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Implementing water adaptation measures within the current legal framework

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The problem: Climate Change



In general there are at least four domains where climate change does have impact upon:

- the main water system and fresh water supply;
- agriculture and nature;
- the urban environment;
- the various networks (infrastructure, energy, transport, IT).

The problem:

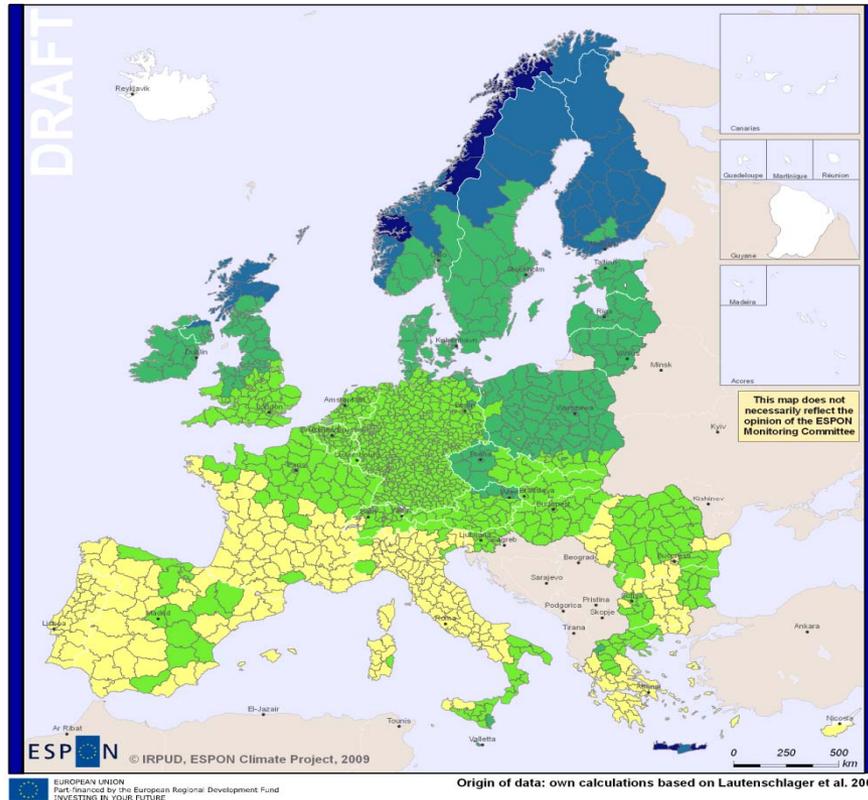
Water systems and fresh water supply



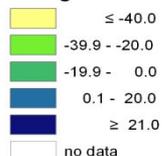
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- Increased risks of flooding
- Water scarcity
- More precipitation
- Salination
- Changing weather conditions

Impact Climate Change on water supply



Change in annual mean precipitation in summer months (in %)



Decreasing availability of fresh water in the EU

South of Europe: > 40%

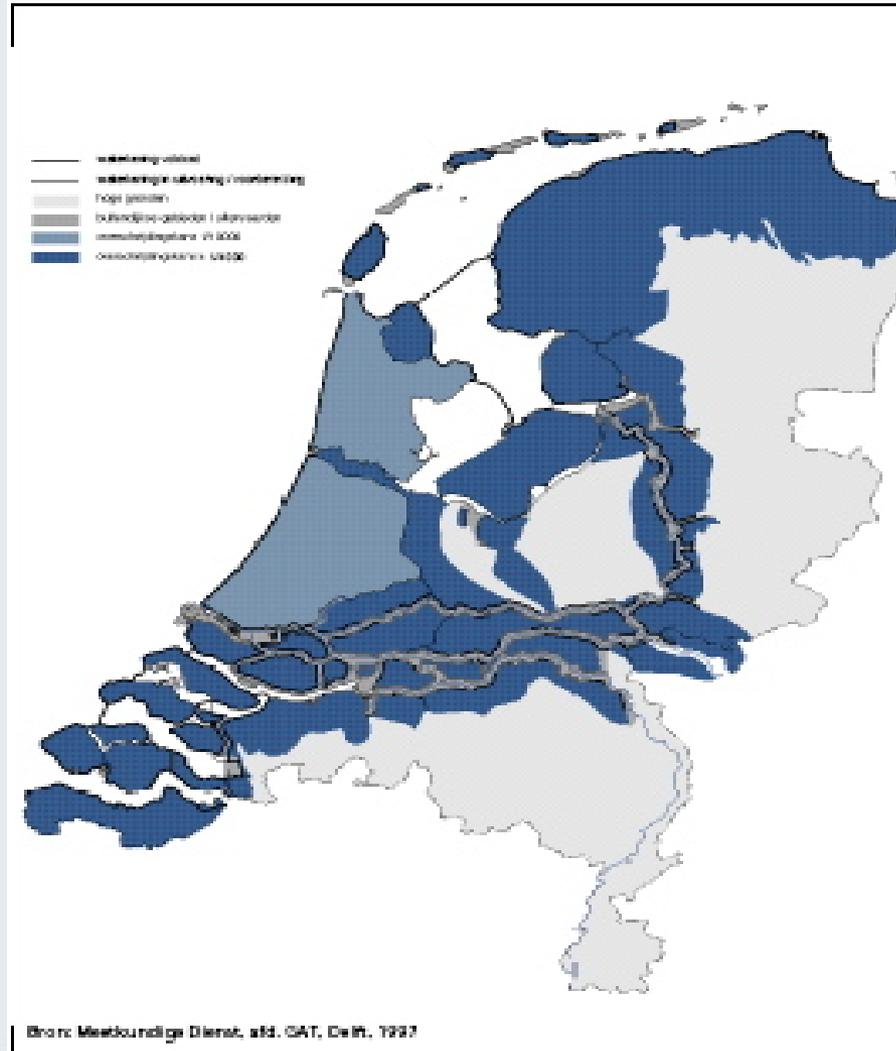
Water abstraction EU (average)

Agriculture	32%
Electricity	31%
Industry	13%
Households	24%

Flood risks: the Netherlands



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Societal functions of water

Protected interests



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- Drinking water
- Water storage
- Fresh water for economic purposes (agriculture, industry)
- Bathing water & recreation
- Shipping
- Protection against flooding
- Nature

Climate Change and its complexities



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- Multi actor & multi level:
 - the variety of actors at different scale levels:
macro-effects with regard to sea-level rise and a general rise of temperature (global warming).
Effects like wind disturbance, drought or heat stress can be very local or regional
- Lack of a well structured policy domain
- Decision making is knowledge intensive and has to deal with all kind of uncertainties.

Adaptive water management



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Climate change needs new governance arrangements:

- “adaptive water management”.

One of the main challenges is to balance between:

- **a robust (legitimate, legal certainty, effective legal protection) and a flexible approach.**

Reallocation of scarce means



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- Adaptation implies the reallocation of scarce means:
 - financial
 - organizational
 - spatial
- Vested interests – displayed by a specific allocation of functions – can be harmed by adaptation measures.
- Certainty about climate change and its effects is not able to take away differences of interpretation of the seriousness of these impacts or differences in opinion whether (governmental) action is necessary.

Sustainable, balanced and equitable use of water (II)



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How can EU water law reach this goal?

- Instruments like standard setting, planning, basic and supplementary measures
- Access to justice

Basic requirements for adaptive EU water law:

- **legitimate**, i.e. ensuring transparency, accountability, fairness and equity
- **effective**, i.e. address the adaptation task decisively and efficiently through the right mix of norms, instruments, competent authorities and stakeholders, strategies and processes
- **resilient**, i.e. both enabling autonomous adaptation and building long term capacity.

Sustainable, balanced and equitable use of water (III)



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How can EU water law reach this goal?

- A right to water?
- Principles?
- **Existing legislation**

The right to water in the EU



“On World water day the EU reaffirms that all States bear human rights obligations regarding access to safe drinking water, which must be **available, physically accessible, affordable and acceptable**.

The EU recognises that the human rights obligations regarding access to safe drinking water and to sanitation are closely related with individual human rights – as the **rights to housing, food and health**.

But even more than being related to individual rights, access to safe drinking water is a component **element of the rights to an adequate standard of living and is closely related to human dignity**.

The principles of **participation, non-discrimination and accountability** are crucial.

Water for personal and domestic use must be safe, therefore free from substances constituting a threat to a person’s health.

Access to adequate and safe sanitation constitutes one of the principal mechanisms for protecting the quality of drinking water.”

(Brussels, 22 March, 7810/10 (Presse 72) P12/10.

Principles setting boundaries



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- participation
- non-discrimination
- accountability

- prevention principle (avoid problems)
- precautionary principle (doing enough),
- proportionality principle (not overdoing)
- cost recovery principle (internalize the costs).

Adaptation by existing legislation (I)



- Goal of European environmental law is – amongst others – to protect the interests of citizens and stakeholders.
- This used to be done by directives with clear European goals, norms and standards, which offer a certain protection level and on which people can rely on before the courts

Adaptation to climate change in water management by:

- The Water Framework Directive (2000/60/EC) (see art. 1)
- Floods directive (2007/60/EC)
- Policy documents on water scarcity and adaptation to climate change. Legally to be implemented by the instruments given in the Water Framework Directive
- But:

Adaptation by existing legislation (II)

A new approach



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- River basin management and shared responsibilities
- Integration with other policy fields
- Protection of ecosystems in stead of protected areas
- Water quality, flood protection, marine environment, sustainable use of water resources
- Framework Directives with more flexibility and policy discretion
- Proceduralization and public participation
- Multi-level and multi actor governance

Adaptation by existing legislation (III) the step by step approach in the WFD



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- Defining the good status for all waters: setting goals and standards (art. 1, 4 and 16)
- Defining the river basins (art. 3)
- Defining the competent authorities (art. 3)
- Assessing the current status of the river basin and its impacts from human activities (art. 5)
- Making strategic river basin management plans (art. 13) including the need to use exemptions
- Making practical programmes of measures (art. 11) including the chosen instruments based on an integrated approach of point sources and diffuse sources of pollution (art. 10)
- Taking care of the recovery of costs for water services (art. 9)
- Taking care of appropriate monitoring (art. 8)
- Taking care of public participation (art. 14)
- And up we go again

Adaptation by existing legislation (IV) the Floods directive



The most explicit example of the governance approach:

- No European protection level
- No norms
- No safety standards
- Only risk assessment and planning:

Preliminary flood risk assessment (art. 4), Flood hazard maps and flood risk maps (art. 6), Flood risk management plans (art. 7)

Reasons:

- Subsidiarity principle
- Geographical differences between the several Member States
- Strong relation with spatial planning (no competence of the EU)



Effects of new approach: Multi-level governance

- Competent authorities per (sub) river basin
- Shared responsibilities of several competent authorities within one river basin:
 - Transboundary cooperation obliged:
 - ECJ: Under Article 3(4) [WFD], Member States are to ensure that the requirements of the directive for the achievement of the environmental objectives established under Article 4 [WFD], and in particular all programmes of measures, are **coordinated for the whole of a river basin district**. (...) The obligations differ according to whether the river basin district in question is **national or international** (...). For international river basin districts, the Member States concerned are to ensure such coordination together and may, for that purpose, use existing structures stemming from international agreements (C-32/05)

Effects of new approach: focus on planning



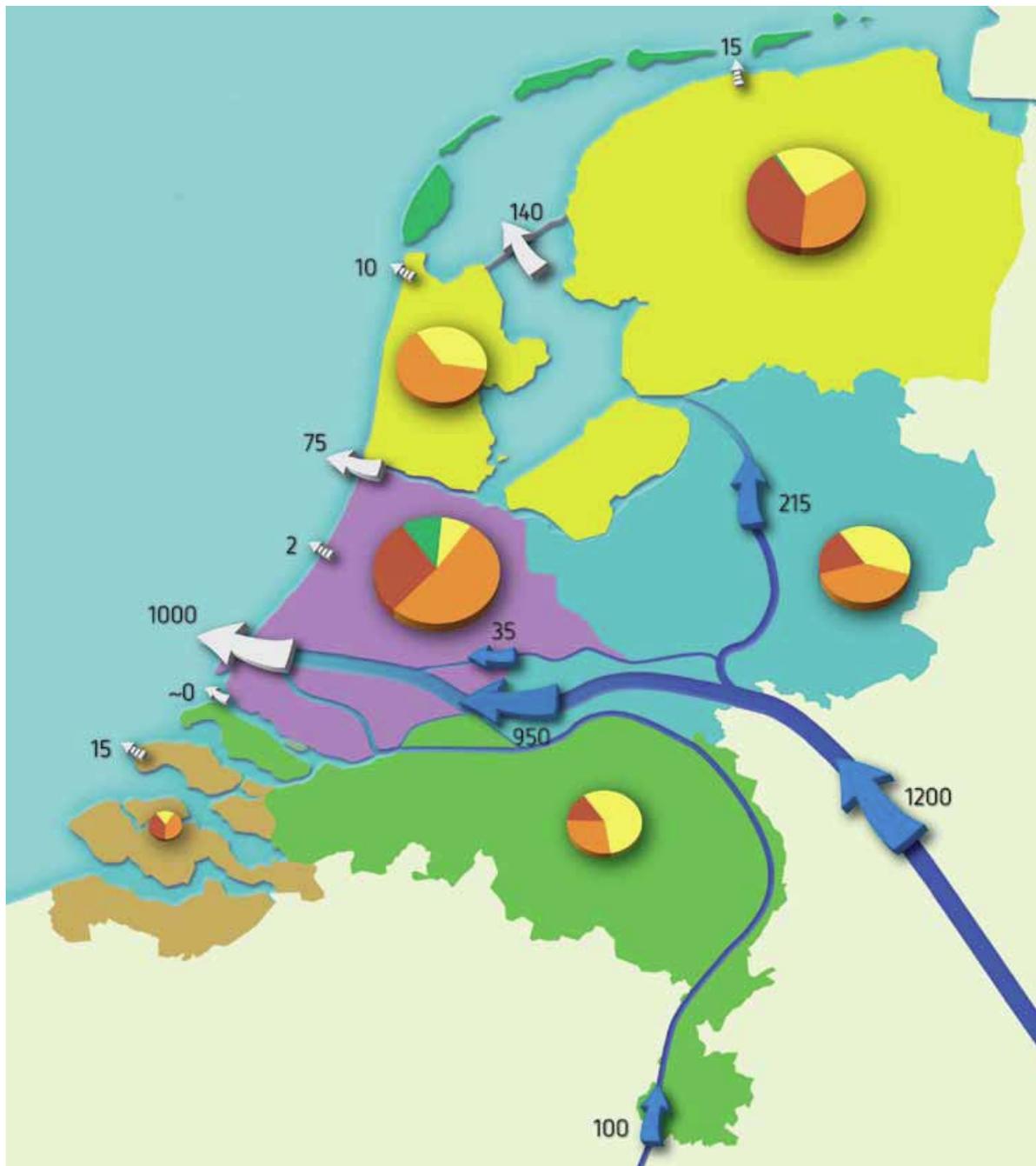
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Plans and programmes in the WFD and the Floods directive

- River basin management plans (WFD)
- Programme of measures (WFD)
- Flood risk management plans (Floods directive)



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Fresh water division of the River Rhine (1200 m³/s)

- Yellow: IJsselmeer
- Blue: Rijn, IJssel, Waal
- Green & Purple: Maas
- Dark green: no water supply
- Brown: Lek, Brielse Meer and Amsterdam – Rhine Canal
- *Use:*
 - Orange: water level management
 - Yellow: use by agriculture
 - Red: refreshment (doorspoeling)
 - Green: other



Effects of new approach: a fair price for water (services)

One part of each river basin management plan is that an economic analysis of water use within the river basin must be carried out. This is to enable a rational discussion on the cost-effectiveness of the various possible measures and how the recovery of costs should take place.

Recovery of costs for water services (art. 9 WFD)

- Member States shall take account of the principle of recovery of the costs of water services, **including environmental and resource costs (...)** in accordance in particular with the polluter pays principle.
- Member States shall that water-pricing policies provide adequate incentives for users to use water resources efficiently (...)
and shall ensure that an adequate contribution of the different water uses, disaggregated into at least **industry, households and agriculture (...)** **will be paid**
- Social, environmental and economic effects of the recovery as well as the geographic and climatic conditions of the region or regions may be taken into account

Legal protection protecting individual rights



- EU leaves it up to the Member States as long as it is effective
- Could be based on private or administrative law

Administrative legal protection the Netherlands



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- Plans and programmes: none
- Water use by other stakeholders: none
- Ranking in water use in case of water scarcity: none
- Licenses and permits: yes
- But: many permits are replaced by general rules:
administrative legal protection: none

- Conclusion: when administrative legal protection is only available against specific individual decisions like permits, there is a lack in legal protection when it comes to a sustainable, fair (equitable) and balanced use of water resources

Does EU water adaptation law meets the general requirements?



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- **legitimate**, i.e ensuring transparency, accountability, fairness and equity
- **effective**, i.e. address the adaptation task decisively and efficiently through the right mix of norms, instruments, competent authorities and stakeholders, strategies and processes
- **resilient**, i.e both enabling autonomous adaptation and building long term capacity.
- We can doubt it! Further research is necessary

Questions to solve in the near future

- Is the current legal framework for adaptation to climate change adequate to solve problems of floods and water scarcity?
- Are the rights of individual citizens to enough and clean water and the protection against flooding sufficiently protected and how can citizens enforce their rights before the courts?

On the one hand the growing attention for public participation in planning and decision making is a positive new element. On the other hand, due to the mainly procedural obligations for the Member States the individual rights may be diminished.