



Response to draft River Basin Management Plan Consultation

9 April 2015

Summary

We welcome the Environment Agency consultation on the draft River Basin Management Plans (RBMPs) and the significant evidence base and analysis contained within. We believe that such evidence and analysis presents a compelling case for the Secretary of State to take action to significantly improve the health of our waters.

For example: the Environment Agency's monitoring system now reflects a far truer picture of water body health and there is clarity on the reasons - and sectors responsible - for failure, and; the economic analysis demonstrates that healthier rivers, lakes and beaches are likely to boost the economy through increased tourism and recreation, mitigate flooding and improve the resilience of public water supply. Scenario 4 of the economic analysis suggests £8.5 billion of net benefit to society by taking cost-effective, well-evidenced actions aimed at achieving 75% of water bodies to good health over the next six years. In our view, of the scenarios presented, scenario 4 is the only one with an approach that comes closest to demonstrating compliance with the Water Framework Directive (WFD). We consider therefore that the final plans must at least reflect this level of ambition.

We take the view that the WFD makes clear that a RBMP should be the framework for setting out action for the protection of waters to prevent deterioration and enhance ecological status, promote sustainable water use, ensure reduction in pollution and contribute to mitigating the effects of floods and droughts. The draft RBMPs fall short of this, and seem more of a mechanism to report on the various things already in train rather than a framework to deliver the objectives of the Directive. Despite the development of the Catchment Based Approach, we believe that the Environment Agency have missed the significant opportunity to put local communities at the heart of river basin planning to ensure that they have a strong voice in decision-making.

Part 2 of the consultation states that: *"it will not be possible to complete all the measures needed to achieve water-dependent objectives for Natura 2000 protected areas, by the*

December 2015 deadline.” Latest Environment Agency results (March 2015¹) also show very little overall progress made since 2009: while 2.2% variables monitored show signs of improvement, there has been no improvement in the proportion of elements or water bodies meeting good status, with the latest results showing just 17% English rivers at good ecological status. Taken together, the Agency’s own data and assessments demonstrate that the measures so far implemented have been inadequate to meet the environmental objectives of the WFD.

Despite this failure to achieve WFD objectives in the first cycle, we are concerned that the draft RBMPs for the second cycle fail to summarise the impact and effectiveness of measures previously deployed and include, with a few exceptions, the same set of apparently deficient measures. Whilst the WFD allows for progressive achievement of reaching good status, it does not allow delay in operationalising effective programmes of measures. We have grave concerns that reliance on the same set of measures is likely to deliver the same lacklustre result. Certainly, without a credible explanation as to how those measures can deliver a significant and cost-effective improvement in the next cycle when they have not in the last one, it is reasonable to conclude that the ‘business as usual’ approach will not deliver. In our view, this approach is likely to result in non-compliant plans unless steps are taken ahead of finalising the RBMPs. In particular we seek the following important amendments:

- On abstraction – implement new measures to amend or retract non-water company abstraction licences on a compulsory basis, where such licences are not supporting good status, fall outside of the Restoring Sustainable Abstraction Programme and where ‘Serious Damage’ cannot be proven. Additional measures are also needed to ensure that the thousands of new authorisations and time-limited licences up for renewal over the second cycle period are licensed only insofar as to support good status.
- On agricultural diffuse pollution – stricter measures are required to enforce compliance with WFD obligations by the agricultural sector, including by making specific use of existing regulatory measures available to the Environment Agency, such as targeted Water Protection Zones (WPZs). Where existing regulatory measures including WPZS are not contemplated due to effective alternatives, those other regulatory measures must be clearly set out.
- On water-dependant Natura 2000 protected areas – all the measures needed to achieve Favourable Conservation Status must be implemented without delay, including by addressing the significant shortfalls in relation to legal and funding mechanisms identified by the Agency and Natural England.

In addition, our analysis of the information provided suggests that the proposed approach set out in the draft RBMPs may be non-compliant with the Water Framework Directive on a number of other counts. For example:

¹ Environment Agency. 2015. Water quality: the good news story. Presentation slides, 26 March 2015. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/419090/WQ_trends_2009-2014_March2015.pdf

- a. The WFD sets out specific obligations around information and consultation for draft RBMPs. This includes a summary of the programme or programmes of measures adopted under Article 11, including *“the ways in which the objectives established under Article 4 are thereby to be achieved”*. This is not included in the consultation.
- b. By deferring certain decisions on ‘affordability’ we do not consider that the draft plans demonstrate how the Article 4 objectives can be achieved. While we understand that this may be a political judgment, it is a critical part of a compliant draft plan.
- c. The WFD requires plans to provide *“a summary of the measures required to implement Community legislation for the protection of water”*. In relation to Natura 2000 protected areas we do not consider that the draft plans provide sufficient information to demonstrate how the conservation measures set for a special area of conservation will achieve favourable conservation status as required by the Habitat’s Directive.
- d. The WFD requires information to be provided in terms of *“a report on the practical steps and measures taken to apply the principle of recovery of the costs of water use in accordance with Article 9”*. We have found no such report in relation to water uses other than costs recovery from the water industry.
- e. The WFD requires details of ‘supplementary measures’ taken. The draft plans do not set out in any transparent way the ‘supplementary measures’ if any that will be taken to achieve the environmental objectives.
- f. The WFD requires that the second cycle update of RBMP contains: an assessment of the progress made towards the achievement of the environmental objectives; a summary of and an explanation for any measures outlined in the 2009 plan not put in place and those in place not originally envisaged. Part 2 of the consultation acknowledges this but the required information is not provided.

We are also concerned that the latest Environment Agency results have significant implications for the levels of ambition presented in the scenarios consulted on.

For these reasons we do not consider that the draft plans published for consultation provide the information necessary for consultees to make a fully informed response. Adequate consultation is a protected individual right under the terms of the WFD and we therefore consider that the Environment Agency must publish compliant draft plans for consultation as soon as possible.

In our response we raise a number of issues that must be resolved ahead of publication of final RBMPs. We are keen to work with the Environment Agency, Natural England and Defra to address such issues and ensure that the final plans can deliver significant improvements to our water environment and meet the objectives set out in the WFD.

Table of Contents

Response to draft River Basin Management Plan Consultation.....	1
Summary	1
1. Introduction	5
2. Purpose of the WFD	5
3. Environmental objectives.....	6
3.1 Protected areas	8
4. Specific Exemptions.....	11
5.1 Cause of adverse impact unknown.....	12
5.2 Practical constraints of a technical nature in relation to technical feasibility.....	12
5.3 Affordability in relation to disproportionate costs	15
5.4 Ecological response times	17
5.5 In cases where lawful exemptions are applied	18
6. Monitoring	19
6.1 Addressing uncertainty.....	19
6.2 Changes to monitoring methods	22
7. Economic analysis of water use and recovery of costs	24
8. Programmes of measures	27
8.1. Measures on abstraction.....	29
8.2 Measures for agriculture	33
9. Economic appraisal of bundles of measures	39
10. Consultation process	41
11. Prioritisation	42
12. Third sector delivery of measures.....	42

Contact	Rose O’Neill; Water Policy Manager; WWF-UK Mark Owen; Head of Freshwater; Angling Trust William Rundle; Head Solicitor; Fish Legal
Email	<u>roneill@wwf.org.uk</u> <u>mark.owen@anglingtrust.net</u> <u>william.rundle@fishlegal.net</u>
Date	9 April 2015

1. Introduction

We – the Angling Trust, Fish Legal and WWF-UK - welcome the opportunity to respond to draft River Basin Management Plan consultation. Our organisations have been working to support WFD implementation over a number of years, and since February 2011, have been specifically looking at how the Environment Agency has delivered under the Government's 'Statement of Position' agreed as a result of legal action commenced by our organisations on the last RBMPs. The Statement of Position sets out the Government's commitment to successful implementation of the Water Framework Directive including by ensuring that: a) the second cycle RBMPs contain clear timetables for action on all water bodies in order to achieve WFD objectives; b) uncertainty would not prevent introduction of necessary measures; c) there is greater engagement with stakeholders and delivery at the catchment level².

2. Purpose of the WFD

Article 1 of the Water Framework Directive states that the purpose is to provide a framework that, inter alia; protects and enhances waters; prevents deterioration; ensures reduction in pollution, and; contributes to mitigating the effects of floods and droughts.

The WFD also specifies active encouragement with local communities in the development of plans stating that:

“To ensure the participation of the general public including users of water in the establishment and updating of river basin management plans, it is necessary to provide proper information of planned measures and to report on progress with their implementation with a view to the involvement of the general public before final decisions on the necessary measures are adopted.”

We consider that the WFD intends for the RBMP to be the mechanism to coordinate delivery and ensure implementation of a number of Government objectives (as set out in, for example, the Natural Environment White Paper, Biodiversity 2020 and achievement of water dependent protected area and SSSI objectives, Water for Life, abstraction reform and the Non-Native Species Strategy) at the local level so that the overall WFD purpose can be achieved.

We believe that the fundamental purpose of the Catchment Based Approach (CaBA) is to put local communities at the heart of river basin planning to ensure that they have a key role in delivery of such strategies and a strong voice in decision-making. CaBA provided a unique and innovative opportunity to meet requirements set out in Article 14, offering a level of granularity to make RBMPs meaningful to most stakeholders. Instead, we find the RBMPs being developed largely in parallel to the CaBA, with CaBA catchment plans and stakeholder discussions not linking to RBMP development processes nor being reflected in the documents for consultation. As a consequence, we take the view that the Environment Agency has missed a significant opportunity. The RBMPs merely report on the various things already in train, when they should have been a mechanism to bring together stakeholders to

² Defra, Statement of Position, 11 February 2011, paragraphs 1, 27, 12 and 22.

develop a vision for catchments that protect, enhance and restore waters thereby achieving multiple benefits.

3. Environmental objectives

The consultation suggests that taking action where it is technically feasible, and the benefits outweigh the costs, should deliver 75% of water bodies at good status and more than £8.5 billion net benefits to society (scenario 4). In our view, of the scenarios presented, scenario 4 is the one with an approach that comes closest to demonstrating compliance with the WFD. We consider therefore that (if these are the only candidate scenarios) the final plans must at least reflect this level of ambition with delivery by the end of the second cycle.

The consultation asks ***Do you agree with the objectives proposed for water bodies and protected areas?***

It is not clear what is meant by this question as the consultation poses multiple objectives for water bodies and protected areas: there is one set of objectives that could be achieved where action is technically feasible, and the benefits outweigh the costs (scenario 4) and there are a second set of objectives that are 'likely' to be affordable for delivery by 2021.

For example, in the South East RBMP, 84% water bodies have objectives for good status or better under scenario 4. Just 31% of water bodies have objectives for good status under scenario 5. It is not clear which particular water bodies will have less stringent objectives set under scenario 5, nor is it clear how this will be justified in accordance with the WFD. This lack of transparency at a local level makes it impossible for stakeholders to properly respond to this consultation question.

The Statement of Position made clear that "*the Government's aim is to set out in the second cycle of RBMPs clear timetables for actions on all water bodies in order to achieve the objectives of the Directive, under Article 4*"³. We are concerned that this aim has not been met in relation to the draft RBMPs for consultation.

In our view, a legally compliant second cycle RBMP – and therefore the drafts for consultation – should clearly set out the environmental objectives (and summarise the cost-effective measures to secure them) for achievement as soon as reasonably possible within the next cycle and by 2021 at the latest.

The consultation fails to do this. Instead it considers achievement of objectives in the 'long term'. Part 2 of the consultation says that:

“Water body status objectives describe the long term aim for specific parts of the water environment. They help to define the set of uses society seeks to achieve. Once approved by ministers, water body status objectives are legally binding. All public bodies must have regard to water body status objectives when making decisions that could affect the quality of the water environment.”

³ Defra, Statement of Position, 11 February 2011, paragraph 27.

There is nothing in the WFD that suggests that water body status can be established over the 'long term'. Subsequently, measures should be in place which aim to deliver good status now: the first round of plans ought to have had sufficient ambition in the measures to bring progress water bodies water status to good by 2015, subject to the application of lawful (i.e. properly applied and reasoned) exemptions under Article 4 (4).

This is made clear by the language of Article 4(1) of the WFD that states "*Member States shall protect, enhance and restore all bodies of surface water..., with the aim of achieving good status*" by 2015 subject to extensions and exemptions. This is the fundamental objective of the WFD, with the achievement of good status the default target for all water bodies.

Equally, Article 4 (1) (c) imposes a different set of environmental objectives by requiring MS to achieve for protected areas "*compliance with any standards and objectives at the latest 15 years after the date of entry into force of this Directive*".

That said, we recognise that where good status is not achievable by 2021 for the reasons permitted by the WFD, despite aiming to do so, a Member State may consider extending the deadline provided the exemption tests set in Article 4(4) are met and the reasoning is expressly justified in the RBMP.

We are concerned that scenario 5 seems to be a list of actions and funding streams already in train and therefore implies that the 'likely' objectives proposed for delivery by 2021 are significantly constrained by domestic 'business as usual' already agreed by Ministers. We consider that intentionally limiting achievement of environmental objectives for the second cycle to those that can be delivered through measures and funding agreed in advance of the final RBMPs is not compliant with the Directive. It is working backwards from a previously restricted funding package, rather than – as should be the case – working forwards towards the required objectives and then ensuring they are financially supported.

The change in monitoring methods both prior to and post publication of the RBMP consultation make it extremely difficult to understand what objectives are proposed. First, it is unclear whether the '37%' target proposed under scenario 5 represents any increased ambition at all from that set in the 2009 RBMPs (we suspect, based on our understanding of the implications of moving from 'old building blocks' to 'new building blocks', it is likely to represent a marginal improvement at most). Second, the latest monitoring results (published on 26 March 2015) have significant implications for the various targets proposed under the scenarios. Conversations with Agency staff suggested that the scale of change envisaged will be the same but the actual number will change due to the change in baseline i.e. the scenario 4 objective will be revised down to 61% (not 75% as set out in draft plans) and the 'likely' ambition (scenario 5) by 2021 will be 24% (not 37%). If this is the case, it will have significant implications for whether the wider response to this consultation question will give a fair view, as stakeholders may have agreed with the targets proposed but not necessarily with the revised-down number. Clearer information on this point must be provided.

The WFD is an important instrument to deliver objectives under the Marine Strategy Framework Directive, which calls for improvements in the quality of our coastal waters. Adequate implementation of the WFD is required to ensure Good Environmental Status is achieved for contaminants (Descriptor 8) and eutrophication (Descriptor 5) under the

Marine Strategy Framework Directive. Given that the human activities which cause these pressures mainly take place on the land or in the coastal zone, it is essential that WFD delivers the necessary measures in order to achieve Good Environmental Status. The draft RBMPs contain relatively little detail on how improvements would be made to our transitional and coastal (TraC) waters. Where there is an absence of data, improved monitoring of coastal water bodies may help to identify appropriate delivery measures. The final RBMPs should acknowledge that action to benefit WFD water bodies will also benefit the TraC waters into which the rivers feed.

Whilst we have seen some efforts to align the draft Flood Risk Management Plans consultation with the RBMP consultation, we suggest that benefits in further integrating the two have been missed in particular with the greater use of Natural Water retention measures. The linkages between the environmental objectives of flood risk management planning and those of the Water Framework Directive should be made clearer, encouraging stakeholders to think about the synergies between the two areas of work, and promoting a more holistic consideration of water management more generally.

3.1 Protected areas

The objectives proposed would see all Natura 2000 protected areas meet favourable conservation status (FCS) in the long term (i.e. by 2027). While we support FCS as an objective we do not agree with the timeframe proposed as we think it is crucial that action is taken to meet FCS as soon as possible and at the least within the second cycle.

Part 2 of the consultation makes it clear that *“it will not be possible to complete all the measures needed to achieve water-dependent objectives for Natura 2000 protected areas, by the December 2015 deadline [set by the 2009 statutory plans]”*. Our organisations are highly concerned about this - and the implications for other water bodies if the Agencies fail to meet deadlines for our most important protected areas.

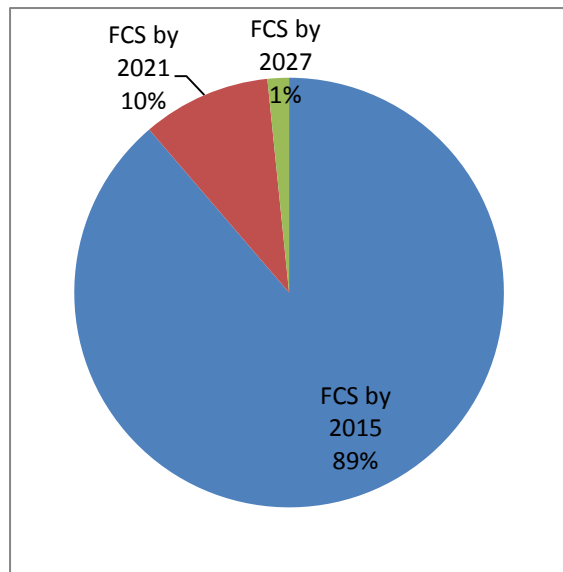
The 2009 RBMPs set a relatively high level of ambition for getting water dependent elements of Natura 2000 sites into FCS with around 89% predicted to reach this by 2015. However the current consultation suggests FCS will be met in just 36% of sites by 2015.

Extending time under art 4(4) for Natura 2000 protected areas

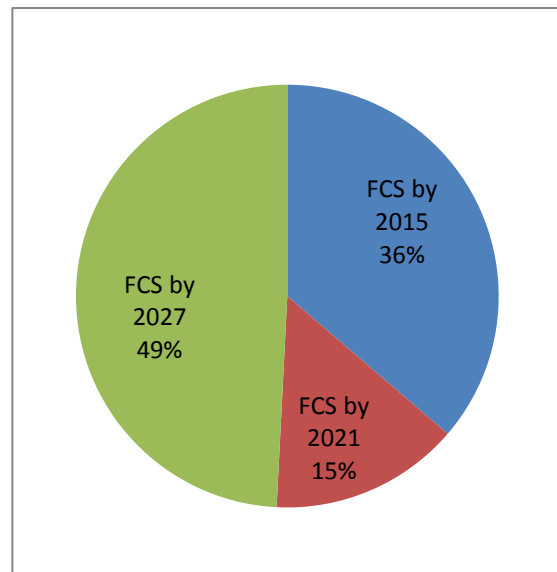
For Natura 2000 protected areas, the gap between the ambition set in 2009 plans and future achievement is wide, as shown in the figures below⁴.

⁴ Derived using data from ‘WFD Extended Deadlines information for Natura 2000 Protected Areas for the updated River Basin Management Plan consultation’ available at: <http://publications.naturalengland.org.uk/publication/6312941326434304?category=10001>. The analysis: does not include sites that were considered to be meeting their objective in 2009; assumes that all sites that had a 2015 deadline in 2009 and are not listed as having an extended deadline in the 2014 table are expected to still meet the 2015 deadline, and; assumes that sites that already had a deadline extension in 2009 and are not listed in the extended deadlines table have kept the same deadline.

**Proposed deadlines for achieving FCS:
2009 Final RBMPs**



**Proposed deadlines for achieving FCS:
2014 Draft RBMPs**



The 2014 draft plans propose extending time to achieve FCS to 2027 for half of sites not currently meeting objectives; just 1% (n=2) sites had a 2027 deadline in the 2009 final RBMPs. This represents a significant step backwards between RBMP cycles, rather than progressive achievement required by the Directive.

Our organisations consider that such extension of time is unlawful within the framework of the WFD. In our view, the treatment of protected areas in relation to extending time is different from other water body objectives in that:

- i) The construction of the WFD is clearly intended to offer protected areas protection over and above that offered to other water bodies, wetlands and groundwater dependent ecosystems.
- ii) Article 4 (1) (c) specifically requires the achievement of compliance – no other objective refers specifically to ‘compliance’ and therefore due weight must be placed upon this word.
- iii) Compliance must be achieved in relation to any standards and objectives at the latest 15 years after the date of entry into force of this Directive, unless otherwise specified in the Community legislation under which the individual protected areas have been established.
- iv) There is no specific reference to the application of exemptions, unlike with the other objectives.
- v) Further, Article 4(8) requires any exemption relied on to be consistent with the implementation of other community legislation e.g. the Birds and Habitats Directive (BHD) and Article 4(9) states extensions must ensure the same level of protection.
- vi) The BHD do not provide for a progressive time line for achieving FCS on the basis of affordability or for technical and administrative reasons that can be overcome. For example, Articles 4 (5); 6 (2) and (3) HD:

*“**as soon as a site is placed on the list** referred to in the third sub paragraph of paragraph 2 it shall be subject to Article 6 (2), (3) and (4).”*

*“For special areas of conservation, **Member States shall establish the necessary conservation measures** involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.”*

*“**Member States shall take appropriate steps to avoid**, in the special areas of conservation, the **deterioration** of natural habitats and the habitats of species **as well as disturbance** of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of the Directive” [our emphasis]*

- vii) It is a legal requirement then to avoid the disturbance of protected sites and to take effective measures to restore and then maintain the sites at FCS where they have been so impacted. This includes preventative measures to avoid disturbance, and ensuring an unimpaired (i.e. not delayed) recovery of impacted sites that have suffered disturbance. Within the context of the WFD, which seeks to coordinate this as part of the broader vision for all water bodies, the RBMPs must set out all the actions and measures needed to restore sites to meet this objective. According to the 2003 UKTAG guidance, Natura 2000 water dependent features shall be judged as meeting their Article 4 (1c) objectives if:

“(i) that feature was reported to the JNCC in 2006 (or in a more recent condition assessment) as meeting the relevant conservation objectives;

*(ii) if the **environmental conditions necessary to achieve conservation objectives have been established and are in place** or*

(iii) if the feature was assessed as not meeting these criteria but this was due a failure to achieve a target for an attribute that is clearly not water related.” [our emphasis]

In our view, the current approach of delayed implementation of the necessary measures to meet FCS is non-compliant with the requirement to restore EU designated conservations sites.

In addition, the WFD does not allow for the extension of time to meet FCS objectives in relation to Natura 2000 protected areas on the grounds of:

- ‘Practical constraints of a technical nature’ (see section 5.1);
- ‘Affordability’ (see section 5.2);
- ‘Cause of adverse impact unknown’ in cases where the monitoring regime is not sufficient to gather the evidence required;

- One of the key characteristics of the Birds and Habitats Directives (BHD) is that they embed the precautionary principle. With that in mind we are concerned that the draft RBMPs infer that time could be extended or less stringent measures applied due to a failure by the Agency to gather the necessary monitoring and surveillance evidence, as required by the WFD, and/or a failure to resolve ‘conflicting evidence’ between biological features and environmental quality standards.

We consider that if such exemptions are used in relation to Natura 2000 sites in the final RBMPs in the way currently proposed in this consultation then they would breach the requirements of the Directive. The final RBMPs must be updated to remove use of such exemptions in relation to Natura 2000 sites.

Alignment between SAC/SSSI and water body assessments and objectives

We understand that SSSI/SAC condition assessment sets the bar higher for certain attributes when assessing FCS. Therefore we would expect that if the objective for a Protected Area is FCS, then the water body objectives should be at least for good status. However, this does not seem to be the case for many water bodies that are part of Natura 2000 sites.

For example: the River Wye SAC in the Severn RBMP has a long term objective of FCS yet only 56% of water bodies within the Wye Management Catchment are forecast to be at good or high status over the same period; the River Itchen SAC in the South East RBMP currently has a phosphate target of good under WFD when the agreed SAC target requires high. In these cases, the WFD is clear that the most stringent measure must apply. In addition there are pressures on Natura 2000 sites and SSSIs that are not flagged as reasons for failure in the RBMP. For example, the SIP for the Itchen SAC and the Nar SSSI (in the Anglian RBMP) show abstraction as key reasons for not achieving conservation objectives yet these pressures are not flagged for these water bodies in the RBMP or Catchment Summaries. Objectives should be aligned further in the context of Natural England’s proposed Common Standards Monitoring Guidance targets for Flow and Phosphorus, which in many cases exceed the requirements of ‘good’ status for water bodies not designated under national or international protections.

4. Specific Exemptions

While we note that there has been considerable progress in addressing uncertainty (see section 6 below), analysis of the data presented in the Objective spreadsheet that accompanies the consultation document suggests that the majority of exemptions applied relate to uncertainty:

EXEMPTIONS FOR NOT ACHIEVING OBJECTIVE	No known technical solution is available	Cause of adverse impact unknown	Practical constraints of technical nature	Unfavourable balance of costs and benefits	Ecological recovery time	Groundwater status recovery time	Background condition
COUNT	2,365	9,085	2,348	2,386	2,891	608	1,544
% TOTAL EXEMPTIONS APPLIED	14%	53%	14%	14%	17%	4%	9%

Given the potential for further work to address uncertainty, as well as refining cost-benefit analysis over the second cycle, it is difficult to understand how the Agency has justified not achieving environmental objectives even in the longer term on these grounds.

If the final RBMPs reflect scenario 5 it is likely that use of exemptions to extend time from 2021 to 2027 will be applied in the majority of cases. This is at odds with CIS guidance 20 which is clear that “*exempting from its objectives should not be the rule but exceptional*”. It also goes against the specific recommendation from the Commission to the UK⁵:

“A large number of exemptions have been applied in this first cycle of RBMPs. While the WFD does provide for exemptions, there are specific criteria that must be fulfilled for their use to be justified. The application of exemptions needs to be more transparent and the reasons for the exemptions should be clearly justified in the plans. The UK should take all necessary measures to bring down the number of exemptions for the next cycle, including the needed improvements in the characterisation process, monitoring networks and status assessment methods, as well as reducing significantly the degree of uncertainties.” [our emphasis]

5.1 Cause of adverse impact unknown

It is currently unclear whether the application of the exemption ‘cause of adverse impact unknown’ is down to valid scientific complexity, or whether a large proportion of which relates to either established deficiencies in the Agency’s monitoring systems (such as over-reliance on spot sampling) and consequent interpretation of results, or due to postponement of investigations that would actually determine causes due to funding constraints.

Despite making a commitment in the Statement of Position to integrate third party information into river basin planning⁶, we continue to be frustrated that such information, in relation to water body classification and reasons for failure, has not been taken into account. For example, the ‘long term’ objective for the River Nar, downstream of Abbey Farm (Anglian river basin district (RBD)) is moderate with an exemption due to ‘cause of adverse impact unknown’ in relation to fish. This is despite the Nar Catchment Plan being clear citing a number of reasons for these failures and highlighting a number of specific and costed actions to implement in order to move the lower Nar to good ecological potential. Third party information, including that collected and reported in CaBA catchment plans must be considered ahead of the final RBMPs.

5.2 Practical constraints of a technical nature in relation to technical feasibility

‘Practical constraints of a technical nature’ constitutes 14% of exemptions applied. However, it is the most frequently cited ground for extension of time for Natura 2000 protected areas. We note that it:

⁵ European Commission, Commission Staff Working Document Member State United Kingdom accompanying the document Report from the Commission to the European Parliament and the Council on the implementation of the Water Framework Directive, November 2012, pages 60 and 61.

⁶ Defra, Statement of Position, 11 February 2011, paragraph 5.

“Includes administrative constraints in terms of commissioning, gaining permission for, and undertaking the necessary works e.g. planning consents. Does not include constraints due to a lack of legislative mechanisms or of funding.”

As written, we are concerned that such a definition could include anything and everything, and we are concerned that no further information is available for water bodies generally as to why such an exemption has been applied⁷. It is therefore impossible for consultees to understand the justification for extensions of time in these circumstances.

We note that the definition for practical constraints of a technical nature *“Does not include constraints due to a lack of legislative mechanisms or of funding.”* However, this is at odds with information recently provided by Natural England⁸ as to how they applied time extensions to Natura 2000 sites justified on the basis of ‘practical constraints of a technical nature’ in relation to diffuse water pollution. This additional information confirms that time extensions were needed as it was deemed impossible to meet objectives by 2021 using current mechanism and funding:

“The extensions proposed for DWP [diffuse water pollution] are based on expert judgement using several national scale analyses that have considered the contribution DWP makes to WFD non-compliance and the predicted effectiveness of available measures.....

The measures we have considered are those where there is some certainty of delivery during the 2nd river basin planning cycle, namely cross compliance, CSF, Countryside Stewardship and Water Company investment in catchment schemes identified in Periodic Review 2014 (PR14). We have considered the likely effectiveness of these measures against contribution that DWP is assessed as making to non-compliance.

Predictions of pollution reduction that can be achieved through these measures will be influenced by:

- *The quality of catchment level information on pollution sources, pathways and impacts.*
- *The level of environmental performance provided by basic measures under cross compliance.*
- *Assumptions around levels of compliance with basic measures*

⁷ Letter from David Baxter, Deputy Director, Water Framework Directive, Environment Agency to Rose O’Neill, Water Policy Manager, WWF-UK, 24 March 2015: *“We did not ask our teams to provide any further information on how they applied this justification and so we do not hold information or analysis that would offer ‘a summary of the types of instances / issues referred to’.”*

⁸ Letter from David Baxter, Deputy Director, Water Framework Directive, Environment Agency to Rose O’Neill, Water Policy Manager, WWF-UK, 24 March 2015. Appendix 2.

- The amount of Rural Development funding available to underpin a Catchment Sensitive Farming type advice and capital grants programme.
- The amount of Rural Development funding available to underpin Countryside stewardship options and items aimed at soil and water.
- Assumptions around levels of voluntary uptake of advice and options.
- The level of overlap between planned water company investment in catchment schemes and Natura 2000 DWP outcomes.

On balance, the evidence from national assessments strongly points to the likelihood of the need for further measures to address DWP beyond the end of the second cycle. Based on this analysis we have concluded that an extension to 2027 is appropriate for Natura 2000 rivers impacted by diffuse pollution.

This analysis does not consider the impact of any significant shift in the application of regulatory measures. Natural England has not been involved in any specific work to evaluate the feasibility of using measures such as Water Protection Zones.”
[our emphasis]

Our conclusion from this is that Natural England have had to determine what is the most likely outcome for Natura 2000 protected areas given current (politically acceptable) legislative mechanisms and likely levels of funding as outlined in scenario 5. It seems that they have concluded that such mechanisms and funding are highly unlikely to deliver the objectives and therefore Natural England have resorted to extending to 2027 (in the view that the new legislative mechanisms and funding they have concluded are needed to deliver objectives may be available then). This clearly shows that constraints are precisely due to a lack of legislative mechanisms or of funding, yet in the majority of cases the time extensions are justified on the grounds of ‘practical constraints – technical feasibility’. However, this situation actually engages Article 11 (5), which requires new, stricter and/or additional measures to be put in place as soon as possible to achieve the environmental objectives within the relevant cycle.

We understand that Natural England have also included lack of landowner cooperation under ‘practical constraints of a technical nature’. We suggest that lack of landowner cooperation points to insufficient legal and funding mechanisms to persuade and/or compel landowners to cooperate.

In our view ‘Practical constraints of a technical nature’ does not constitute technical feasibility as defined in CIS guidance 20, nor is it in the spirit of the WFD. It is also inconsistent with the recent European Court of Justice ruling on the Urban Waste Water Treatment Directive which concluded that:

“in accordance with settled case-law, a Member State *may not plead practical or administrative difficulties in order to justify non-compliance with the obligations and time-limits laid down by a directive.*”⁹ [our emphasis].

We therefore believe that any justification to extend time based on this ground is illegal under the WFD. The final RBMPs must be updated to remove such a justification in relation to extending time.

5.3 Affordability in relation to disproportionate costs

Affordability is not explicitly mentioned within the WFD. We note the Preamble (para 29) refers to Member States phasing implementation of the programme of measures in order to spread the costs of implementation. However, it is settled case law that a recital in the preamble has no legal force¹⁰. Therefore, the phasing of implementation must be read in the light of the more specific obligations set out in the WFD and ensure that administrative measures are in place so that the purpose of the WFD can be achieved. In particular, the use of phasing of implementation is specifically referred to under Articles 4(4) and (5) making it clear that the strict conditions established under these Articles must be applied to any decision to phase implementation through the extension of time. In our view, the reference in the preamble (para 29) to the use of costs as a reason for phasing implementation is logically referenced by Article 4(4)(a)(ii), namely that completing improvements within the timescale would be disproportionately expensive.

Thus, we argue that it is not lawful to apply 'affordability' as a general stand-alone principle for phasing implementation of all measures but only where it is evidenced that the necessary measures within the draft plans would prove to be disproportionately expensive, taking into account the Article 5 economic analysis and Article 9 polluter pays principle.

However, if scenario 5 is the likely indication of ambition for the second cycle, it is clear that the most fundamental and prolific exemption proposed – and most crucial decision in relation to the RBMPs – is in relation to affordability, which the consultation attests forms part of the disproportionate cost test. Remarkably, consultees are not being consulted on this most important decision.

Part 2 of the consultation states:

“Affordability will govern the speed at which the benefits can be achieved. In some cases, even if the benefits are greater than costs for a bundle of measures, it might be judged disproportionate to implement the measures because of affordability issues. Therefore consideration of costs and benefits helps to determine the status part of a water body objective and decisions on affordability help to determine the date by which that status can be achieved.”

⁹ European Union Cases. Court of Justice. JUDGMENT OF THE COURT (First Chamber) of 18 October 2012 (*) in Case C-301/10.

¹⁰ For example: Case 215/88 Casa Fleischhandels [1989] ECR 2789, paragraph 31: “*whilst a recital in the preamble to a regulation may cast light on the interpretation to be given to a legal rule, it cannot in itself constitute such a rule.*”; Case C-162/97 Nilsson [1998] ECR I-7477, paragraph 54: “*the preamble to a Community act has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner clearly contrary to their wording...*”.

This seems inconsistent with the fact that scenario 5 relates to spending decisions that have already been agreed by Ministers. These decisions have been made without reference to the WFD's economic assessment and programme of measures. Instead, scenario 5 appears to be based on a quantum of money already set by the Treasury.

The consultation makes clear that it considers the question of whether something is 'affordable' is the same question as whether a measure is to be judged 'disproportionate'. It notes that this is a political decision for Ministers.

However, CIS Guidance 20, whilst noting that concerns over affordability are likely to play a part in the question of disproportionate costs, is clear that it cannot be determined solely on the basis of political whim.

The CIS Guidance 20 suggests that more care must be taken to explain any such decision. For instance, it notes that "*affordability (or ability to pay for a certain measure) can be one element for justifying the decision on a time extension (i.e. application of Article 4.4), if based on a clear explanation*" which explains:

- the non-availability of relevant alternative financing mechanisms which would not result in affordability issues;
- the consequences of non-action in deciding on an extension of the deadline including weighing foregone benefits against the specific costs of measures;
- steps to resolve the affordability issues in the future.

All of this detail is absent from the draft RBMPs published for consultation. For example, scenario 5 estimates that the likely costs deemed 'affordable' for the agricultural sector equate to £15m per year. This represents an annual cost avoidance of £165m (91% of total annual costs estimated as needed according to the 'polluter pays' principle illustrated in scenario 4). It also appears to be the core reason why scenario 5 delivers far fewer improvements for the environment and wider society. Despite suggesting that 'affordability' will be the main element to justify extending time, there is no discussion of alternative financing, nor how the lack of financing will be resolved in the future.

The CIS Guidance 20 states that "*most importantly, for all cases where an exemption is applied, all measures that can be taken without involving disproportionate costs should still be taken to reach the best status possible*". [our emphasis]

As outlined in section 4, it is not clear which measures will be taken under Scenario 5, and which will be ruled out, an approach which makes it difficult for the public to rationally assess the proposals.

We have further concerns that Scenario 5 appears to suggest that political judgement on affordability will be taken at the level of which Programme of Measures are afforded nationally (with varying implications for a particular River Basin District), rather than the exemption being applied at a river basin and water body level. Arguably such an approach could fundamentally undermine the achievement of the objectives of the WFD.

Given that the WFD does not allow for ‘phasing’ to reduce eventual ambition, it follows that there needs to be a clear process and timetable to overcome affordability concerns. This is not included in the consultation.

We are also concerned that there is also a shortfall in terms of the ‘likely’ funding available for measures to achieve protected area objectives. Correspondence from the Agency dated 24 March¹¹ states that the total funding needed to address diffuse pollution from agriculture in Natura 2000 protected areas alone is £72m per year, while the total pot available under scenario 5 for *all* protected areas is just £74m per year. It makes clear that under scenario 5 there is a “*gap in funding for agricultural measures across all protected areas is about £100m/year*”. On restoration for Natura 2000 protected areas, scenario 5 represents a shortfall of £100m over the second cycle period. This shows that funding constraints set by scenario 5 are a significant limitation to delivery of Natura 2000 objectives over the second cycle. Our understanding of the Habitats Directive is that funding constraints cannot be used as a justification for not achieving FCS. It is therefore crucial that the funding decisions reflected in the final RBMPs ensure that there is sufficient investment in measures needed to meet FCS, ensuring delivery of those measures without delay.

In our view applying ‘affordability’ criteria in this broad way is unlawful. The final RBMPs must clearly explain how affordability decisions are made, taking full account of the CIS Guidance 20, and show how such decisions have been made in consideration of each River Basin District, taking account of the economic assessment required under Article 5 and the principle of recovery of costs required under Article 9.

Regardless of the view about whether affordability applied in the way suggested by the consultation is lawful, it is clear that the RBMP consultation is failing to consult on this critical decision.

5.4 Ecological response times

Part 2 of consultation document suggests that extending time beyond 2027 is justified if measures are delivered in cycle 3

“Generally speaking the ecology of aquatic systems recovers quickly when pressures are removed. However, in some cases ecological recovery time is a justification for proposing an alternative objective based on an extended deadline...Where impacted habitats are hydrologically connected to un-impacted locations, recovery can occur quickly. This is particularly true for species that show mobility through their life history (for example fish and invertebrates). Here, recovery can happen within a limited number of generations over a period of years. Where recovery is expected to take this form, extending deadlines beyond 2027 is only likely to be justified where measures are implemented in the third cycle (2021 to 2027). Where habitats lack this connectivity, or where species are no longer present, recovery may take much longer.”

¹¹ Letter from David Baxter, Deputy Director, Water Framework Directive, Environment Agency to Rose O’Neill, Water Policy Manager, WWF-UK, 24 March 2015

We are concerned that a second cycle based on scenario 5 will back-load delivery of the significant majority of measures into the third cycle and therefore make it highly likely that achievement of the objectives will go beyond 2027. Given experience to date (e.g. the 2014 Catchment Sensitive Farming evaluation report which suggests that it can take three years for the ecosystem to respond to the measures), forward planning and early delivery of effective measures is crucial to ensure delivery of objectives.

In our opinion, any justification of extending time to 2027 and beyond based on ecological response time is unlawful if effective measures to address pressures have not been put in place in a timely way.

We are concerned that there has been some suggestion that failure to achieve the 2009 RBMPs targets have been largely down to ecological response. While we accept that there may be some instances of this, we believe it is significantly more likely that effective measures to address the limiting pressure within the ecosystem have not yet been implemented. Environment Agency classification results from 2014 provide further support for this; macro-invertebrate populations, which would be expected to rapidly recover on removal of pressures, have not shown improvement trends¹².

The Directive makes clear that the surveillance monitoring required under Article 8 must assess any changes in the status of water bodies resulting from the programmes of measures.

This was reiterated in the 2012 European Commission report on the implementation of the WFD in the UK which found that, despite an extensive monitoring network, there seems to be an extensive lack of certainty relating to the impact of potential measures.

Evidence about the impact and effectiveness of measures is a crucial part of the justification for extending time based on ecological response. The WFD requires information about the effectiveness of measures to be presented, however, this information was not included in the draft plans for consultation.

5.5 In cases where lawful exemptions are applied

Article 4(4) (d) provides that, for a time extension to be lawful:

“A summary of the measures required under Article 11 which are envisaged as necessary to bring the bodies of water progressively to the required status by the extended deadline, the reasons for any significant delay in making these measures operational, and the expected timetable for their implementation are set out in the river basin management plan.”

Accordingly, the Plans must include:

¹² Environment Agency. 2015. Water quality: the good news story. Presentation slides, 26 March 2015. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/419090/WQ_trends_2009-2014_March2015.pdf

- (1) a summary of the measures which are envisaged as necessary to bring the bodies of water progressively to the required status by the extended deadline,
- (2) the reasons for any significant delay in making these measures operational, and
- (3) the expected timetable for their implementation (taking account of how the measures are to be financed).

This information is not included in the plans for consultation and as such, it is one of the reasons why we do not believe these to be compliant 'draft' plans.

6. Monitoring

We welcome the significant number of investigations and improvements to the monitoring regime including introduction of a static monitoring system with an increased number of biological parameters.

6.1 Addressing uncertainty

The 'long term' objectives presented suggest that a minority of water bodies will be exempt from achieving objectives justified on the grounds on uncertainty. At a headline level this is encouraging and suggests that the Agency is on track to meet the Government's aims¹³ that uncertainty over water body classification and reasons for failure do not prevent the introduction of the measures necessary to achieve improvements in status in the second cycle.

However, we note that Part 2 of the consultation states:

"The level of certainty needed to make sure an element is at less than good status is influenced by the measures required to resolve the environmental problem. If costly or targeted regulatory measures are needed then a high degree of certainty that there is a problem is usually required to justify action. However some low cost, voluntary type measures may be justified where there is much less certainty in the classification result."

We cannot ascertain from the information provided whether the level of certainty is sufficient to ensure that effective measures are in place to meet the objectives of the WFD. We are concerned, for example, that the Agency have assumed that a level of certainty associated with low cost or voluntary measures is sufficient, even though we know that to date, low cost or voluntary measures have failed to deliver required improvements in water body health.

We note that there have been improvements in level of certainty for high cost and regulatory measures, for example, in 2013:

¹³ As set out in the Statement of Position, paragraphs 12 and 22.

- 61% of failing elements recorded in rivers have sufficient confidence of classification for high cost or regulatory measures, up from 51% in 2009.¹⁴
- 43% of recorded reasons for failure have sufficient confidence for high cost and regulatory measures (up from 40% in 2009).

However, it is not clear as to whether this increase in certainty is sufficient to ensure that *all* the *necessary* measures are put in place. The Agency has not demonstrated, in the draft RBMPs, that it has completed, nor has sufficient prioritisation criteria to ensure completion of, all investigations needed to deliver ‘sufficient confidence’ where it is likely that high cost or regulatory measures are needed. It is therefore unclear to consultees whether the monitoring and investigation regime is fit to deliver the levels of confidence the Agency has set out. The final RBMPs must be amended to make this clear.

For example, we note that the ‘Information on Mechanisms for the Water Framework Directive’ document that supports the consultation states¹⁵:

“Designation of water protection zones can be used as a mechanism where evidence shows that existing statutory or voluntary measures have been or are unlikely to be sufficient to meet Water Framework Directive objectives. It will then be possible to prohibit or restrict polluting activities within those zones. The size and nature of the zones depends on the location and the nature of the problem”. [our emphasis]

Correspondence from the Agency¹⁶ confirmed that:

“The [DWP Diffuse Water Pollution] Plan ‘remedy’ for protected sites was developed in recognition of the fact that tackling DWP effectively required detailed catchment level understanding of the following:

- *the contribution made by diffuse sources of pollution compared with other sources*
- *where the pollution was coming from in the catchment*
- *the type of interventions required to tackle the issue*
- *the location and scale of intervention needed.*

A lack of detailed catchment information has presented a very real practical constraint on the delivery of greater progress during RBMP1. The barrier to progress presented by a lack of good information was also highlighted by the National Audit Office.

¹⁴ Supplied on request to the Environment Agency, by T. Ash, January 2015.

¹⁵ EA(2014) A consultation on the draft update to the river basin management plan. Information on mechanisms for the Water Framework Directive, at page 26.

¹⁶ Letter from David Baxter, Deputy Director, Water Framework Directive, Environment Agency to Rose O’Neill, Water Policy Manager, WWF-UK, 24 March 2015

In 2012 Natural England commissioned ADAS to review the status of DWP Plans. It identified that many plans were struggling to deliver their intended purpose. Issues of data availability and limitations around modelling capability were particular barriers.”

In this case, we are utmost concerned that evidence is not being collected to the sufficient standard needed to justify a Water Protection Zone in catchments where no improvement in water body status suggests that it may be necessary. We are also concerned that other regulatory alternatives are not being engaged where possible, or because of a lack of reliable information.

In any event it is incumbent on the Agency to put itself in the position it needs to be in to exercise the relevant statutory powers so as to take the necessary measures. While we accept that a ‘weight of evidence’ approach is reasonable, it has yet to demonstrate that it is fit for purpose to deal with complex and diffuse pressures (such as agricultural pollution) and it has not demonstrated impact by leading to targeted regulatory action. In fact, a search of the public register demonstrates that levels of regulation have decreased since 2009¹⁷, which could suggest that the ‘weight of evidence’ approach is failing to ensure sufficient confidence for regulatory action is obtained.

We note that Article 8 and Annex V of the WFD requires that Member States must have programmes in place to capture /monitor all relevant information and that CIS 20 guidance that states:

“There needs to be a balance between the risk of failing to meet objectives and the risk of failing to use the most cost-effective means of achieving those objectives, with priority being given to minimising the risks of the first.” [our emphasis]

We do not believe extending time on the basis of the Agency’s failure to collect evidence for sufficient certainty for ‘high cost’ and regulatory measures is lawful where these are required to meet the objective, particularly at this stage in the process, over a decade since the Member States were required to establish monitoring programmes. This point was a significant ground of complaint in our first legal action (on publication of the 2009 RBMPs), whereby Defra and the Agency unlawfully sought to extend time on the basis that the objective is not “technically feasible” simply because sufficient investigations had not yet been undertaken to identify the measures required to meet the objective. Commitments made in the Statement of Position indicated that this would not be a ground of complaint in the second cycle plans. Further explanation is needed in the final RBMPs to demonstrate that such commitments are being met.

We also believe that the ‘weight of evidence’ approach needs to give due transparent consideration to the range of regulatory options available, as well as the precautionary principle in relation to Natura 2000 sites in particular.

¹⁷ Data downloaded from <http://epr.environment-agency.gov.uk/ePRInternet/searchregisters.aspx> shows that the number of enforcement notices served in relation to water quality were: 7 in 2014; 6 in 2013; 14 in 2012; 12 in 2011; 14 in 2010; 14 in 2009.

6.2 Changes to monitoring methods

The consultation asks ***do you agree with the proposed changes to river basin district, catchment and water body boundaries and artificial and heavily modified water body designations?***

While the consultation documents summarise the ‘proposed’ changes, more detailed information regarding the complexity and implications of this has not been made publically available.

On the information provided, we welcome some significant improvements in monitoring methods, including stricter environmental quality standards and the move to a static monitoring system with increased biological monitoring. This addresses some of our long-standing concerns. It is unclear however, whether, the ‘default to good’ (where elements are assumed to be good in the absence of monitoring) which caused the optimism bias in the last cycle has sufficiently been addressed.

We note that water body boundaries and the number of water bodies designated for WFD have been altered, resulting in the removal of 1,210 water bodies. It is difficult to comment on the appropriateness or implications of these changes because it is not clear which water bodies have been merged and which have been removed entirely. However, we do have some concerns in principle. For example, instead of addressing an already recognised problem of the under representation of small water bodies¹⁸, the ‘proposed’ changes have resulted in further removal of smaller water bodies such as coastal streams and headwaters. This is concerning because, removing smaller water bodies could result in no further action to improve status, and even if such water bodies have been merged into larger water bodies, monitoring information about the smaller streams could be lost. Headwater streams, and the habitats and species assemblages they support, are particularly vulnerable to hydrological variability and change, and to pollution impacts, so any action that could reduce the focus on their status and needs would be wrong, in our view.

Some of our most sensitive and precious water bodies are small streams and headwaters. In drafting WWF’s State of England’s Chalk Stream report, a key concern from a variety of stakeholders was the fact that chalk stream headwaters were overlooked or ignored under WFD. The move to ‘new building blocks’ (NBB) will likely make this worse. For example, under ‘old building blocks’ (OBB) there were 247 chalk stream water bodies and under NBB there are just 197. For example, the Northend stream, in the Ouse catchment (South East RBD) was to be removed from WFD classification due to its catchment area being less than 10 km². The Ouse and Adur Rivers Trust report that despite its small size, it is a chalk stream of considerable ecological importance with a population of brown trout and the only stream entering the tidal River Ouse with a significant run of sea trout. Under OBB the Northend stream was considered to be in moderate status and failing for phosphate. There is concern that de-designation as a WFD water body will result in no action to address phosphate levels and improve the river to good, as well as the risk that, over time, the river will be allowed to deteriorate further.

¹⁸ Standing waters of less than 50 hectares and streams with catchments of less than 10km were previously excluded as WFD water bodies.

Many of the 'merged' or 'removed' water bodies (including coastal and transitional waters, head waters and ephemeral streams) are essential if the health of the whole catchment is to reach good status. We are concerned that these changes risk WFD deterioration as non-WFD water bodies will not be prioritised for action but could significantly contribute to pressures (such as diffuse pollution). While the Environment Agency has indicated that waters that are not a WFD water body will still be improved, we are yet to find a single example of where this has occurred¹⁹. The Agency has also not made clear what impact the changes will have on the delivery of the Marine Strategy Framework Directive. The final RBMPs must be updated to ensure clarity on the changes and the implications for both the 'removed' or 'merged' water bodies and the wider catchments.

We understand that there are new approaches within the monitoring programme, biological tools and quality standards for existing substances. We support the new methodology for macro-invertebrate sampling, which monitors to species level, and the new, more conservative Phosphorous standard. We are concerned about proposed changes in relation to fish sampling methodology for large water bodies, as it could result in fishery health being misrepresented. While we recognise the technical difficulties sampling fish populations on large water bodies, it is poor practice to substitute fish sampling on large water bodies with fish sampling on a nearby small water body: these ecological niches are not substitutes for one another.

The improvements to the monitoring programme and standards could be improved further. For example, the monitoring of elements is carried out on a basis of risk, and could therefore miss important environmental stressors. We believe that the impact of multiple stressors is not well understood or addressed in the current monitoring regime. There are weaknesses in the fisheries classification tool which means that the health of fish populations is not well assessed, despite it commonly being the driving element. Presently there is no mechanism by which third party data can be considered and used to strengthen the evidence of the health of waters.

We remain concerned that water bodies are designated as a Highly Modified Water Body even when it is not the modification per se causing failure to meet good, as required by the Directive. We are also frustrated with the way that local information has continued to be ignored during the designation process. For example, the lower Nar (Anglian RBD) has been highly modified - it essentially functions as a drainage channel, perched above the floodplain, with steep sided grassed banks and a straight and deep channel with very little variation and in-stream habitat. Counter-intuitively, in 2009, the Agency designated this as Not a Highly Modified Water Body, on the basis that monitoring (including fish) showed the water body to be at good ecological status. The Norfolk Rivers Trust raised this as a key concern in their Nar Catchment Plan and have petitioned the Agency to change the designation. The Trust believe that unrepresentative sampling accounted for the 'good' status and in fact, it is clear that the river is failing, with the modification being a key reason for failure, with evidence set out in the Nar Catchment Plan. Despite assurances from the Agency that the designation will be changed, the latest draft RBMP suggests the lower Nar remains a not a HMWB and reports that it is now it is at moderate status, failing for fish with 'cause of impact unknown'.

¹⁹ Survey of Blueprint for Water coalition members, December 2014.

Changes to the 'building blocks' has resulted in a shift in the baseline, which is important to understand both in the projections for achievement of objectives under the various economic scenarios presented in the consultation, and in wider communications (and annual update reports) of water body status. On the former, it is vital that the Agency confirms the implications of a change in baseline on projections to stakeholders as soon as possible. On the latter point, the Agency must ensure that communications and updates up to 2021:

- Present key statistics (such as element and water body classifications and objectives) in both the OBB and NBB format so that they are comparable overtime so that movement towards good status is transparent.
- Lead by reporting progress to good status as required by the WFD taking account of the 'one out all out principle'. While we accept that the Agency may want to supplement this information with additional and supplementary indicators and information, it is essential that good status is the leading indicator and is no way undermined. Good status is an indispensable indicator because holistic ecosystem health is the defining success factor. This marks a significant shift change from previous approach which looked at water chemistry or fisheries health alone. Failure to meet good status is not a 'failure caused by one out all out' but is caused by failure to implement the correct measures to address all the pressures on a water body. We recognise that on some occasions ecology may take longer to respond, and on these occasions it may be appropriate to use 'alternate success factors' in order to share good news stories with stakeholders. However, as the independent and competent authority for the protection of the environment, we expect the Environment Agency to not only *implement* the one out all out principle, but to *recognise, endorse* and *promote* its use, making it clear to all stakeholders why ecological functioning is our utmost aim.

7. Economic analysis of water use and recovery of costs

We note clarification from Defra in response to their consultation on the RBMP Guidance that Defra, and not the Environment Agency, is responsible for the economic assessment required under Article 5 of the Directive.

However, it is unclear how such assessment links to the Environment Agency's economic analysis presented in the consultation document, nor is it clear how it has been used to inform development of the programmes of measures for consultation.

We understand that Defra have conducted an internal review of the assessments originally completed in 2008²⁰ but have not made this review public and have not made any amendment. In our view, the public is entitled, as set out by provisions in the WFD, to be informed and consulted upon the review of the economic assessment. This is clear from Articles 13 (4) and 14, and Annexures III and VII when read together.

²⁰ Available at:

<http://webarchive.nationalarchives.gov.uk/20080305115859/http://www.defra.gov.uk/environment/water/wfd/economics/index.htm>

In our opinion, the 2008 economic assessment of water use for each River Basin District fails to take account of the recent ruling by the ECJ²¹ that cost recovery applies to a wide range of water uses which have an impact on water. This implies that sectors that have a significant impact on the status of waters, other than the water industry, such as agriculture, must be taken into account as part of the economic assessments.

Significantly, the Court held²² that there was no obligation upon a member state to apply measures for the recovery of costs to other sectors so long as other measures are in place that ensure water resources are used efficiently and the decision does not compromise the ability to meet environmental objectives (our emphasis).

While, the 2008 economic assessments do provide a short section on the agricultural sector, it does not go into sufficient detail to meet the requirements of Annex 3 of the Directive specifically in relation to agricultural water use.

The 2008 economic assessment states that:

“It is not currently possible, given existing data and bearing in mind the cost of additional data collection, to identify recovery of costs of water uses by these water user groups. In addition, some of the costs imposed by water uses such as diffuse pollution from roads, agriculture, etc., may not be adequately recovered from the relevant users but further research is required to establish this.”

The economic analysis presented in the Environment Agency’s consultation seems to suggest that extensive additional evidence has been compiled since 2008 in relation to sector apportionment and costs. In light of this, and the clear expectation in the Directive that Member States will ensure that the requirement to contribute to the recovery of costs will be kept under review, and taken into account when reviewing the plans, we believe it is essential that the Article 5 economic assessment is revised and the review made public ahead of publication of final RBMPs. In our opinion, the final RBMPs will not be compliant with the WFD unless they demonstrate that such an exercise has been undertaken. Further, we consider that the failure to recover costs has compromised achievement of the objectives in relation to addressing pressures from the agricultural sector in particular, and therefore we would expect the Agency to either present evidence in the final RBMPs that this is in fact not the case, or else explain how they will lawfully re-balance the effective recovery of costs of water uses.

Advocate General NIILO JÄÄSKINEN noted, in the recent case of European Commission and the Republic of Germany, that:

“Article 9 of the WFD, which enshrines the principle of recovery of costs, cannot be analyzed in isolation. In reality, it is a device intrinsically linked to Article 11 of the WFD on the obligation of Member States to develop a programme of measures,

²¹ Commission v Germany (Case C-525/12)

²² CJEU held (para 59): *“In those circumstances, the fact that the Federal Republic of Germany does not make some of those activities subject to that principle does not establish by itself, in the absence of any other ground of complaint, that that Member State has thereby failed to fulfil its obligations under Articles 2(38) and 9 of Directive 2000/60.”*

which is one of the main instruments of qualitative management of water. Under the terms of Article 11, paragraph 3 (b)), the basic requirements of each program include the measures deemed appropriate for the purposes of that section 9. Thus, measures relating to the recovery of the costs of services related to the use of water are an integral part of the programmes of measures.”

In this way the Advocate General explains that whilst pricing policies, per se, may not apply to all uses of water, the WFD expects through the provisions of Articles 5 and 9 for Member States to conduct the economic analysis that ensures that the programme of measures includes an internalisation for the relevant sector of the economic costs associated with their uses having a significant impact on waters. In our view, failing to review and update the economic analysis as part of revision of the Programme of Measures is not compliant with the WFD.

Article 9(4) says Member States shall report the reasons for not fully applying cost recovery with adequate contribution of different water uses in the RBMPs. The draft RBMPs fail to do this.

We note that Part 2 of the consultation states:

“The hierarchy for funding measures to resolve or mitigate an environmental problem is:

- 1. Polluter pays - the person whose activity causes (is at risk of causing or has caused) an environmental problem pays.*
- 2. Beneficiary pays - the person who will benefit from the improvement (or reduced risk) to the environment pays (sometimes called payment for ecosystem services; PES).*
- 3. Government pays - the UK government directly or indirectly (via EU, central and local government) pays.”*

The cost of measures for scenarios 2, 3 and 4 of the Agency’s economic analysis have been broadly allocated to the sectors based on this hierarchy. However, scenario 5 illustrates an assumed level of ‘likely’ sector contribution which is at odds with this hierarchy, and the principal aim of Article 9 to ensure that wherever possible the polluter pays.

	Scenario 4		Scenario 5	
	Annual cost	% total cost	Annual cost	% total cost
Water and sewage industry	£160m	41%	£390m	72%
Agriculture	£180m	36%	£15m	3%
Other industry	£40m	9%	£40m	7%

Government	£60m	14%	£100m	18%
-------------------	------	-----	-------	-----

In our view, delaying measures purely on the grounds of ‘affordability’ whilst at the same time failing to fully recover costs from sectors other than the water industry without having alternative financing in place is compromising the objectives of the Directive. As such we believe that the approach taken is unlawful.

8. Programmes of measures

The consultation asks ***Do you agree that the correct measures have been identified?***

We understand that ‘bundles of measures’ (the physical measures needed in catchment to address various reasons for not achieving good status) were used in economic analysis at operational catchment level although this information was not available in the draft RBMPs, nor is it in all cases, fully available on request from local Agency catchment coordinators. Part 2 of the consultation presents a list of measures (the policy and regulatory ‘mechanisms’ that could potentially be used across the country to ensure physical measures are put in place). However, despite this, it is completely unclear which measures are proposed to be delivered where and when.

Annex VII (A) (7) requires that RBMPs shall include:

“a summary of the programme or programmes of measures adopted under Article 11, including the ways in which the objectives established under Article 4 are thereby to be achieved”.

Annex VII (B) also includes a retrospective review when undertaking an update of the RBMP. This includes setting out information explaining the measures previously confirmed but not eventually implemented, as well as those *additional* interim measures that should have been taken under Article 11 (5) considered necessary to supplement basic measures to reach good status in time.

The Statement of Position states:

“The Government’s aim is to set out in the second cycle of RBMPs clear timetables for actions on all water bodies in order to achieve the objectives of the Directive, under Article 4. This will be possible as a result of the additional monitoring information obtained during the first cycle as well as the intensive investigation programme.

In setting that aim, the Government notes that such timetables need an element of flexibility because it may not be possible to be certain that proposed measures will work as contemplated. The second cycle RBMPs will therefore explain the steps which are proposed to meet water body objectives (including deadlines), including the progressive steps to be taken if existing or proposed measures will not reach those objectives within the prescribed timeframe. These steps will involve the introduction of stricter approaches, including the introduction of further regulatory

measures on a local or more generalised basis, in circumstances where it is plain that a particular measure or measures are needed and justifiable but cannot be generated voluntarily/through the deployment of advice/ incentives or through the application of existing regulatory measures. When publishing the timetables, the Government will identify review dates for each timetable at which progress towards achieving water quality objectives can be assessed with a view to introducing more stringent measures if the existing measures are not on track. To support this process, the Environment Agency will evaluate what is achieved in catchments through the measures that are deployed and the gap between what has been achieved and what needs to be achieved.”²³ [our emphasis]

The information provided in the consultation in no way meets the commitments in the Statement of Position, nor, in our opinion, does it meet the requirements of the Directive. The lack of information about where, when and how the possible measures listed in the RBMPs will be used makes it impossible to ascertain the scale of works being proposed and the total and distribution of costs and benefits. It is therefore difficult to understand whether the action proposed will achieve the scale of improvement in good status necessary. In our view, this makes it impossible for consultees to fully respond to the consultation question set.

We have also found it difficult to understand the effectiveness of measures deployed to date based on this evidence and we believe that such an understanding is fundamental to making a comprehensive response to the consultation. This is reflected in the WFD Annex VII (B) retrospective.

Annex VII (B) requires that:

“The first update of the river basin management plan and all subsequent updates shall also include:

- 1. a summary of any changes or updates since the publication of the previous version of the river basin management plan, including a summary of the reviews to be carried out under Article 4(4), (5), (6) and (7);*
- 2. an assessment of the progress made towards the achievement of the environmental objectives, including presentation of the monitoring results for the period of the previous plan in map form, and an explanation for any environmental objectives which have not been reached;*
- 3. a summary of, and an explanation for, any measures foreseen in the earlier version of the river basin management plan which have not been undertaken;*
- 4. a summary of any additional interim measures adopted under Article 11(5) since the publication of the previous version of the river basin management”.*

Such analysis is not included in the draft RBMPs.

After requesting such analysis, the information subsequently provided by the Agency²⁴ in no way met the requirements of Annex VII (B). For example, while the interim report on programmes of measures that was submitted to the Commission in December 2012,

²³ Defra, Statement of Position, 11 February 2011, paragraph 27 and 28.

²⁴ Letter from David Baxter, Deputy Director, Water Framework Directive, Environment Agency to Rose O'Neill, Water Policy Manager, WWF-UK, 24 March 2015.

confirms whether measures have been made operational in each River Basin District, it does not assess the effectiveness of those measures in delivering or progressing towards stated objectives. This suggests that such an assessment has yet to be completed.

The Statement of Position committed to implementing at least ten pilot catchments in order to understand the absolute and relative effectiveness of measures. The purpose was to drive action of measures set out in the 2009 RBMPs so as to understand the 'gap' between what could be achieved using those measures, and what was needed to achieve objectives and use the results of the pilots to inform second cycle programmes of measures more generally. The Statement of Position says:

“In these catchments the Environment Agency will drive action vigorously and pay particular attention to dealing with violations of baseline legislation, including undertaking any necessary enforcement action and seeking to provide the required information to regulatory partners to allow them to take action. These will in effect be trials for second phase catchment plans that will form the basis of the second cycle of river basin planning.”²⁵

While the ten pilots were operationalised, we have concerns as to whether they were actually used to understand effectiveness of measures. No such analysis has been released nor presented in the draft RBMPs. The ten pilot catchments have failed to meet good status, and by and large, the same pressures reported in 2009 RBMPs are listed in the new draft RBMPs as reasons for failure.

That said, the headline monitoring shows that the measures have been woefully inadequate to meet the (unambitious) objective set out in the 2009 RBMPs. For example, the consultation makes clear that achievement of the legally binding objectives - 32% of water bodies at Good and 86% water-dependent Natura-2000 sites meeting Favourable Condition - now look extremely unlikely. One reasonable interpretation of this is that the measures in the first cycle plans were far from sufficient and/or were not fully implemented.

Whilst the WFD allows for progressive achievement of reaching good status, it does not allow delay in operationalising effective programmes of measures. We have grave concerns that reliance on many of the same set of measures as 2009 for this next cycle is likely to deliver the same lacklustre result. In our view, this approach is likely to result in non-compliant plans unless steps are taken to put in place additional and / or new measures ahead of finalising the RBMPs; any continued reliance on measures that are now shown to have failed in the last cycle must have a credible explanation for how they will deliver much more in this cycle and/or be supplemented / substituted with more effective ones.

We continue to be frustrated that local information, such as the measures identified as necessary developed as part of the CaBA catchment plans, has not been included in summaries of measures in the draft RBMPs nor in the accompanying Catchment Summaries.

8.1. Measures on abstraction

Water company abstraction

²⁵ Defra, Statement of Position, 11 February 2011, paragraph 3.

We note that there has been a significant change since the 2009 RBMPs in the Water Act 2014, which ended the entitlement for water companies to claim compensation for reductions in licensed rights to restore abstraction to sustainable levels. We understand that this will significantly increase the ability of the Agency to address pressures on the environment from water company abstractions, the pace by which it can do so, and that a programme of investigations and licence changes has been agreed as part of the water company business plans for 2015-2020. In our opinion, the final RBMPs must go beyond stating the general principle that such a measure can be applied, and specifically summarise the forward work programme for addressing environmentally-damaging abstractions by water companies in each river basin district. This should identify:

- The numbers of water bodies failing due to water company abstraction ('over-abstracted' sources), and of these:
 - Water bodies where measures (i.e. licence changes) will be implemented within the second cycle, with a timetable for the work, including the dates whereby Agency notices will be served and licence changes / revocations made.
 - Water bodies where further investigations will be completed within the second cycle, with a timetable for the work, including a date for completion of the investigation, and – should implementation of licence changes prove necessary, the dates whereby Agency notices will be served and licence changes / revocations made.
- The numbers of water bodies where total licensed abstraction risks causing WFD failures ('over-licensed' sources).

The need for such analysis is heightened by the limited scope of Defra's on-going 'abstraction reform' programme to licence allocation issues, under the assumption that all legacy cases over-abstraction and over-licensing will have been (or more realistically, will be) dealt with separately, by the Agency via the RBMP process. Should that assumption fail, the abstraction reform proposals would be fatally undermined.

We have some concerns around the use of exemptions specifically related to abstraction pressures.

For example, we note that action on abstraction in a number of cases has been delayed on the grounds of 'practical constraints of a technical nature'. While we understand that there have been some difficulties finding alternative sources of water, the delays so far seem to have been largely related to bureaucracy, administration and constraints related to funding and political acceptability, rather than difficulties gaining planning permission (the example given in the Ministerial Guidance). As stated in 5.1, in these circumstances we do not believe this to be a lawful extension of time under the Directive. For example, on the Itchen SAC, we think it is unreasonable that the Agency has taken well-over 5 years to offer firm conclusions on the alternative sites proposed in 2009. While it could be argued as to which party is responsible for procrastination and delay, in our opinion it is the responsibility of the regulator to drive the timetable to ensure the environmental objectives are met. In this example, we welcome comments from the Agency that it intends to give formal notice of

intention to amend abstraction licences on the Itchen by December 2015. In addition, the Agency must also impose conditions (such as the proposed monthly limitations on abstraction) where this would not contravene public water supply, ahead of finalisation of the RBMP.

In the final RBMP, measures on abstraction should also include operational changes in the abstraction regime, particularly where a permanent licence change has been ruled out of the grounds of disproportionate cost. Article 4(5)(b) of the Directive makes clear that, where less stringent environmental objectives are proposed, action must be taken to ensure the highest status possible. For rivers like the Cray (Thames River Basin District), we believe that there would be considerable scope to reduce pressure from damaging abstraction through changes in operations (for example, by ‘resting’ the Cray groundwater sources in so far as possible and by only using them as a last resort when all sources in the Water Resource Zone are needed to meet demand) and through greater use of demand management.

We note that water company Water Resource Management Plans suggest that only 60% households in England and Wales will be metered by 2020, with 80% of households being metered expected to occur by 2035 at the earliest. This is counter to an independent government review of water metering and charging which recommended 80% households metered by 2020 in order to ensure environmental objectives were met²⁶. In addition, the tariffs for metered households employed to date have barely extended beyond the use of flat rate volumetric charging. We consider there to be considerable scope for the development of tariffs that encourage and incentivise the efficient use of water for all, whilst protecting the needs of the vulnerable, particularly where and when water is scarce - including the use of rewards for reduced consumption in those circumstances. We see all too little progress in this area of water management, and lament the lack of drive from government to mandate progress in active water conservation by water companies and their regulators.

As stated in section 7, we understand that there is no obligation upon a member state to apply measures for the recovery of costs – including that “*water pricing policies provide adequate incentives for users to use water resources efficiently*”²⁷ - so long as other measures are in place that ensure water resources are used efficiently and the decision does not compromise the ability to meet environmental objectives. We are concerned that decisions may be taken to set less stringent objectives for water bodies impacted by abstraction on the grounds of disproportionate cost without first ensuring cost recovery pricing policies are in place. In our view, this would be a breach of the Directive.

‘Non-water company’ abstraction

While we note that water company abstractions dominate the reasons for not achieving good in relation to abstraction and flow, non-water company abstractors, in particular farmers and industrial abstractors, still make a significant contribution to abstraction pressures on the environment.

²⁶ Defra, 2011, The independent review of charging for household water and sewerage services (Walker review)

²⁷ WFD. Article 9 (1)

We are concerned that the draft RBMPs do not include all of the basic measures required under Article 11 (3)(e) to address abstraction for sectors other than the water industry. For ‘non-water company’ abstractors the measures listed in the RBMPs include:

- Implementing the Restoring Sustainable Abstraction (RSA) programme whereby changes to the licences can be made on a compulsory basis, under section 52 of the Water Resources Act 1991, with compensation payable from funds collected via the Environmental Improvement Unit Charge (EIUC). We note that this only applies to licences that fall within a limited number of sites.
- Voluntary changes to the licences, made under section 51 of the Water Resources Act 1991, whereby the abstractor is not entitled to compensation.
- Compulsory changes to licences where the Agency can demonstrate ‘Serious Damage’ has occurred, made under section 27 of the Water Act 2003, whereby the abstractor is not entitled to compensation.

This leaves a potentially significant ‘rump’ of water bodies that do not fall under the above criteria. This could be where abstractions may not reach the ‘Serious Damage’ threshold but cause failures to meet good status. Such abstractors would, under the Water Resources Act 1963, be entitled compensation should changes to the licence be made. We note that the compensation fund raised via EIUC is not able to be used for sites outside of the limited RSA programme. This leaves the Agency in an impossible situation whereby it is required to make changes to licences to meet environmental objectives, yet domestic legislation requires compensation payments to be made and no compensation mechanism is available.

Such a ‘rump’ may also significantly increase as abstractions currently exempt from abstraction licensing under existing legislation, such as dewatering, transfers for navigation and some forms of irrigation, are brought into regulation (which is essential to ensure the WFD is transposed fully into domestic legislation). It is therefore critical that any new licences granted to currently exempt abstractions must restrict abstraction so as to maintain a hydrological regime that supports good status. In our opinion, authorising new licences to reflect current levels of unsustainable, but hitherto unlicensed abstraction, when that contravenes achievement of WFD objectives, will not be compliant with Articles 4 and 11(3)(e) read together and will also represent failure to properly transpose to the WFD into UK law.

On the government's own admission, abstraction reform is urgently required and in particular in relation to compensatory measures that would incentivise the industry towards greater efficiency²⁸. The Agency has made clear that the current charging system does not discourage waste and the current approach to changing licences is inconsistent and slow.

In ‘Every Drop Counts’, Defra has consulted on potential reforms to the current system for abstraction licenses, including those which would remove the historic right to compensation for all licence holders²⁹. The government has yet to respond to this consultation; however, in

²⁸ Defra, 2013. Every Drop Counts.

²⁹ In ‘Every Drop Counts’, Defra noted “*if individual abstractors receive compensation there is little incentive for them to take measures to address the impact of reduced water availability*”

our opinion the reform proposals demonstrate that the government has significant doubts that the EIUC is a credible incentivising measure for the recovery of costs. While Part 2 of the consultation notes that the Agency will “*work with the outcomes of the proposed abstraction reform*”, the potential reforms are not included as measures in the draft RBMPs.

In our view, failure to bring forward some reform for ‘non-water company’ abstractors into the draft RBMPs compromises the achievement of the environmental objectives within the time frame set out by the WFD. The final RBMPs must include reformed measures to address ‘non water company’ abstraction – for example, removing the right to compensation, or the establishment of a new compensation mechanism to ensure changes can be made under existing domestic legislation, as well as a clear timetable for action as to how and when the Agency will use such measures to address abstraction related pressures so as to secure good status. In our view, final RBMPs without such measures will be in breach of Articles 4 and 11 (3)(e).

We understand that as many as 3,000 time-limited licences will come to the end of time-limits within the next few years, giving the Agency an important opportunity to make significant progress in tackling abstraction without incurring compensation or ‘disproportionate’ costs. In our view, the default position must be not to renew a time-limited licence if flow and abstraction flow pressures do not support good status of the associated water body. We understand that there may need to be an appeal process for the abstractor to demonstrate with a high level of certainty that renewal of licence will not materially contribute to the WFD failure. The onus should not be on the Agency to demonstrate that the abstraction is causing damage, as this places a high burden on the public purse (and not the polluter) and there are concerns as to whether existing Agency monitoring processes are sufficient to this task. The final RBMP must set out how the Agency will deal with time-limited licences in this next cycle so as to achieve environmental objectives.

8.2 Measures for agriculture

Article 11 of the WFD sets out the ‘the minimum requirements to be complied with’ shall include:

“11(3) (h) For diffuse sources liable to cause pollution, measures to prevent or control the input of pollutants. Controls may take the form of a requirement for prior regulation, such as a prohibition on the entry of pollutants into water, prior authorisation or a registration based on general binding rules where such a requirement is not otherwise provided for under Community legislation.”

Our organisations consider that measures that are both ‘preventative’ and ‘prohibitive’ are unlikely to be effective if contained in a voluntary code rather than regulatory framework. This view is shared by the Commission. Their review of the 2009 RBMPs stated³⁰:

³⁰ European Commission, Commission Staff Working Document Member State United Kingdom accompanying the document Report from the Commission to the European Parliament and the Council on the implementation of the Water Framework Directive, November 2012, pages 60 and 61. available at: http://ec.europa.eu/environment/water/water-framework/pdf/CWD-2012-379_EN-Vol3_UK.pdf

“Despite agriculture being identified as a significant pressure, no new mandatory measures have been agreed in the plans. Voluntary measures are listed instead of mandatory measures.”

And went on to recommend:

“This should be translated into a clear strategy that defines the basic / mandatory measures that all farmers should adhere to and the additional supplementary measures that can be financed”

Despite this recommendation, the draft RBMPs largely rely on voluntary measures to address agricultural pollution.

The Commission’s recent ‘Screening Assessment of Draft Second Cycle River Basin Management Plans’ shows that, in the Anglian draft River Basin Management Plan³¹:

“There was very little explicit mention of the basic measures required by Directives with only Nitrates Action Programmes being described. The only basic measures are those relating to the Nitrates Directive. It seems that there are no other mandatory basic measures such as required under Article 11.3.h. Supplementary measures are listed for the current and the second plan: these are by and large soft measures such as voluntary agreement, advice and further research and investigations. There is no information on how any of the current or proposed measures will contribute to the achievement of WFD objectives.”

In March 2015, the Commission published a communication which made clear that failure to address shortfalls could result in infringement proceedings. It included the following recommendations for the UK³²:

- *“Ensure that the RBMPs clearly identify the gap to good status, and that the PoMs are designed and implemented to close that gap (this is particularly relevant to assess the effectiveness of the existing measures in relation to significant pressures such as agriculture and hydromorphology and which additional measures are needed to close the gap).*
- *Ensure that basic (mandatory) measures required under the WFD are implemented. The United Kingdom should also set out clearly the contribution that supplementary measures are expected to make towards the achievement of WFD objectives in the 2nd RBMP. There should be a re-focus to “harder regulation” and more enforceable supplementary measures that might make these measures more effective.*
- *Provide a clear strategy that defines the basic/mandatory measures that all farmers should adhere to and the additional supplementary measures that can be financed because the United Kingdom is a country where agriculture is indicated as exerting a significant pressure on the water resource in all RBDs. This strategy*

³¹ European Commission. 2015. Screening Assessment of Draft Second Cycle River Basin Management Plans. Report produced by WRC.

³² European Commission. 2015. COMMISSION STAFF WORKING DOCUMENT Report on the progress in implementation of the Water Framework Directive Programmes of Measures.

should aim at solving the problem of pollution from N, P, organic pollution, sediment, and pesticides. It should involve the implementation of WFD basic measures (including the Nitrates Directive) and supplementary measures at a level that will ensure the achievement of WFD good status.”

Our organisations are also concerned regarding the extent that existing regulatory measures are addressing agricultural diffuse pollution. For example:

- Research suggests that there is a gap in compliance with baseline regulations, with a 2011 NFU survey of NVZ compliance finding 45% of farmers surveyed did not have enough slurry storage to comply with the 5 month storage requirement. Recent research for WWF suggests that compliance with NVZ and SSAFO regulations to range between 60 and 80% and compliance with the GAEC as between 50-90% depending on the individual requirements³³.
- Anti-pollution works notices in theory can be used to tackle diffuse pollution. However, they are not, due to “*complexity of the issuing process, the disproportionate level of evidence required to support the notice, and a lack of management and legal support*”³⁴. The Agency issued seven such notices in 2014 in relation to water quality, the majority of which to water companies³⁵.
- The nature of diffuse pollution makes it difficult for the Agency to gather evidence to prosecute individuals and businesses ‘knowingly polluting’ water bodies because:
 - It requires each specific observation to have significant impact rather than take into account cumulative effects;
 - Pollution incidents are generally reported after they have occurred (so action is focused after damage is occurred not at preventing risk of damage, and;
 - The criteria (initially designed to address point source pollution incidents) tends to categorise diffuse pollution from agriculture as a lower severity incident (Category 3 or 4 incident).

For example, analysis of Environment Agency catchment walkover data (where hundreds of miles of river were walked) showed identification of thousands of diffuse pollution incidents, yet less than 90% resulted in any follow up action at all, and of those that were followed up, it is unknown to how many actually resulted in a caution or sanction.

- Where a causal link between significant diffuse pollution impact on WFD status and an operator (or multiple operators) is established, the Agency could notify such operator under the Environmental Damage Regulations 2009/Environmental Liability Directive for having caused environmental damage where the impact is

³³ WWF. 2014. Ensuring Company Operations and Suppliers are Compliant with Existing Water Protection Legislation and Regulations.

³⁴ <http://www.nao.org.uk/wp-content/uploads/2010/07/1011188.pdf>

³⁵ Data downloaded from <http://epr.environment-agency.gov.uk/ePRInternet/searchregisters.aspx>

significant. Following such a notification the operator(s) must themselves then propose remedial and preventative measures *at their own cost*, which the Agency then decides upon having consulted affected parties. It is not clear whether the Agency is contemplating this, or using such powers in relation to WFD implementation.

We are also concerned regarding the extent that existing voluntary measures are addressing agricultural diffuse pollution. For example, the Agency's:

- Progressing towards WFD objectives – the role of agriculture report 2014 shows that *“the agricultural load reductions needed to meet good status for P are considerably greater than the estimated levels of reduction achieved through current measures”*, stating that the average required reduction was 43%, where *“for CSF and ELS, P load reductions are typically around 4-8%...and lower for NVZs”*.
- The Catchment Sensitive Farming (CSF) Evaluation Report 2014 shows that, while it has demonstrated some notable impacts in some areas, in isolation it is far from sufficient to deliver WFD objectives. For example, the CSF Evaluation report notes:
 - Modelling of current CSF activity shows that it contributes 10 to 15 per cent, on average, of the proportional target for river phosphorus (i.e. towards the total P target the agricultural sector is required to meet to support delivery of WFD objectives). This implies that other measures will need to contribute 85-90% of the sector target. Note that in-stream monitoring has yet to demonstrate actual reductions in Phosphorous.
 - Modelling suggests that the maximum contribution possible for CSF (under the 'optimised' scenario) to contribute to reduced total Phosphorous loads is 33%, falling short of the load reductions identified as needed in the 'role of agriculture' report.
 - While monitoring data shows that CSF has made significant reductions in sediment loads, we note that it is sufficient to 'hold the line' and ensure no deterioration, rather than deliver overall improvements needed to meet WFD objectives (noting that deteriorations are likely in 'non-CSF' catchments).
 - 62% of measures advised on via 1-2-1s are implemented. While this is noteworthy for a voluntary scheme, this does mean that two fifths of measures are not implemented even by farmers spoken to. There is also the issue that some of the 'harder to reach' farmers that may be more likely to cause problems, do not engage in the scheme at all. Overall participation rates (total farmers implementing CSF measures out of all the farmers in CSF target catchments) are not included in the evaluation.
 - Our conclusion upon reading the report is that, while CSF is a valuable scheme and must continue to be sufficiently resourced, it is absolutely vital that it is supported by stricter, non-voluntary measures to ensure WFD objectives are met.

The 2009 RBMPs included Water Protection Zones (WPZs) as a potential measure. For example, in the case of Poole Harbour SPA (South West River Basin District), the 2009 RBMP included the objective to meet Favourable Conservation Status by 2015. The measures proposed included: “*Develop pollution action plan (evaluate impacts and apply appropriate solution, e.g. catchment sensitive farming, water protection zone or control of discharges)*”. Despite, the ‘pollution action plan’ showing nitrate pollution as a key reason for failure, and that the large majority - 80% - is attributed agricultural fertilisers and manures run-off from the Frome catchment, to date the ‘appropriate solution’ has not been applied. The draft RBMP show that achievement of FCS is not achievable by the 2015 deadline and extensions are applied on the basis of ‘practical constraints of a technical nature’. The draft RBMPs suggest a continued reliance on existing voluntary (e.g. CSF) and regulatory (e.g. NVZs) measures even though to date, no improvement in water body status suggests that these have proven ineffective. Crucially, it seems that no review to assess effectiveness of measures implemented, including an assessment of the potential to designate a Water Protection Zone, or other regulatory options, has been undertaken.

In the case of *Commission of the European Communities v Luxembourg* (C-32/05) E CJ, 30 November 2006, the Court made clear that a Member States were obliged to **adopt all the measures necessary** to ensure that a directive was fully effective. The Court noted that the EC Treaty (Amsterdam) Art.249 expressly allows for Member States to choose the form and methods to do so that best ensures the result to be achieved by the Directive. Legislative action was not necessarily required, provided that any existing measures relied on did apply the Directive fully and were sufficiently clear and precise to enable individuals to know the full extent of their rights. The Court went on to note that the WFD was the type of Directive that required a Member State to take the necessary measures to ensure that its objectives were achieved - although it left the Member State some discretion as to the nature of those measures.

In our view, the RBMP must adopt all the measures necessary to achieve the objectives, including Water Protection Zones when other measures are not sufficient. WPZs are the only regulatory measure the Agency has available that was designed specifically to deal with diffuse agricultural pollution. The explanatory notes that accompanied the 2009 regulations on WPZs made clear that³⁶:

*“As a matter of policy, it is preferred to address adverse impacts on the water environment from diffuse pollution and hydromorphological pressures by voluntary means and this position will be reflected in guidance to the Environment Agency on the use of Water Protection Zones. **However, legal mechanisms are necessary to back up the voluntary approaches since the WFD requires Member States to establish enforceable controls to prevent or limit the input of pollutants from diffuse sources and to ensure that hydromorphological conditions are consistent with the achievement of good ecological status**”.* [our emphasis]

³⁶ Explanatory Memorandum to The Water Resources Act 1991 (Amendment) England and Wales Regulations 2009.

However, since the new regulations came into force, not a single WPZ has been designated and Part 2 of the consultation that summarises ‘all the measures identified’ to tackle diffuse pollution from agriculture does not include WPZs.

It seems that the use of WPZs had been ruled out – on a policy basis – well before the current consultation exercise, with the Agency reporting³⁷ that Defra:

“have indicated that the Environment Agency should exhaust these other options before presenting candidate Water Protection Zones for consideration by the Secretary of State for designation. Accordingly the Environment Agency is using the Catchment Based Approach to work closely with sectors to help them to better understand and minimise their impact”.

In addition, it seems that such a decision was taken in January 2011, and has not been revisited as part of latest draft RBMPs in consideration of the Agency’s and Natural England’s improved evidence base. It seems that the evidence provided so far (and summarised above), suggests that, in certain catchments, other options may well have been ‘exhausted’. The decision about whether to apply for Water Protection Zones in targeted catchments (in particular Natura 2000 protected areas) must be reviewed ahead of the final RBMPs, and WPZs must be identified as a measure in the final RBMPs.

Article 23 of the Directive states that *“Member States shall determine penalties applicable to breaches of the national provisions adopted pursuant to this Directive. The penalties thus shall be effective, proportionate and dissuasive”*. We are concerned that ‘business as usual’ efforts to enforce existing regulations are far from sufficient to secure compliance. The final RBMPs must include information as steps the Agency, and other appropriate regulators, will take to secure compliance. At the European Commission Water Conference (23rd March 2015), the Defra Water Director presented the Scottish General Binding Rules³⁸ as one of the UK’s key successes from the first cycle. In our view, adopting a risk based and targeted approach to compliance in England, akin to that pursued in Scotland, would go some way to ensure the UK government is not in breach of Article 23.

To tackle diffuse pollution from agricultural where it is causing failure to meet environmental objectives, the UK government must:

³⁷ Environment Agency. 2014. Information on mechanisms for the Water Framework Directive, at page 27.

³⁸ The main instrument deployed in Scotland to regulate diffuse pollution from agriculture is a package of Diffuse Pollution General Binding Rules (GBR), a key feature of which is that they represent a statutory baseline of environmental husbandry which all farmers and rural land managers must abide. The main thrust of GBR enforcement is undertaken at a priority catchment level, with farmer contact made exclusively by SEPA. Where breaches of GBR and/or significant pollution risks are identified, farmers are given time (usually 1 year) to address these breaches and risks before a second repeat visit is arranged by SEPA to check on progress. A key point to note is that 85% of farmers have taken action to address failings identified during their initial visit from SEPA. Evidence from the River Ayr Priority catchment demonstrates how 90% of farmers have taken action to rectify problems without any need for SEPA to take further action. This represents a significant body of targeted pro-environmental behaviour taking place, which was not being undertaken previously. Encouragingly, farmers and their representative bodies appear to have received the programme in a favourable light, regarding the enforcement process as balanced and fair.

1. Have in place effective basic measures – these are the minimum mandatory requirements farmers must comply with across the country;
2. Ensure compliance through effective surveillance, enforcement and dissuasive penalties;
3. Target advice and incentives through provision of voluntary schemes;
4. Where the above measures have not been sufficient to drive change to meet objectives, targeted regulatory measures (such as Water Protection Zones) should be put in place.

Such a framework needs to be made upmost clear to stakeholders, including the timetable for decision points to introduce further regulatory measures (as outlined in Statement of Position, paragraph 28).

In relation to this, we are concerned that taken together, current basic measures, current enforcement mechanisms and voluntary schemes have proven far from sufficient to deliver the scale of change needed to meet WFD objectives. In addition, targeted regulation, such as Water Protection Zones, have not even been considered in preparation for the draft RBMPs, and the promised timetable for introduction of stricter measures has not been proposed.

In our view, the measures set out in Part 2 of the consultation to address diffuse agricultural pollution will fail to deliver the objectives. It is assumed that Defra also recognise the need to revise such measures, having set up a 'Water and Agriculture' group of stakeholders to consider options. In a Ministerial meeting in July 2014, Defra inferred that a consultation on new measures would be published alongside the draft RBMPs. To date, such a consultation has not been forthcoming. It is essential that new measures on agriculture diffuse pollution, including new basic and targeted regulatory measures (including Water Protection Zones) and enforcement measures to secure compliance, are included in the final RBMPs. In our view, final RBMPs without such basic measures would be in breach of Article 11(3)(h).

9. Economic appraisal of bundles of measures

The consultation asks ***do you agree with the way the economic appraisal process has been done?***

We welcome the outcome of the economic appraisal process that shows that taking action where it is technically feasible, and benefits outweigh the costs, should deliver 75% of water bodies at good status and more than £8.5 billion net benefits to society (scenario 4). That said, we believe that benefits presented in scenario 4 are a conservative estimate as the methods used for the appraisal significantly underestimates the benefits.

In contrast, scenario 5 offers something very similar to a business as usual scenario and, according to the figures recently confirmed by the Agency³⁹, is £110 million/year more expensive than scenario 4 over the next parliament – but would forfeit 80% of river and coastal improvements, worth £5.5bn, and only deliver just 37% improvement in good status by 2021. We are concerned that scenario 5 does not include a discussion on the consequences of back-loading the large majority of costs to the third cycle, which is particularly important as we would expect the cost of addressing many causes of failure will be significantly greater if there is very little action taken during the second cycle. It also does not include discussion on failing to recover costs as per the *hierarchy for funding measures* presented in Part 2 of the consultation, despite showing that under scenario 5:

- The water industry facing far higher costs: in the region of £230m (140%) extra each year;
- Government faces higher costs: in the region of £40 million each year;
- Conversely, agriculture bears far lower: it avoids just over £165m a year of clean-up costs (over 90% of the total clean-up costs for agriculture). This appears to be the core reason why Scenario 5 delivers far fewer improvements.

In our opinion, scenario 5 fails to deliver best value for people or the environment and fails to meet the overall aims or specific requirements of the Water Framework Directive.

The CIS Guidance states that the 'logic' of the WFD makes clear that an assessment of disproportionate costs *“only makes sense after a combination of the most cost-effective solutions has been identified”*. Whilst scenario 4 purports to provide us with the most cost effective solutions - it does so over the long term so that we do not have the data to inform ourselves what is *cost effective* in the second cycle, with the details about which 'bundles' of measures have been assessed, and how costs have been attributed to sectors, not publically available, over the relevant plan period. We have also found it impossible to make more than an approximate comparison of scenarios 4 and 5 because they are discounted across different time periods and farm subsidies are treated differently, with compensation to farmers appearing in Government expenditure in scenario 5 but against farming in scenario 4.

We have also been frustrated with a lack of transparency over the economic analysis and have experienced difficulty obtaining information on the 'bundles of measures' used at a catchment level. Our request for this information was countered with: *“we cannot provide a single consolidated database containing this information, as it is held locally at a catchment scale and not at the national scale. The information that has been used to develop the consultation documents is held on a series of separate documents, for each operational catchment”* and it was suggested we contact the local Agency catchment coordinator. Even in the few cases where the catchment coordinator was able to provide some information, much of the information was not shared on the grounds of

³⁹ Email from Steve Arnold Principal Economist, Environment Agency, to Jack Rhodes, Water Policy Officer, RSPB, 30 March 2015.

'confidentiality'. This is not compliant with Article 14 (1) and undermines the consultation process.

10. Consultation process

We consider that a 'draft RBMP', required for consultation under Article 14, must comply with all the requirements set out at Annex VII of the Directive, including the listing of the objectives and a summary of proposed measures for each water body, with any justification of exemptions that have been applied or recommended. As such, we do not consider that the plans published for consultation in October 2014 properly constitute 'draft plans' as required by the Directive. It is in our opinion therefore, that failure to remedy this by urgently embarking on a compliant consultation process is a legal breach of the Directive.

The Environment Agency's 'draft plans' published for consultation do not include sufficient information for stakeholders to make a proper response, for example:

- They do not contain objectives for the second cycle planning period (i.e. there are no objectives at a water body level for 2021).
- They do not propose which water bodies will not be a good by 2021, and subsequently, they do not propose and justify exemptions, nor do they set out measures and timetables to meet good by 2027 (as the Government committed to in the Statement of Position).
- They do not propose measures to be implemented at a water body – or even an operational catchment level. Instead they propose a list of potential measures available at a national level.
- There is insufficient information on how cost analysis has been undertaken – including adequate information on recovery of costs - therefore we cannot determine, whether the existing measures proposed (e.g. for abstraction) ensure the best compliance with the Directive.
- The issue of affordability – how and where this will be used to 'justify' disproportionate cost exemptions – and how such an issue will be overcome to ensure delivery of objectives by 2027, is entirely absent. While we understand that this may be a political judgment, it is a critical part of a compliant draft plan.

Our analysis of the information that has been provided suggests that the proposed approach may be non-compliant with the Water Framework Directive on a number of counts but until we see proper draft plans we cannot be certain.

We welcome the Environment Agency's intention, expressed to us in person, to publish an interim update which sets out the proposed scale of ambition and use of exemptions after consultation with the Secretary of State sometime in the summer. However, we believe that the Environment Agency must go further and publish compliant draft plans for consultation *with the public* as soon as possible. A fair and proper consultation process is an essential part of RBMP development. Arguably, it is more important than pressing ahead with a compromised consultation process, which is not compliant with the WFD, in order to meet 22 December 2015 deadline.

11. Prioritisation

The consultation asks ***where flexibility exists, should the priority be maximising the number of water bodies at good status or improving the worst water bodies?***

The WFD itself provides the proper framework for responding to this question. The process set out in the Directive - understanding the current status, setting objectives, devising programmes of measures and applying legal exemptions – is itself a process of prioritisation. In our view, any additional prioritisation process – such as making an arbitrary policy decision of improving the number of water bodies at good or improving the worst water bodies – made in isolation to the process set out in the WFD, is not compliant.

12. Third sector delivery of measures

The consultation asks ***what measures can you deliver to help achieve the long term objectives?***

We believe that it is vital that the third sector are able to shape and influence development of RBMPs and hold the government to account to ensure that the plans are compliant with the WFD and result in effective delivery to protect and restore our water environment. Our organisations will continue to play a key role in this, both directly and by supporting other organisations to do so.

For example, WWF's **WaterLIFE** project, delivered in partnership with the Rivers Trusts and Westcountry Rivers Trust, will support work in 5 catchments and with businesses and civil society groups across the country, to support development of River Basin Management Plans and delivery on-the-ground improvements towards good status. To date, through the project we have enabled over 800 responses to Agency's consultation via the Blueprint for Water **Save Our Waters** website and held 4 workshops specifically to support delegates to respond to the RBMP consultation, attended by just under 200 people.

Over the last six years, the development of the Catchment Based Approach and the Catchment Restoration Fund (CRF) have significantly increased the capacity of third sector organisations to play a key role in development and delivery of the RBMPs. As the recent CaBA evaluation survey notes, partnerships are already delivering a range of practical and cross-cutting environmental improvements. Moreover, they are also acting as a catalyst to attract additional funds and lever up to 8 times the initial investment. We believe it is vital that the next government supports both the CaBA and the CRF to at least historic levels of funding in order to maintain active civil society delivery of measures. We are deeply concerned that cuts to these budgets, as well as budgets of the Environment Agency and Natural England will undermine work to date and efforts to restore and protect our waters in the longer term.

/ Ends.