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The Impact-based Regulatory Strategy in Environmental Law: Hallmark of Effectiveness or Pitfall for Legitimacy?

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Impact-Based Regulatory Strategy in Environmental Law: Hallmark of Effectiveness or Pitfall for Legitimacy?

- 1 Two strategies for regulating the commons: behaviour or impact
- 2 The hegemony of the impact-based regulatory strategy in EU environmental policy
- 3 Legal legitimacy of impact-based regulation?
- 4 Example: EU Water Framework Directive
- 5 Conclusions

1 Two strategies for regulating the commons: behaviour or impact

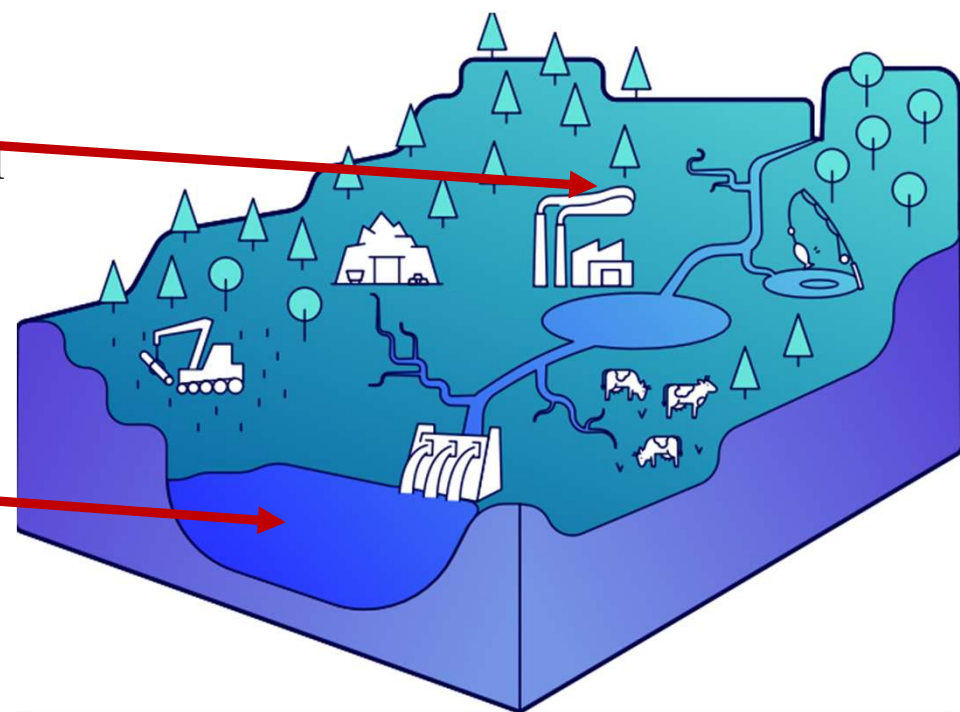
- **Behaviour-based strategy**

- Example: BAT
- What is regulated?
- Role of science: explain emissions that are produced
→ disconnect between facts and law

- **Impact-based strategy**

- Example: Environmental status standards
- What is regulated?
- Role of science: explain the impact of human activities
→ science interprets legal obligations stemming from the ecological status standards

➔ The role of scientific knowledge is very different between the two strategies



Soininen et al. 2023. See also Rose 2004;
Paloniitty 2017.

2 The hegemony of the impact-based regulatory strategy in EU environmental policy

- Habitats Directive (92/43/EEC):
 - Favourable conservation status of species (art. 2)
- Air Quality Directive (2008/56/EC):
 - Quality criteria for ambient air quality (art. 1)
- Water Framework Directive (2000/60/EC):
 - Good ecological and chemical status of waters (art. 4)
- Marine Strategy Framework Directive (2008/56/EC):
 - Good environmental status in the marine environment by the year 2020 at the latest (art. 1)
- LULUCF Regulation (2018/841/EU):
 - Forest reference levels (art. 8)



Effective if properly implemented but **they transform scientific knowledge from a description of environmental status to "law"**

3 Legal legitimacy of impact-based regulation?

Lon L. Fuller: The Morality of Law (1965; rev. 1969) as our analytical frame

1. There is a need to have some kind of rules to guide the actions of states, companies and individuals;
2. **Rules need to be made public** to those that/who are regulated;
3. **Rules cannot be applied retroactively, i.e., to events preceding the adoption of the rule;**
4. **Rules must be understandable** to the states, companies and individuals that are regulated;
5. Rules cannot contain contradictions with other rules;
6. **Rules cannot require the impossible** from the regulated parties (i.e., legal requirements must be feasible to implement);
7. **Rules cannot change constantly;**
8. Rules must be applied as they are announced (i.e., the legal text should convey the legal norm clearly, and implementing and enforcing public authorities should generally stick to the letter of the law).

4 Legitimacy challenges of the WFD

1.1. Quality elements for the classification of ecological status

1.1.1. Rivers

Biological elements

Composition and abundance of aquatic flora

Composition and abundance of benthic invertebrate fauna

Composition, abundance and age structure of fish fauna

Hydromorphological elements supporting the biological elements

Hydrological regime

quantity and dynamics of water flow

connection to groundwater bodies

River continuity

Morphological conditions

river depth and width variation

structure and substrate of the river bed

structure of the riparian zone

Chemical and physico-chemical elements supporting the biological elements

General

Thermal conditions

Oxygenation conditions

Salinity

Acidification status

- Water Framework Directive (WFD, 2000/60/EC): Art. 4: **Good Ecological Status of waters** by 2015/2021/2027
- Annex V (“lawyers and laypeople don’t have a clue”):
 - Are the rules for producing scientific knowledge about the status of and impact on waters public?
 - Does scientific knowledge require retroactive changes to existing water uses?
 - Is it understandable?
 - Does it require the impossible?
 - Does it change?

5 Conclusions

1. Impact-based regulatory strategy needed to regulate the commons (e.g., biodiversity loss, environmental status, climate change)
2. BUT WITH IT, significant societal decision-making and power shifts to scientists *outside* parliamentary and legal control (i.e. science as the authority for interpreting and implementing impact-based legal obligations)
3. Leads to significant legitimacy challenges from a legal perspective
 - E.g. is regulation understandable? Is it predictable? Is it retroactive? Is it impossible to achieve what the law requires?

Thank you!



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