.78) Proposed 26.7.76 – COM(76)401	Directive on the quality of fresh waters needing protection or improvement in order to support fish life (codified version)
Legal base	Article 294 TFEU (originally article 251 TEC)
Binding dates	
Notification date	20 July 1978
Formal compliance	20 July 1980
Designation of waters	20 July 1980
Standards to be met	20 July 1985
Note on versions Directive 2006/44/EC is a codified version of Directive 78/659/EEC as amended (see below) by the standardized reporting Directive (91/692/EEC). The provisions in the original Directives are unaffected by the codification.	

Purpose of the Directive

Quality objectives are to be set for designated stretches of river or other fresh waters in order to allow fish to live under favourable conditions. A further stated objective is the need to approximate different national laws that might distort competition (see below). A separate Directive 91/493/EEC is concerned with protecting consumers of fishery products (see below).

Summary of the Directive

The Member States are to designate fresh waters needing protection or improvement in order to support fish life. Two categories of water are to be designated: suitable for salmonids (salmon, trout) and suitable for cyprinids (coarse fish). A Member State must consult with other Member States before designating fresh waters that cross or form national frontiers with the other Member State.

An Annex sets out 14 physical and chemical parameters against which are listed *I* (imperative) and *G* (guide) values for salmonid and cyprinid waters. Member States are to set values no less stringent than the *I* values and ‘shall endeavour to respect the values in column G’.

Member States are to establish pollution reduction programmes and are to ensure that within five years of designation the waters conform to the values set. The Annex also sets out minimum sampling frequencies but where the water quality is high, sampling frequency may be reduced. Certain reference methods of analysis for the parameters are set out in the Annex but other methods may be used so long as comparable results are obtained. If sampling shows that a set value is not being met, appropriate measures are to be taken.

In cases of non-compliance with the water quality standards, Member States must establish the cause of non-compliance and take appropriate measures to rectify the situation. They must also ensure that measures taken to implement Directive 2006/44/EC do not lead to an increase in pollution.

Derogations may be given by Member States for certain parameters because of exceptional weather or special geographical conditions or because of 'natural enrichment'. These are to be communicated to the Commission.

The Standardised Reporting Directive [91/692/EEC](#) (see section on implementation and enforcement of legislation) introduced the requirement for Member States to report on the implementation of Directive 78/659/EEC (now Directive 2006/44/EC) every three years. National reports are to be drawn up on the basis of a questionnaire which was drafted by the Commission, assisted by a Committee of Member States' representatives and adopted in a Commission Decision [92/446/EEC](#). This was amended by Commission Decision [95/337/EEC](#), together with explanatory notes and detailed tables. The main elements to be reported on included:

- Transposition, with texts of the main provisions of national law adopted in the field covered by the Directive.
- The designation of cyprinid and salmonid waters.
- The quality of designated waters.
- Provisions relating to new parameters.
- Cases of derogation from the Directive.
- Other information relating to the application of the Directive.
- Measures taken to comply with the Directive.

Development of the Directive

Directive 78/659/EEC was adopted two years after it was first proposed. It created significant debate in two areas. The first was the appropriateness of the Community adopting such a Directive at all. The second concerned the technical issues relating to the protection of aquatic ecosystems.

It is important to note that in 1978 there was no separate environmental Article in the Treaty. Environmental legislation was adopted as measures necessary to ensure the function on the Common Market, as exemplified by the development of the Dangerous

Substances in Water Directive [76/464/EEC](#), adopted in the year that Directive 78/659/EEC was proposed. The arguments for the role of the Directive in ensuring the function of the Common Market included both the establishment of common objectives across the Community for pollution control (as with Directive 76/464/EEC) and for protecting consumers of freshwater fish, which could be traded across the Community. While the latter was, in theory justifiable, there was doubt that the former would achieve its objectives. This is exemplified in an exchange of views between the European Commission and the United Kingdom during the adoption of the Directive.

The UK Parliamentarian, Lord Ashby, viewed the proposal as being ‘for the sake of the fish, not for the sake of the fishermen, or for the sake of those who eat the fish’. This resulted in a lengthy letter from the then Director of the Commission’s Environment and Consumer Protection Service, M. Michel Charpentier. In it he confirmed that the Directive was indeed aimed primarily at securing ‘a sound aquatic ecosystem for fish’, but that it further sought to safeguard the health of fish consumers – even though such a rationale appears nowhere in the Directive and is now the subject of a further Directive on consumer protection (see below). The preamble to the Directive in fact refers both to ‘the protection and improvement of the environment, and to the requirement in, the then, Article 100 to approximate laws, which directly affect the functioning of the Common Market. In practice, the impact of Directive 78/659/EEC on equalizing the competitive conditions of polluting industries has been remote, since the criteria for designating waters, the quality standards set and the nature of the receiving waters have all varied widely between Member States. M. Charpentier himself observed that ‘the quality objective method is intended to allow for regional differences. .. (The Directive) seeks to harmonize, not homogenize’. Given the failure of Directive 78/659/EEC to establish clear requirements that would have met Common Market objectives, there were objections that such legislation was not appropriate at the Community level. While in hindsight this was probably correct, the inclusion of the environment article in the Single European Act now makes such observations largely academic.

The technical issues concerned two major difficulties posed by the Directive, which were: Who was to be responsible for designation, and were the parameters realistic? Both difficulties were eventually resolved by amendment, but not before a considerable amount of heat had been generated in debate. The two difficulties seem to have been universally noted because they were discussed in the European Parliament’s debate (14 January 1977) and in the report of the Economic and Social Committee (23 February 1977).

The first difficulty was created by ambiguous drafting. Article 1 of Directive 78/659/EEC (now Directive 2006/44/EC) as finally agreed is quite clear:

This Directive concerns the quality of fresh waters and applies to those waters designated by the Member States as needing protection or improvement in order to support freshwater fish (Article 1).

The proposed Directive on the other hand had Articles 1 and 4 as follows:

This Directive concerns the quality requirements for waters capable of supporting freshwater fish (Article 1).

For the purposes of applying this Directive, the Member States shall specify those waters capable of supporting freshwater fish (Article 4).

This seemed to imply that Member States would have no choice but to designate all those rivers capable of supporting freshwater fish that is virtually all of them, involving very large resources to restore polluted waters. In contrast, the Directive as agreed left wide discretion with the Member States. <AQ: Please check the portion ‘wide discretion with’ in the sentence ‘In contrast,...’> When there was a suggestion, therefore, where it could mean that Member States need designate nothing at all, and that the Directive would then be inoperative, M. Carpentier responded:

I am shocked by your suggestion that Member States will simply select a few areas of pure waters as the designated area, and let the question rest there. I have more faith in the seriousness and commitment to the improvement of the environment of the governments of our Member States.. . What will be the reaction of public opinion if it discovers that in the Member State where it resides, few or no areas have been designated under the Directives. .. there would be a clamorous protest¹.

However, the doubters were proved right, for by 1985 – five years after the specified deadline – Belgium, Denmark, France, Greece and the Netherlands had not designated any waters. Three years later, in July 1988, Italy faced successful infringement proceedings in the European Court for inadequate transposition, including in relation to designation ([Case C322/86](#)).

The second difficulty created by the Directive as proposed concerned the parameters, which in the view of some of the water industry were unnecessarily stringent. In the event, a number of them were altered including temperature, dissolved oxygen, phosphates and phenols. The nitrate parameter was completely deleted. The United Kingdom was particularly involved in seeking such changes and felt that it had won a victory in the negotiations. Indeed its Parliament argued that ‘The reason why the draft Directive’s standards are so unrealistic may be explained, in part, by the failure of the Commission to accept some of the advice submitted by a group of experts set up by the Commission for that purpose’.

Consumer Protection – Directives 91/493/EEC and 93/351/EEC

Directive [91/493/EEC](#) sets marketing standards for fishery products and lays down essential requirements for their handling, storage and transport. It requires that fishery products, in their edible parts, must not contain contaminants such as heavy metals and organochlorines at levels which would exceed the acceptable daily intakes (ADIs). Standards for mercury (0.5 ppm in edible parts of fishery products) have been set in Commission Decision [93/351/EEC](#).

Implementation of the Directive

All Member States have [reported](#) national legislation transposing Directive 78/659/EEC (now Directive 2006/44/EC). The European Commission has produced only one report on the implementation of Directive 78/659/EEC (now Directive 2006/44/EC) resulting from the completion of questionnaires under Directive 91/692/EEC. Although this was produced in 2000, derived from information required to be submitted by Member States by May 1997, much of the reporting to the Commission was poor, with Denmark, Greece, Luxembourg, Portugal and Spain providing no information.

As it covered the period 1993–1995, the reporting requirements only affected 12 Member States (i.e. prior to the 1995 Community enlargement). The main implementation conclusions are presented in Table 1.

Table 1. The main implementation issues in Directive 78/659/EEC (now Directive 2006/44/EC)

Implementation issue	Member State reporting comments
Designation of fishlife waters	Designations were reported by Belgium, Germany, Ireland, Italy, the Netherlands and the United Kingdom. The UK designations were significantly greater than other Member States.
Setting limit values	Most that responded had set limit values, with Italy, the Netherlands and the United Kingdom including additional parameters. However, only information from Belgium, Italy and the Netherlands provided numerical values for the limit values.
Monitoring	Only Germany reported monitoring all parameters at most sites, with Belgium, Ireland and the Netherlands monitoring most parameters. Italy reported monitoring only four parameters and the United Kingdom did not provide information on this.
Compliance	Significant problems with compliance were reported by Belgium (Flanders) and Germany, with smaller numbers of sites failing in Italy and the United Kingdom. The most common problems related to pH, total ammonium and zinc.

Enforcement and court cases

The following cases specifically concerning Directive 78/659/EEC (now Directive 2006/44/EC) have been decided by the European Court of Justice:

- [C-14/86](#) 11.06.1987. This case related to internal concerns in Italy concerning

- liability arising from lack of implementation of the Directive. The Court ruled that the Directive does not of itself, and independently of a national law, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the Directive.
- [C-322/86](#) 12.07.1988. This was a judgement against Italy for failure to transpose the Directive. Italy claimed that its pre-existing legislation was sufficient to meet the objectives of the Directive, but the Commission argued that, after nine years, around 98 per cent of waters in the country will still be unprotected in the meaning of the Directive. The Court agreed.
 - [C-298/95](#) 12.12.1996. This was a judgement against Germany for failure to transpose the Directive. This is an important case in clarifying the scope of the Directive. The Court emphasized the purpose of the Directive as set out in the recitals, stating that these include the protection of public health, that is ‘one of the purposes ... is to protect human health through the monitoring of the quality of waters which support, or could support, fish suitable for human consumption’. This meant that the use of selective designation was highly questionable. The Court went on to conclude that Germany had failed to demonstrate that non-implementation would not present any danger for human health. It also stated that pollution reduction programmes required under the Directive must be targeted at specific waters, which meant that general water quality programmes are insufficient.
 - [C-435/99](#) 12.12.2000. This was a judgement against Portugal for failure to provide a report on the implementation of the Directive by 30 September 1996 as required under Directive 91/692/EEC. The Commission issued a formal letter of notice on 30 June 1998, but the Portuguese response to this was inadequate. The Commission issued a reasoned opinion on 2 February 1999 and the response to this was also inadequate. Portugal indicated that the problems were ‘due to serious difficulties in the bodies responsible for completing the’ relevant questionnaire. The case was referred to the Court, which ruled on 12 December 2000 that Portugal had failed to meet its obligations under the Directive regarding reporting.
 - [C-406/02](#) 12.02.2004. This was a judgement against Belgium for failure by the Brussels Region to provide a report on the implementation of the Directive by 30 September 1996 as required under Directive 91/692/EEC. The Commission issued a letter of formal notice on 30 June 1998 to Belgium for failure to receive implementation reports for Brussels Region and Walloon. The response to this letter was adequate for Walloon, but inadequate for Brussels Region. As a result, on 22 December 1998 a reasoned opinion was issued against Belgium. On 17 May 2000, Belgium replied that measures to ensure the collecting of data to prepare the report would be in place from 2001. On 10 July 2000, the Commission replied stating that it considered this period as too long. As a result the case was brought to Court and the judgement made on 12 February 2004 that Belgium had failed to meet its obligations under the Directive regarding reporting.

The infringement proceedings have, in effect, partly continued the debate that began as Directive 78/659/EEC (now Directive 2006/44/EC) was proposed, that is whether the

Directive was aimed at protection of fish or consumers. The conclusion in the Court has been that consumer protection is also a stated objective. The extent of designations in the Member States was also inadequate. Thus even though the United Kingdom had designated more fishlife waters than any other Member State, the Commission was not satisfied. In response the United Kingdom, in 2003, extended designations in England and Wales to all rivers down to an average natural daily flow of greater than 0.31 m³/s, <AQ: Please confirm the edited 'cubic meters per second' to 'm³/s' in the sentence 'In response... '> any gaps between existing designations on rivers or canals, previously designated river stretches to be designated to source and all still waters of surface area greater than 50 ha. Although this represented a major increase in activity to implement the Directive, these waters will, in any case, be subject to the requirements of the Water Framework Directive 2000/60/EC.

Further developments

Directive 78/659/EEC (now Directive 2006/44/EC) will be repealed on 22 December 2013 as the Water Framework Directive [2000/60/EC](#) is implemented. Directive 2000/60/EC requires a comprehensive approach to surface water protection based on biological and chemical parameters, which go well beyond those in Directive 2006/44/EC.

Related legislation

There are a number of other EU Directives which has a strong interaction with Directive 78/659/EEC (now Directive 2006/44/EC). These include

- Consumer Protection Directive 91/493/EEC (see above).
- Water Framework Directive [2000/60/EC](#).
- Dangerous Substances Directive [2006/11/EC](#) and its daughter Directives.
- Urban Waste Water Treatment Directive [91/271/EEC](#).
- Nitrates Directive [91/676/EEC](#).
- Integrated Pollution Prevention and Control (IPPC) Directive [2008/1/EC](#)
- Directive on Access to Environmental Information [90/313/EEC](#).

The issues of relevance to these Directives are covered in the chapters which deal with them. However, most obvious are the need to establish water quality objectives under the Dangerous Substances Directive 2006/11/EC and the use of provisions in the Urban Waste Water Treatment Directive 91/271/EEC and IPPC Directive 2008/1/EC to control pollutants, which affect cyprinid and salmonid waters.

References

1. Letter from M. Michel Charpentier to Lady White, 22 September 1977.