

# An Assessment of Applicable Laws and Institutions relevant to the Development of a ‘Durable River Protection Mechanism’ in the European Union and Countries in the Western Balkan Region.

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## **A. Introduction:**

*The purpose of this study is to assess the opportunity for the creation of a legal, institutional or policy mechanism that would provide a coherent, consistent, shared approach amongst the European Union, its Member States and its immediate neighbor countries in the Western Balkan region, as well as in the EU environmental community at large for a ‘durable river protection mechanism’ (DRPM) that could achieve assured protection of free-flowing rivers in Europe. The study will examine the existing legal context at the EU level, at the national level and at the local level of governments to determine how a DRPM can be implemented. If no authority or only partial authority exists for a DRPM, the study will identify potential changes to the legal contexts in selected countries that could establish a DRPM.*

## **B. Background:**

*The EU’s Birds & Habitat Directives (Birds 2009/147/EEC, revised) (Habitats 92/43/EC) comprise Natura 2000, a network of Special Protected Areas (for birds) and Special Conservation Areas (for habitats). Protected habitats are not invulnerable from development: Article 6(4) of the Habitats Directive, the “derogation clause,” allows development on Natura 2000 designated sites if the project can demonstrate prima facie: No viable alternatives, overriding public interest, and adequate compensation. Designation and enforcement for Natura 2000 occurs at the Member State level, monitored by national environmental agencies and courts unless a case is appealed to the EU level. Evaluation is conducted at six-year intervals. A potentially promising aspect of the Habitats Directive is its definition of biogeographical regions, which include categorizations such as “constantly flowing Mediterranean rivers with *Glaucium flavum*”—i.e. can be highly dependent on specific endemic species and the biogeographical conditions they require. One way to protect rivers is to aim for the inclusion of specific free-flowing rivers as a type of biogeographical region to be protected, which could be supported by evaluation of endemic species found in Balkan rivers, particularly those found in the Adriatic drainages, that require free flow to reproduce and thrive.*

*In addition, the EU’s Water Framework Directive addresses the availability, pollution, ecosystems, and morphology of water bodies. Like Natura 2000, the Water Framework Directive is primarily implemented at the national level, with Member States providing River Basin Management and Water Management plans. International river basins call for collaboration, e.g. the Sava, Rhine, and Danube River Basin plans are in place among countries in the Western Balkan region. Technically, water should be maintained in a defined “good status,” with the concept of good status broken down into more specific definitions for each type of water body. For rivers, specifically, biological status largely determines compliance with hydromorphological and physico-chemical as well; if the abundance and age structures of fish are more than “slightly changed” by anthropogenic activity, then the river’s hydromorphological and physico-chemical also fail to clear “good status.” This is the so-called “one out, all out” principle for determining water body status.*

*Finally, consideration must be given to the national laws and institutions of non-EU Western Balkan countries. An analysis could be undertaken to assess whether and how relevant laws could be used to establish a DRPM as well as the prospects for creating protections for a DRPM under each nation’s laws. Local governance and local responsibility for river basin management is also important to examine. Unfortunately, local government responsibilities vary across Balkan countries. While generally, national laws formally delegate certain duties, including environmental management, to county, municipal, and town governments, in practice there are many such administrative units which proves challenging for proper river basin management and coordination. Furthermore, the funding pipelines to local governments remain inconsistent. Governments of countries in the Western Balkan region have proven open to discussing new approaches to river protection however.*

## **C. Research Questions to be Addressed:**

- 1) Given the elements needed to establish effective and durable protection for rivers (described in section E below), can effective river protection be established under existing EU law or under existing national law in

the individual countries of the Western Balkans? What levels of river protection are provided by national park designations, Natura 2000, Water Framework Directive, Birds & Habitat Directives, and other EU or national protected areas policy and legislation?

2) In what ways do these or other laws or policies fail to protect free flowing rivers? In other words, where are the gaps in the laws or policies for river protection?

3) If the analysis above reveals that there are gaps in the laws or policies at the EU level and at national levels in the Western Balkan countries for the protection of rivers in their free-flowing state, are there legal or policy mechanisms or approaches that could be designed and implemented to fill the gaps in the policies/laws identified above? Such mechanisms might include for example, an amendment, ruling or other administrative action. If so, describe the substantive legal content or change needed and the process or procedure for implementing or adopting such mechanism(s).

4) If existing law or policy cannot be amended to provide durable protection for rivers, what options, procedures and approaches exist that could be used to establish or enact a new law or policy to achieve the objective of effective river protection? Does this require a legislative change (at either the EU and/or at the national/local levels) or can such new initiatives be implemented through administrative action? What support would any new law or policy for durable protection for rivers need to ensure enactment?

#### **D. Other Useful Models for a DRPM:**

*This research project seeks to assess the applicability of elements of laws providing for river protection from other countries which might be illustrative of effective DRPM's.*

*The US' Wild and Scenic Rivers Act (WSRA) for example, is one such case study which might be examined for lessons learned for the EU and/or in its member states and the non-EU Western Balkans countries. The WSRA was created by the US Congress in 1968 to preserve certain "free-flowing" rivers with outstanding natural, cultural, and recreational values in a free-flowing condition for the enjoyment of present and future generations. The Act is notable for safeguarding the special character of these rivers, while also recognizing the potential for their appropriate use. It encourages river management that crosses political boundaries and promotes public participation in developing goals for river protection. To accomplish this objective, the WSRA prohibits federal support for actions such as the construction of dams or other instream activities that would harm the river's free-flowing condition, water quality, or outstanding resource values. Once designated as either a Wild, Scenic or Recreation river, projects proposed by federal agencies like the Federal Energy Regulatory Commission and the Federal Power Commission may not be approved.*

*However, WSR designation does not affect existing water rights or the existing jurisdiction of states and the federal government over waters as determined by established principles of law. Protection of the river is provided through voluntary stewardship by landowners and river users and through regulation and programs of federal, state, local, or tribal governments. In most cases not all land within boundaries is, or will be, publicly owned, and the Act limits how much land the federal government may acquire from willing sellers. Rivers need not be completely undeveloped. Rivers can be designated either through Congress, or by the Secretary of Interior (the administering government agency) upon the State Governor's request. In either case, however, local interest in protecting the river and the local governance that manages land and water are necessary for the river to be found not only eligible according to the law's text, but also realistically suitable. Suitability entails existing local governance for environmental management, and private landowner willingness to cooperate with such protections.*

*There are examples from countries in the EU as well. Swedish legislation enacted in 1983 identified sixteen rivers or river sections which must be protected in their natural state and on which no dams are to be permitted. Finland enacted the Wild River Act of 1987 which prohibited the construction of hydroelectric plants on 53 watercourses and in most cases throughout the entire named watershed. That Act authorized the promulgation of additional regulations to prevent other incompatible uses to protect the named rivers.<sup>1</sup>*

*Thus, there are likely to be examples of river protection laws in other countries which also may be useful to examine for potential applicability and lessons learned.*

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<sup>1</sup> Shine, Clare and Cyrille de Klemm, Wetlands, Water and the Law, IUCN Environmental Law Centre, IUCN Environmental Policy and Law Paper no. 38, IUCN, Gland, Switzerland, 330pp. 1999.

*It is noted that the lack of environmental protection mechanisms (including for water or rivers) in the laws providing oversight of water-related activities in other sectors (e. g. energy sector, spatial planning, mining, waste water, etc.) may also be a barrier which will need to be overcome to create an effective DRPM. Existing water or river management institutions may not have a significant enough role in decision making about water-related activities in other sectors to assure durable river protection. Therefore, it will be important to examine how the relevant water ministry/agency has or can be provided authority to regulate or prevent certain actions or projects which may be proposed by other sectors.*

#### **E. Study Process:**

*A first step of this assessment will be for the project team (including representatives from the project partners and the legal researchers) to reach consensus to articulate the critical components that are necessary functions of a 'durable river protection mechanism.' At its essence, a 'durable river protection mechanism' or DRPM has the following characteristics:*

- 1. Planning: this component involves the assessment of the characteristics of the river and its watershed that are important and worthy of protection. Riverine and watershed goals must be established and appropriate management and land uses must be identified.*
- 2. Designation: Here there must be an officially recognized mechanism to demarcate the river (or the watershed) as having special qualities worthy of protection. Such qualities can include scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values. Procedures must be established specifying the nomination and approval process for such designation.*
- 3. Enforceability: Once officially designated, a procedure must be established to review, approve or deny proposed land uses along the river and within the watershed for compatibility with the officially approved designation which must have the force of law. An agency or agencies must be assigned responsibility for conducting such reviews as well as monitoring and enforcing decisions.*
- 4. Stakeholder Involvement: Parties with an interest in the river and the watershed should be involved in planning and decision-making. This includes individuals at the community, region and national levels of government as well as representatives from the NGO community. Institutional arrangements, such as river basin commissions for example, must be established as a forum for consensus-building.*
- 5. Funding: Adequate funding, resources and capacity must be assured for the planning, decision-making and enforcement functions if the protection system is to work as intended. Consideration should also be given to identifying incentives for river protection and for locating river-related uses in areas appropriate for such uses.*

*The second component of the analysis would be to examine the current primary environmental legislation governing the land and water conservation initiatives in the EU. Generally, the starting point for this analysis will involve a review of the EU's Water Framework Directive and the Birds & Habitat Directives. However, there may be other relevant laws in other related areas as well. It will also be important to analyze legislation related to other sectors which may have an impact on water and river protection. Such other laws, for example, might include environmental concerns which must be taken in account under the policies and laws governing sectors such as energy, spatial planning, mining or wastewater treatment, among others.*

*The goal of this phase would be to determine whether a 'durable river protection mechanism' or DRPM could be created under current EU legislation or other administrative action. If such a DRPM mechanism is possible, the analysis should describe how that objective may be accomplished. If there is a gap in current legislation such that no authority exists for a DRPM, then the analysis should describe the changes needed to be able to establish such a mechanism. In 2019, the EU will likely review the Water Framework Directive. If the directive were to be amended in a manner to include a formal 'durable river protection mechanism' for free-flowing rivers, it would be a very good opportunity to realize a major environmental achievement for river conservation in Europe. Consideration could also be given to other kinds of voluntary land conservation measures that would also benefit river protection objectives. This component will be developed by an European lawyer or lawyers. (Client Earth or similar).*

*The third component of the study involves an examination of the relevant laws and institutions of the 8 Western Balkans countries, EU Member States and Non-EU / EU accession countries alike, national level legal frameworks relevant for impact on river protection. Again, the goal of this phase of the project would be to describe, with respect to each Balkan nation, whether a legal framework exists or if not, which are the key institutions, what is the legal*

*framework and what opportunities and gaps are there for the creation of a DRPM or the elements thereof. This component will be developed by a team of national legal experts, in cooperation with WWF Adria.*

*The fourth and final component of the project involves developing recommendations for the most effective options to pursue to create a DRPM at the EU level and at the national level in the Balkans. Here, we seek to develop model legislation or legislative changes that could be proposed for adoption by each of the relevant Balkan nations to create a DRPM. Each of the legal analysts working on this project will complete a set of recommendations based on their work.*

#### **F. Areas of Detailed Legal and Institutional Inquiry:**

The following sections provide the background information and research questions that should be investigated to be able to develop proposals for a 'durable river protection mechanism.' It is envisioned that these are relevant areas to be researched and considered in the context of determining if and how a DRPM can be created. However, it is not expected that this research will include a response for each individual element described below.

##### *a. Institutional systems and arrangements*

Which institutions are relevant for freshwater protection and management? (Government agencies, Parliament, public institutions)?

Which – if any – are the key agencies, ministries, departments, or institutions which are the current custodians or provide oversight of freshwater conservation?

What is the current system of river or watershed planning, designation, monitoring, enforcement and stakeholder involvement functions for freshwater conservation?

Are there examples of river basin commissions in the jurisdiction? (or similar kinds of institutions that bring together stakeholders to oversee river management?)

Are there laws, guidelines or institutions impacting freshwater conservation being reviewed or will be reviewed soon? What laws and institutions are being reviewed and what is the timetable for such review?

Are there institutions in other sectors that may significantly influence realization of river protection – do these institutions take water concerns into consideration in decision making process (e.g. in concessions for HPPs, waste water treatment, etc.)

##### *b. Land and Property Rights:*

Describe the land tenure system in the country.

What type of property rights may be held by private entities? Are there certain rights retained by the government?

Describe the concession process for riparian areas, river access and river management. Are there partial interests in land such as a leasehold interest for river areas that provide control over use rights or development rights in river areas? Which agency(ies) are responsible for the granting of such concessions or leases? May such concessions be granted to any private party for any use or are there limitations on permitted grantees and permitted uses? May such concessions be granted to NGO's established for conservation and for the purpose of holding interests in land?

Does the law provide for the conveyance of partial interests in land? Is there a mechanism under law for restrictions to be placed on the use of land so that the land is limited in its use for conservation purposes?

Can land be owned by a non-governmental organization (NGO) if held primarily for conservation purposes?

Can land be acquired and owned by the local government to keeping the land undeveloped? How are parks owned and managed? What agencies of government are responsible for park ownership and management?

Does land use regulation exist? How is it administered? By which agencies? Are there riparian zoning regulations in the country?

Is there a system of designating certain areas as 'protected?' How are such protections enforced?

Describe the protected areas programs in the country and the legal enforcement mechanisms that exist to ensure that protection goals are achieved. Do those mechanisms apply to rivers within protected areas?

c. Water Rights:

Is there a system of ownership of water (e.g. water rights) in the country? How are water ownership rights asserted? How are water rights allocated? Is there an agency responsible for allocating water rights?

Can ownership of water rights be held separately from the ownership of land? Or is the right to water included in the ownership of land?

Is there a requirement for river basin management plans to be prepared? Who prepares such plans? For which rivers are plans prepared? Once a plan is prepared and approved, how is the plan enforced?

What are the river basin governance mechanisms that exist once a plan is prepared? Are there examples of River Basin Commissions that oversee the management issues for the river?

Are there mechanisms in law to provide legally enforceable protections for all or sections of important rivers in the country?

d. Mitigation/Offsets:<sup>2</sup>

Describe the existence or use of the mitigation hierarchy in the country.

Have mitigation or offset programs been used to provide resources for river protection? Please cite examples.

Are there examples of transfer of development rights programs? (e.g. one area is designated for protection while another area is designated for development at a more intensive level than would otherwise be permitted.)

e. Sources of Funding

What are the amounts and sources of direct funding that are dedicated to the functions involved in river and/watershed management?

Are all or a portion of any concession fees (related to concessions for water use) are or could be dedicated to conservation or mitigation-related activities?

What are the amounts and sources of domestic funding versus international funding (EU, pre-accession funds, GEF, etc.) (it is noted that this may be time consuming to obtain, as not all information is readily transparent or available.)

Are there examples of citizen votes or 'ballot initiatives' having been used to create funding for conservation programs or purposes?

Are there tax and/or other incentives that could be used to stimulate protection of river corridors and watershed lands?

Are there incentives or subsidies provided to developers of dams that could be used to incentivize developers to avoid free-flowing rivers and to locate such facilities in more appropriate locations?

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<sup>2</sup> Mitigation is defined as the process to avoid, minimize, and compensate for impacts from infrastructure projects and is typically grounded through the following:

1. A policy, program, or project that seeks to avoid, minimize, and/or provide compensation for impacts that are being approved prospectively through a permit or licensing program that will affect fish and wildlife habitat or other natural resources; or
2. A policy, program, or project that requires compensation after-the-fact for damages to fish and wildlife habitat or other natural resources.

### **G. Study Product(s)**

It is expected that each of the research questions identified in item C above will be addressed in the following reports to be prepared:

1. A report on the relevant river protection laws, policies and directives at the EU level, including at the national level in other EU countries.
2. A report on the relevant river protection laws, policies, and administrative regulations in each of the following Western Balkan countries:
  - a. Albania
  - b. Bosnia and Herzegovina
  - c. Croatia
  - d. Kosovo
  - e. Macedonia
  - f. Montenegro
  - g. Serbia
  - h. Slovenia

### **H. (Tentative) Timetable (to be developed with input from WWF et. al.)**

1. Presentation of 'T of R' to WWF Colleagues: week of May 8<sup>th</sup>
2. Legal experts selected: mid to end of May
3. Conference Call with Legal Experts:
4. Research begins:
5. Preliminary Review of Initial Research results:
6. Research Concludes: (3 months?)
7. Draft Report Presentation:
8. Final Report Presentation:
9. Final Report Submitted: