



**Co-operation with national judges in the
field of environmental law under the
European Commission Framework Contract
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Training module

**HOW TO HANDLE COURT PROCEEDINGS
INVOKING NON-COMPLIANCE WITH EU
WATER LAW**

05 - 07 April 2017, Warsaw (Poland)



European water management Legal framework

DG Environment, EC

*Illustration activities
possibly impacting
water quality and
quantity*

*What is a river basin
and a water body?*



Slide 3

This slide is to show how different (human) activities can have effects on water, both surface waters and ground waters (and why there are different legal instruments dealing with these effects).

Water quality may be affected by point and by diffuse pollution. Point pollution: discharge of waste water by industry. Diffuse pollution by agriculture (spreading of manure, excess running off to surface water) or households which are not connected to an urban waste water collection and treatment system.

The amounts of surface water / ground water can also be affected by water abstraction, such as for preparing drinking water, producing hydropower and irrigation.

Both impacts on water quality (level of pollution) and quantity (actual amount left) can have impacts on the animals and plants living in the waters (which therefore present a link to the habitats and Birds directives).

All rivers end up in the sea and this is where pollution ends up as well.

Moreover, human activities can also affect the flood risk, where they prevent rain water to slowly penetrate the soil.

All the sorts of impacts are addressed by EU water legislation as is shown in the next slide.



Overview

- Water Framework Directive (2000/60/EC)
- Completing the framework:
 - Groundwater (2006/118/EC)
 - EQS / Priority Substances (2013/39/EU)
- Extending the scope:
 - Floods Directive (2007/60/EC)
 - Marine Strategy Directive (2008/56/EC)
- Urban waste water treatment Directive (91/271/EEC)
- Nitrates Directive (91/767/EEC)
- Drinking water Directive (98/83/EEC)
- Bathing water Directive
 - New (2006/7/EC)
 - Old (76/160/EEC)
- Environmental Impact Assessment (2011/92/EU)
- Habitats (92/43/EEC)
- Liability (2004/35/EC)

Slide 4

This slide shows the EU legal instruments which are directly related to water quality or quantity.

There are many other instruments which are indirectly about water, such as the impact assessment directives (SEA – 2001/42/EC and EIA – 2011/92/EU), nature directive (Birds Directive 2009/147/EC and Habitats Directive 92/43/EEC), waste directives and the directive on industrial emissions (IED 2010/75/EU). There are separate training modules on these Directives on the website of DG ENV.

The EU legal framework on water management was not put in place overnight. As is often the case, specific problems led to specific solutions and only over time, when the patchwork of solutions started raising issues of coordination the idea was born to streamline the solutions as much as possible. This is what happened also with EU water management.

The framework for water management in the EU today is made up of the Water Framework Directive 2000/60/EU (WFD), the Directives which are part of the family and older Directives predating the entry into force of the WFD. Although the WFD provides for an overall framework it did not replace all existing legal instruments because the Directives listed on the right side of the slide remain in force. These Directives address specific water related

concerns (such as the pollution by nitrates) in a specific manner.

So, the WFD has not made the Directives already existing before 2000 redundant. It did set however a kind of overall framework for water management and provided a format for more recent Directives, such as the Marine Strategy Framework Directive, which is very similar to the WFD as regards its approach.

The WFD added to the existing patchwork a general framework allowing all related concerns over water quality and water quantity to be taken into account when making (long-term) policies. A good illustration of this is the fact that the Nitrates Directive doesn't set a deadline for achieving good status for a water body. Such a deadline is however set by Article 4 of the WFD. The same is true for the objective of the Habitats Directive (achieving good conservation status but no deadline in that Directive). The WFD may set the deadline where the good status for a habitat or species depends on water quality or water quantity.

This overview illustrates that the legal basis for a case put to the national judge related to water can be the WFD itself or one of the other Directives, or even a combination of legal basis (such as a case based on both the WFD and the Nitrates Directive or the Habitats Directive).

The WFD, urban waste water and nitrates directives will be presented more in detail during the workshop. The present presentation is therefore meant to provide only a short introduction to the Groundwater, Floods and EQS Directives as well as the environmental Liability Directive. However, it is useful to explain very briefly first some key provisions of the WFD.



Linkages between legal instruments

New projects: assessment of impacts under the WFD, the EIA and possibly Habitats Directive.

Agriculture: nitrates, drinking water, habitats

Discharge by industry: industrial emissions

Activities leading to damage: Liability Directive

Legal action on water quality or quantity may take different legal basis as their starting point. It is important to keep the linkages between the different EU legal instruments into account.

Think of the following:

A project of construction of a new dam for hydro power, for dredging water ways or port extensions may fall under different obligations of assessment of their effects / impacts: Article 4(7) WFD, Article 6(3) Habitats Directive and the EIA Directive. All these directives apply in their own right and assessments need to comply with all the requirements. They are similar but with some differences.

What is important to keep in mind though is that a project being compliant with one directive does not automatically imply being compliant with the WFD, because the policy objectives of other Directives may be more narrow than the one of the WFD (focusing on addressing a specific problem). The obligations of Art 4 WFD to prevent deterioration and to achieve good status are overarching. Existing obligations under the diverse legal instruments predating the WFD are fully respected. The WFD cannot be invoked to justify a reduction of protection under let's say the drinking water directive. Rather, the WFD takes the level of protection for granted and where needed

complements it by a deadline.

Illustration of why compliance with one Directive doesn't automatically imply compliance with the WFD (or another Directive):

Under the Nitrates Directive the objective is to avoid eutrophication of surface waters by pollution from agriculture. Suppose under that Directive the concentration of nitrogen in surface water should not exceed 50 mg/l and farmers are restricted in the amount of manure (organic fertiliser) they can put on the land. It may be that under the WFD the objective of achieving good status for the water body (good status = nearly natural conditions) implies allowing only for 40 mg/l because of the requirements of the aquatic life found in that water body. Imposing measures on farmers so that a maximum concentration of 40 mg/l can be achieved cannot be based on a legal obligation under the Nitrates Directive itself; one needs to rely on the WFD for this.

The Industrial emissions Directive 2010/75/EU requires that authorities set limits in the permit as to the permissible emissions into water, based on best available techniques. It may be though that even the emissions based on best available techniques are still too high for water quality. Additional efforts in reducing such emissions can be required by the WFD (Article 10(3) WFD).

A legal case based on impacts on water quality or quantity may also be based on the environmental liability Directive 2004/35/EC. That Directive deals inter alia with water damage.

(this will be dealt with at the end of the presentation if time allows : C-529/15 (Folk) – preliminary ruling touching on the link between scope for being liable under Directive 2004/35/EC and the WFD (whether having a permit for operating a hydro power plant may exclude liability). The operation of a hydro power dam may have reduced fish stock. However, the operator of the dam has a permit and the Austrian legislation then excludes all liability.



The Water Framework Directive

River basin approach (including international coordination)

What? Achieving environmental objectives (good status, no deterioration)

How? Programmes of Measures (PoM) + cost recovery, plans adopted and reviewed every 6 years

Only a few words on this Directive because it will be explained in detail in the following presentation. It is however useful to have some knowledge about what this Directive is about because the Directive which I will explain a bit more in detail use similar concepts or build upon the WFD.

WFD:

- objective is protecting all surface and ground water bodies, including transitional waters and coastal waters, bringing them under one legal / policy framework.
- covering all pressures and impacts on waters (quality and quantity)
- Water management at river basin level = planning, monitoring and identifying measures via river basin management plans (RBMP).

The WFD is a Framework Directive, as the CJEU emphasizes in its case law time and over again, meaning that the Member States authorities must identify tailor made solutions.

The WFD applies to all water bodies in the EU so, in a way, one may say that there is no water body (stretch of river, lakes, canals, coastal waters) which is without protection. The WFD requires the authorities to make a complete picture of where the problems with the water bodies are and what the solutions will be, via the river basin management plans (RBMP) and the programme of measures (PoM). By bringing all problems of water quality and quantity and solutions together in one overview (the RBMP) the long term planning is largely facilitated.

Given that other Directives apply as well, the solutions proposed to problems can be based on either the WFD itself or on one of these other Directives.



Article 4 WFD environmental objectives

No deterioration for surface and groundwater + deadline for achieving good status

Surface waters: good chemical status + ecological status

Ground water: good chemical status + good quantitative status

Article 4 WFD is the key provision as regards the objectives of the WFD: avoid deterioration and achieve good status by the deadline.

Note that objectives are different for ground water and surface water (no ecological status for ground water).

As regards good chemical status, for **surface waters** the objective is to reduce progressively pollution by priority substances + phasing-out of emissions of priority hazardous substances to water (=> this is further detailed in the EQS Directive 2008/105/EC as amended)

For **groundwater**: the objective is prevention and limitation of input of pollutants + reversal of any significant, upward trend of pollutants (=> this is further detailed in the Groundwater Directive).

So the EQS and Ground water Directive fill in details and complement the approach of the WFD, reason why they must be read together.

Legal cases will likely be built on an alleged infringement of Article 4 WFD, in

particular on breach of the non-deterioration obligation.

Groundwater Directive

The authorities must prevent or limit inputs of pollutants
assess chemical status of groundwater bodies -
identify and reverse significant and sustained
upward trends in pollutant concentrations
establish groundwater quality standards set out
in Annex I and set threshold values for pollutants
triggering action curbing this upward trend

This Directive establishes groundwater quality standards ('how clean/free of pollutants water must be ') and introduces measures to prevent or limit inputs of pollutants into groundwater. It builds upon the WFD.

The WFD applies to all water bodies, meaning all bodies of surface waters and ground water. The overall objective of the WFD is that all water bodies achieve good status.

Good status is defined slightly differently for surface waters and for ground waters. For **groundwater bodies** good status means good chemical status (absence of pollution by chemicals) and good quantitative status (as in contrast to depletion of ground water reserves).

Achieving good **quantitative status** for ground water addresses issues such as ground water abstraction surpassing the replenishment of ground water reserves. Achieving good quantitative status means aiming at ensuring a balance between abstraction and recharge of groundwater. This aspect is fully dealt with by the WFD itself.

Chemical status criteria were more complex to be defined at the time of the adoption of the WFD. The Groundwater Directive introduced for the first time

quality objectives which oblige Member States to **monitor and assess groundwater quality** on the basis of **common criteria** and **identify and reverse trends** in groundwater pollution.

The directive establishes quality criteria that takes account local characteristics and allows for further improvements to be made based on monitoring data and new scientific knowledge. Member States should establish standards at the most appropriate level (flexibility) and take into account local or regional conditions.

Two slides to illustrate what the Groundwater Directive is after.

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Background

Article 1 on purpose:

1. This Directive establishes specific measures as provided for in Article 17(1) and (2) of Directive 2000/60/EC in order to prevent and control groundwater pollution. These measures include in particular:
 - (a) criteria for the assessment of good groundwater chemical status; and
 - (b) criteria for the identification and reversal of significant and sustained upward trends and for the definition of starting points for trend reversals.
2. This Directive also complements the provisions preventing or limiting inputs of pollutants into groundwater already contained in Directive 2000/60/EC, and aims to prevent the deterioration of the status of all bodies of groundwater.

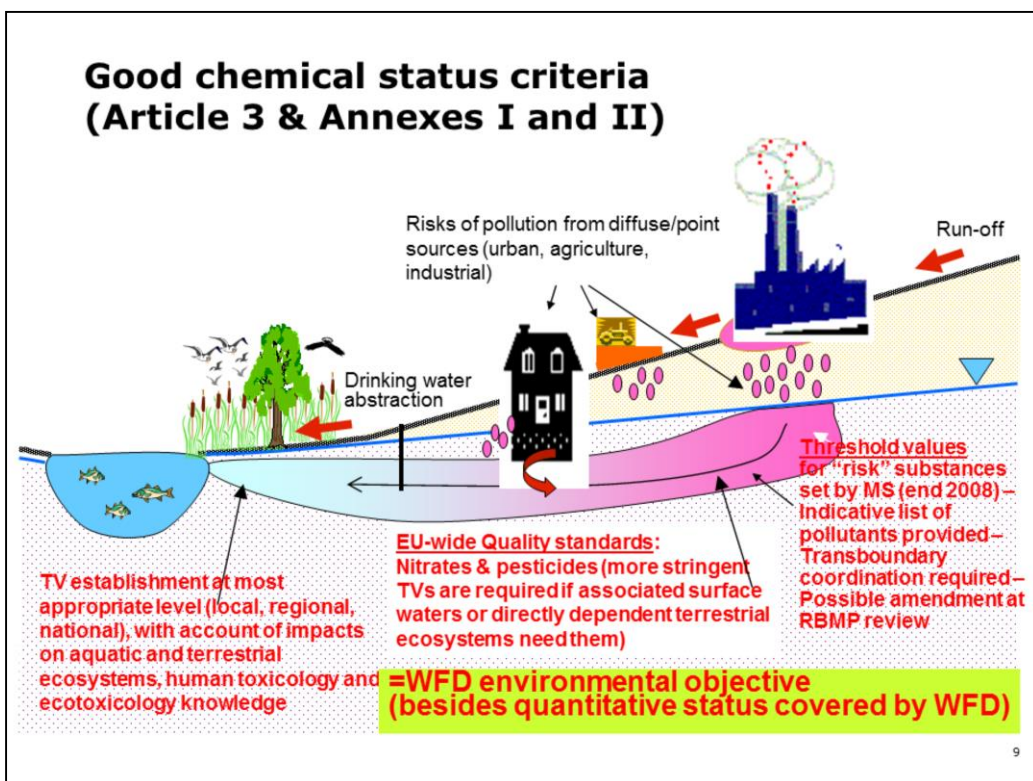
The Groundwater Directive complements the Water Framework Directive (WFD). It requires:

- groundwater quality standards (to be established by the end of 2008);
- pollution trend studies to be carried out by using existing data and data which is mandatory by the WFD (referred to as "baseline level" data obtained in 2007-2008);
- pollution trends to be **reversed** so that environmental objectives are achieved by 2015 by using the measures set out in the WFD;
- measures to **prevent or limit inputs of pollutants** into groundwater to be

operational so that WFD environmental objectives can be achieved

- reviews of technical provisions of the directive to be carried out in 2013 and every six years thereafter;
- compliance with good chemical status criteria (based on EU standards of nitrates and pesticides and on threshold values established by Member States).

Annexes I and II of the Groundwater Directive 2006/118/EC were reviewed in 2013 and are reflected under the Commission Directive 2014/80/EU of 20 June 2014.



This slide illustrates the way the **criteria for assessing chemical status** should work.

Pollution of groundwater stems from different sources (households, agriculture, industry).

The Member States must set groundwater quality standards for certain substances which are known for polluting groundwater (called "threshold values", to be completed in 2008 already). It concerns those pollutants which are responsible for the fact that the groundwater body does not meet conditions for good status.

These standards take account of existing EU standards such as those applicable under the Nitrates Directive (prevent/reduce eutrophication by nitrogen and phosphorus) and pesticides legislation. These existing EU thresholds values must not be exceeded (nor can the MS change them). If they are exceeded, the water body is not in good chemical status.

The pollutants at stake can be hazardous or non-hazardous.

Hazardous substances cannot be discharged whereas the input of non-hazardous substances should be limited.

There is flexibility for the MS because they can set the thresholds at the most appropriate level (WFD allows for a lot of tailor made solutions):

"2. Threshold values can be established at the national level, at the level of the river basin district or the part of the international river basin district falling within the territory of a Member State, or at the level of a body or a group of bodies of groundwater."

Via monitoring they must assess the current status of the groundwater (good, moderate, bad?) and then decide what must be done for the groundwater body to achieve good chemical status (via the Programme of Measures, Art 13 WFD).

The non-deterioration obligation of Article 4(1) WFD applies also to ground water bodies, which is important in case of new activities or projects with a polluting effect.

Background

Article 6 on measures to prevent or limit inputs of pollutants into groundwater, which also has exceptions:

1. In order to achieve the objective of preventing or limiting inputs of pollutants into groundwater, established in accordance with Article 4(1)(b)(i) of Directive 2000/60/EC, Member States shall ensure that the **programme of measures** established in accordance with Article 11 of that Directive includes:

(a) all measures necessary to **prevent inputs** into groundwater of any hazardous substances, without prejudice to paragraphs 2 and 3. In identifying such substances, Member States shall in particular take account of hazardous substances belonging to the families or groups of pollutants referred to in points 1 to 6 of Annex VIII to Directive 2000/60/EC, as well as of substances belonging to the families or groups of pollutants referred to in points 7 to 9 of that Annex, where these are considered to be hazardous;

(b) for pollutants listed in Annex VIII to Directive 2000/60/EC which are not considered hazardous, and any other non-hazardous pollutants not

listed in that Annex considered by Member States to present an existing or potential risk of pollution, all measures necessary **to limit inputs** into groundwater so as to ensure that such inputs do not cause deterioration or significant and sustained upward trends in the concentrations of pollutants in groundwater. Such measures shall take account, at least, of established best practice, including the Best Environmental Practice and Best Available Techniques specified in the relevant Community legislation.

For the purpose of establishing measures referred to in points (a) or (b), Member States may, as a first step, identify the circumstances under which the pollutants listed in Annex VIII to Directive 2000/60/EC, in particular essential metals and their compounds referred to in point 7 of that Annex, are to be considered hazardous or non-hazardous.

2. Inputs of pollutants from **diffuse sources of pollution** having an impact on the groundwater chemical status shall be taken into account whenever technically possible.

3. Without prejudice to any more stringent requirements in other Community legislation, Member States may **exempt from the measures required** by paragraph 1 inputs of pollutants that are:

(a) the result of direct discharges **authorised** in accordance with Article 11(3)(j) of Directive 2000/60/EC;

(b) considered by the competent authorities to be of a quantity and concentration so **small** as to obviate any present or future danger of deterioration in the quality of the receiving groundwater;

(c) the consequences of accidents or exceptional circumstances of natural cause that could not reasonably have been foreseen, avoided or mitigated;

(d) the result of artificial recharge or augmentation of bodies of groundwater authorised in accordance with Article 11(3)(f) of Directive 2000/60/EC;

(e) in the view of the competent authorities incapable, for technical reasons, of being prevented or limited without using:

(i) measures that would increase risks to human health or to the quality of the environment as a whole; or

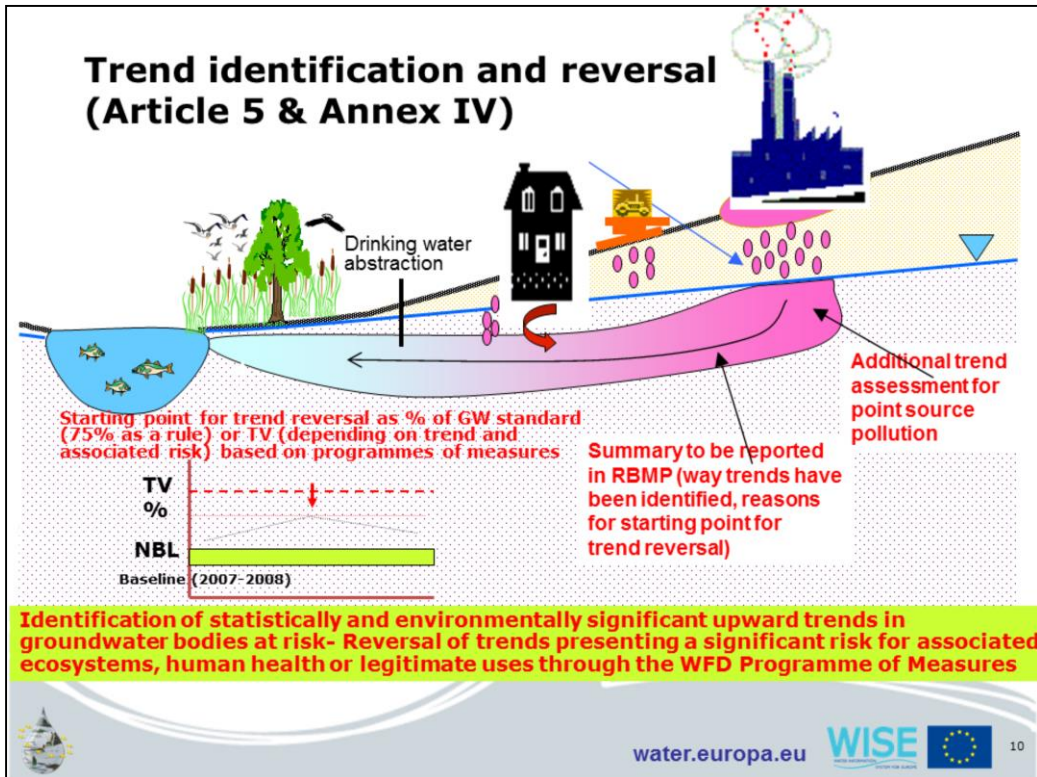
(ii) disproportionately costly measures to remove quantities of pollutants from, or otherwise control their percolation in, contaminated ground or subsoil; or

(f) the result of interventions in surface waters for the purposes, amongst others, of **mitigating the effects of floods and droughts**, and for the **management of waters and waterways**, including at international level. Such activities, including cutting, dredging, relocation and deposition of sediments in surface water, shall be conducted in accordance with general binding rules, and, where

applicable, with permits and authorisations issued on the basis of such rules, developed by the Member States for that purpose, provided that such inputs do not compromise the achievement of the environmental objectives established for the water bodies concerned in accordance with Article 4(1)(b) of Directive 2000/60/EC.

The exemptions provided for in points (a) to (f) may be used only where the Member States' competent authorities have established that efficient monitoring of the bodies of groundwater concerned, in accordance with point 2.4.2 of Annex V to Directive 2000/60/EC, or other appropriate monitoring, is being carried out.

4. The competent authorities of the Member States shall keep an inventory of the exemptions referred to in paragraph 3 for the purpose of notification, upon request, to the Commission.



This slide focusses on the element of prevention in the Groundwater Directive: setting the starting point for trend reversal.

As an expression of the idea that prevention is always better than remediation/repair afterwards, the Directive requires the MS to act *before* a threshold value risks being exceeded. The monitoring allows the MS to identify the pollution trend. If this trend is going up they must take measures to curb this trend.

So if concentrations of pollutants increase over time and thus risk causing harm to the quality of aquatic ecosystems or terrestrial ecosystems, to human health (drinking water !), or to actual or potential legitimate uses of the water environment (irrigation for agriculture) they must take action.

How to decide when to take such action? If monitoring shows that concentrations are a certain percentage of the threshold value / ground water quality standard (normally 75%). So if a certain pollutant should not exceed 100 mg/l, action must be taken once the concentration exceeds 75mg/l. So *before* real harm is being done to the water

environment.

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Background

Article 1(b): (b) criteria for the identification and reversal of **significant and sustained upward trends** and for the definition of starting points for trend reversals.

Article 2(3) on definitions: "significant and sustained upward trend" means any statistically and environmentally significant increase of concentration of a pollutant, group of pollutants, or indicator of pollution in groundwater for which trend reversal is identified as being necessary in accordance with Article 5;

Article 5 on the identification of significant and sustained upward trends and the definition of starting points for trend reversals:

1. Member States shall identify any significant and sustained upward trend in concentrations of pollutants, groups of pollutants or indicators of pollution found in bodies or groups of bodies of groundwater identified as being at risk and define the starting point for reversing that trend, in accordance with Annex IV.
2. Member States shall, in accordance with Part B of Annex IV, **reverse trends which present a significant risk of harm to the quality of aquatic ecosystems or terrestrial ecosystems, to human health, or to actual or potential legitimate uses of the water environment**, through the programme of measures referred to in Article 11 of Directive 2000/60/EC, in order progressively to reduce pollution and prevent deterioration of groundwater.
3. Member States shall define the starting point for trend reversal as a **percentage of the level of the groundwater quality standards** set out in Annex I and of the threshold values established pursuant to Article 3, on the basis of the identified trend and the environmental risk associated therewith, in accordance with Part B, point 1 of Annex IV.



Environmental Quality Standards Directive 2008/105/EC

WFD general objective: achieve good status

Surface waters: good chemical status + good ecological status

Good chemical status for surface waters means meeting all environmental quality standards for chemicals set at EU level

Currently listing 45 priority substances + 8 other substances

Monitoring + review every 4 years

The Groundwater Directive refers to hazardous substances which cannot be discharged into groundwater. The Environmental Quality Standards Directive, EQS) does something similar but for surface waters. The environmental quality standards set at EU level determine whether or not a surface water body has achieved good chemical status (required by Art 4 WFD).

Directive 2013/39/EU amended the WFD and the 2008/105 EQS Directive as regards priority substances. There are now standards in surface waters for 45 substances + 8 "certain other pollutants" (from Directive 76/464/EEC). This update was based on the latest scientific research.

The EQS is about – simplified – concentrations of pollutants in water (or the sediment or the biota). That Directive itself does not limit the input of such pollutants into water. Such limits may be imposed via the WFD. The WFD requires the MS to take measures needed for the progressive reduction of pollution from priority substances and the cessation or phasing-out of discharges, emissions and losses of priority hazardous substances into water.

By when have these (revised or new) quality standards to be met?

The revised EQS for existing priority substances should be taken into account for the first time in river basin management plans covering the period 2015 to 2021. The newly identified priority substances and their EQS should be taken into account in the establishment of supplementary monitoring programmes and in preliminary programmes of measures to be submitted by the end of 2018. With the aim of achieving good surface water chemical status, the revised EQS for existing priority substances should be met by the end of 2021 and the EQS for newly identified priority substances by the end of 2027.

There are many other EU instruments dealing with putting on the market of chemicals / pollutants (think of the REACH regulation on risk assessments of chemicals, the plant protection regulations (pesticides) and biocides, medicines).

It remains to be seen whether / how under the WFD or EQS Directives Member States can be required to take measures limiting the input of the identified priority (hazardous) substances into water. (= bridge to next slide)

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Background

Article 16 of the Water Framework Directive (2000/60/EC) (WFD) sets out "Strategies against pollution of water", outlining the steps to be taken.

The first step was to establish a first list of priority substances to become Annex X of the WFD. These substances were selected from amongst those presenting a significant risk to or via the aquatic environment, using the approaches outlined in Article 16 of the WFD.

This first list was replaced by Annex II of the Directive on Environmental Quality Standards (Directive 2008/105/EC) (EQSD), also known as the Priority Substances Directive, which set environmental quality standards (EQS) for the substances in surface waters (river, lake, transitional and coastal) and confirmed their designation as priority or priority hazardous substances, the latter being a subset of particular concern.

The Commission subsequently reviewed the list and adopted Directive

2013/39/EU for a Directive amending the WFD and the EQSD as regards priority substances. After the 2013 directive there are now standards in surface waters for 45 substances + 8 "certain other pollutants" (from Directive 76/464/EEC). The revised EQS for existing priority substances should be taken into account for the first time in river basin management plans covering the period 2015 to 2021.

Directive 2013/39/EU also contains specifications regarding the monitoring and reporting to be carried out by Member States in relation to the Watch List. The first Watch List was adopted in March 2015 (Commission Implementing Decision (EU) 2015/495); monitoring should be taking place in the year from September 2015.

Directive 2013/39/EU amended the Directives 2000/60/EC and 2008/105/EC as regards priority substances in the field of water policy. Newly identified priority substances were added (45 now listed) and environmental quality standards (EQS) set for them, while the EQS of some existing priority substances were revised.



Article 10 WFD Combined approach

Discharges into surface waters are controlled for point and diffuse sources based on a combination of emission controls and environmental quality standards

Emission controls including emission limit values, and best environmental practices set out in: IED 2010/75, Urban Waste Water Treatment Directive 91/271, Nitrates Directive 91/767, other relevant Union legislation

EQS set out in the EQS Directive

"(3) Where a quality objective or quality standard (...) requires stricter conditions than those which would result from the application of [the emission controls set by existing legislation], more stringent emission controls shall be set accordingly."

This slide is an short illustration of how the different legal instruments on water work out:

although discharges may comply with one instrument it may be necessary to further reduce that discharge in order to satisfy another instrument. Although the amount of manure spread on the land is in line with the Nitrates Directive it is not necessarily enough to achieve the good status under the WFD. Although the discharge of certain chemicals is in line with the best available techniques of the Industrial Emission Directive 2010/75 it may be necessary to further limit such discharges under the WFD. Additional reductions can thus be required under Article 10(3) of the WFD.

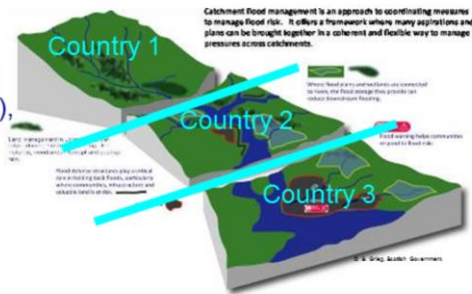
Extending the scope

Floods Directive (2007/60/EC)

Marine Strategy Directive (2008/56/EC)

What is the Floods Directive ?

- Legal framework for integrated water management including flood risk management.
- Coordination other acts, mainly Directive 2000/60/EC (Water Framework Directive), including cyclical implementation.
- Integration, covers many sectors. Land use, civil protection, dam management, strategic and environmental impact assessments, nature legislation, public consultation.
- Coordination across the river basin, including requirements for trans-boundary coordination



Directive 2007/60/EC on the assessment and management of flood risks entered into force on 26 November 2007.

This Directive requires Member States to assess which water courses and coast lines are at risk from flooding (preliminary flood risk assessment), to map the flood extent and assets and humans at risk in these areas (2013) and to take adequate and coordinated measures to reduce this flood risk. Such measures concern prevention, protection, damage control and recovery. They are described in the first flood risk management plans (2015).

The Directive allows the public to access information on flood risks and to have a say in the planning process leading to the adoption of flood risk maps and the first flood risk management plans by the end of 2015.

The Floods Directive is much about ensuring coordination.

- With the WFD: Flood risk management is an integral part of integrated river basin management, and the Floods Directive shall therefore be coordinated with the Water Framework Directive. The flood risk management plans and river basin management plans will be coordinated with the river basin management plans under the WFD , and through coordination of the public

participation procedures in the preparation of these plans. All assessments, maps and plans prepared shall be made available to the public.

- With other MS and third countries: Member States shall furthermore coordinate their flood risk management practices in shared river basins, including with third countries. They shall not undertake measures that would increase the flood risk in neighboring countries. Member States shall in take into consideration long term developments, including climate change, as well as sustainable land use practices in the flood risk management cycle addressed in this Directive.

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Background

Flood risk management aims to reduce the likelihood and/or the impact of floods. Experience has shown that the most effective approach is through the development of flood risk management programmes incorporating the following elements:

Prevention: preventing damage caused by floods by avoiding construction of houses and industries in present and future flood-prone areas; by adapting future developments to the risk of flooding; and by promoting appropriate land-use, agricultural and forestry practices;

Protection: taking measures, both structural and non-structural, to reduce the likelihood of floods and/or the impact of floods in a specific location;

Preparedness: informing the population about flood risks and what to do in the event of a flood;

Emergency response: developing emergency response plans in the case of a flood;

Recovery and lessons learned: returning to normal conditions as soon as possible and mitigating both the social and economic impacts on the affected population.

Flood risk management is an integral part of integrated river basin management, and the Floods Directive shall therefore be coordinated with the Water Framework Directive.

Civil protection is also a crucial component of flood risk management.



Marine Strategy Framework Directive 2008/56/EC (MSFD)

Protecting the marine environment across Europe while enabling the sustainable use of marine goods and services upon which marine-related economic and social activities depend.

Ecosystems based approach aiming at the protection of the full range of marine biodiversity.

Objective: ensure good environmental status in the marine environment by 2020 = obligation of result

Adoption of plans + measures comparable to the WFD

All water ends up in the sea. But until 2008 there was no overall framework for protection of the marine environment (the WFD applies to mixing zones and coastal waters). This changed with the adoption of the Marine Strategy Framework Directive in 2008.

The key objective of the MSFD, which is also a framework Directive, is to achieve or maintain good environmental status (GES) in the marine environment by 2020.

The good status takes into account a variety of environmental aspects, including ecosystem functions, hydro-morphological, physical and chemical properties, as well as the protection of marine species and habitats. Again, overlaps can be found with the Habitats Directive (also applicable on the sea the EEZ) and where species and habitats protected by the nature directives are concerned.

The WFD and the MSFD take a “strategic approach” to environmental protection, starting from an assessment of the characteristics, pressures, impacts and current status of the relevant waters within the basic units of management of the two Directives (river basin districts under the WFD, marine regions or sub-regions under the MSFD) and resulting in the preparation of strategies or plans (river basin management plans under the

WFD, marine strategies under the MSFD) detailing the measures envisaged to achieve the objectives thus identified.

Under the MSFD, the status determination applicable to each marine region or sub-region is not embedded in the Directive, but must be determined based on the characteristics of the region or sub-region concerned.



Environmental liability Directive 2004/35/EC

Operator must prevent and remedy water damage and pay for the costs, unless ...

Damage results from an emission or event expressly authorised

Folk C-529/15

Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage is also dealing with prevention and remedying water damage (as part of the general concept of environmental damage).

Water damage is any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in Directive 2000/60/EC, of the waters concerned, with the exception of adverse effects where Article 4(7) of that Directive applies. Article 4(7) WFD concerns an authorisation procedure in case new activities lead to deterioration of a water body.

The Directive lays down rules based on the **polluter-pays principle**. This means that a company causing environmental damage is liable for it and must take the necessary preventive or remedial action and bear all the related costs.

Scope: there are 2 scenarios where liability occurs:

1. Environmental damage caused by any of the activities listed in Annex III of the directive, such as energy industries , production and processing of metals, large-scale meat, dairy and food production etc.

2. Environmental damage to protected species and natural habitats (or its imminent threat) caused by occupational activities other than those listed in Annex III, and if the company is at fault or negligent.

Exceptions to liability include natural disaster, liability for types of environmental damage covered by international conventions (e.g. maritime pollution).

Obligation for the operator to take **preventive (Article 5) and remedial actions (Article 6 + 7) and pay the costs (Article 8)**:

- If there is an imminent threat of damage occurring, the company must, without delay, take the necessary preventive measures.
- If damage has already occurred the company must immediately inform the authorities and take steps to manage the situation to prevent further environmental damage and threats to human health, and take appropriate remedial action.

The company must pay for preventive actions and remedial actions, except in certain situations, e.g. if the damage was caused by a third party despite the appropriate safety measures, or resulted from compliance with an official instruction.

Under Art 12 natural or legal persons and NGO can make a request for taking action to the competent authorities, which may invite the operator to give its views before taking a decision. If there is an imminent threat of damage the authorities can act immediately. Under Art 13 there is a possibility to ask for a legal review by a Court.

So far the Directive has been invoked only a few times, but it seems that there is potential for new cases. (bridge to next slide)

Background

Article 2 on definitions:

For the purpose of this Directive the following definitions shall apply:

1. "environmental damage" means: (a) damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species. The significance of such effects is to be assessed with reference to the baseline condition, taking account of the criteria set out in Annex I;

Damage to protected species and natural habitats does not include previously identified adverse effects which result from an act by an operator which was expressly authorised by the relevant authorities in accordance with provisions implementing Article 6(3) and (4) or Article 16 of Directive 92/43/EEC or Article 9 of Directive 79/409/EEC or, in the case of habitats and species not covered by Community law, in accordance with equivalent provisions of national law on nature conservation.

(b) **water damage**, which is any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in Directive 2000/60/EC, of the waters concerned, with the exception of adverse effects where Article 4(7) of that Directive applies;

(c) **land damage**, which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, on or under land, of substances, preparations, organisms or micro-organisms;

2. "damage" means a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly;

5. "waters" mean all waters covered by Directive 2000/60/EC;

6. "operator" means any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including

the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity;

Article 5 on preventive action:

1. Where environmental damage has not yet occurred but there is an imminent threat of such damage occurring, the operator shall, without delay, take the necessary preventive measures

Article 6 on remedial action

1. Where environmental damage has occurred the operator shall, without delay, inform the competent authority of all relevant aspects of the situation and take:

(a) all practicable steps to immediately control, contain, remove or otherwise manage the relevant contaminants and/or any other damage factors in order to limit or to prevent further environmental damage and adverse effects on human health or further impairment of services and

(b) the necessary remedial measures, in accordance with Article 7.

Article 8 on prevention and remediation costs

1. The operator shall bear the costs for the preventive and remedial actions taken pursuant to this Directive.

(...)

4. The Member States may allow the operator not to bear the cost of remedial actions taken pursuant to this Directive where he demonstrates that he was not at fault or negligent and that the environmental damage was caused by:

(a) an emission or event expressly authorised by, and fully in accordance with the conditions of, an authorisation conferred by or given under applicable national laws and regulations which implement those legislative measures adopted by the Community specified in

Annex III, as applied at the date of the emission or event;

(b) an emission or activity or any manner of using a product in the course of an activity which the operator demonstrates was not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the emission was released or the activity took place.

Article 12 on request for action:

1. Natural or legal persons:

(a) affected or likely to be affected by environmental damage or

(b) having a sufficient interest in environmental decision making relating to the damage or, alternatively,

(c) alleging the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

shall be entitled to submit to the competent authority any observations relating to instances of environmental damage or an imminent threat of such damage of which they are aware and shall be entitled to request the competent authority to take action under this Directive.

What constitutes a "sufficient interest" and "impairment of a right" shall be determined by the Member States.

To this end, the interest of any non-governmental organisation promoting environmental protection and meeting any requirements under national law shall be deemed sufficient for the purpose of subparagraph (b). Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (c).

2. The request for action shall be accompanied by the relevant information and data supporting the observations submitted in relation to the environmental damage in question.

3. Where the request for action and the accompanying observations show in a plausible manner that environmental damage exists, the competent authority shall consider any such observations and requests for action. In such circumstances the competent authority shall give the relevant operator an opportunity to make his views known with respect to the request for action and the accompanying observations.

4. The competent authority shall, as soon as possible and in any case in accordance with the relevant provisions of national law, inform the persons referred to in paragraph 1, which submitted observations to the authority, of its decision to accede to or refuse the request for action and shall provide the reasons for it.

5. Member States may decide not to apply paragraphs 1 and 4 to cases of imminent threat of damage.

Article 13 on review procedures

1. The persons referred to in Article 12(1) shall have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority under this Directive.

2. This Directive shall be without prejudice to any provisions of national law which regulate access to justice and those which require that administrative review procedures be exhausted prior to recourse to judicial proceedings.

C-529/15 Folk

Article 2(1)(b) ELD:

(b) water damage, which is any damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential, as defined in Directive 2000/60/EC, of the waters concerned, with the exception of adverse effects where Article 4(7) of that Directive applies

*So, no water damage if activity or emission covered by a permit?
Any permit?*

Opinion AG Bobek

In 1998, a hydroelectric power plant was authorised on the river Mürz in Austria. It has been operational since 2002. Dr Folk ('the Applicant') holds fishing rights for both banks of the river downstream from the power plant. According to the Applicant, the operation of the power plant causes significant and repeated short-term variations in the water level. Some areas that are submerged under water consequently dry up rather rapidly. This leads to separation of the outlet areas from the current of the river, rendering it impossible for small and young fish to follow the downstream flow. The fish die.

The Applicant submitted a complaint to the competent authorities. However, his application was rejected on the basis that the operation of the power plant is covered by an authorisation. The referring court — the Austrian Verwaltungsgerichtshof (Administrative Court, Austria) — poses a series of questions pertaining to three issues. The first concerns the temporal scope of application of Directive 2004/35/EC (the Environmental Liability Directive, 'ELD'). (2) The second is whether the definition of environmental damage in Austrian law is in line with the ELD, as with regard to water it excludes any damage that is 'covered by an authorisation'. The national court also asks about the role of Article 4(7) of Directive 2000/60/EC (the Water Framework Directive, 'WFD') (3) in the definition of 'water damage' under the ELD. The third is whether a national provision that prevents persons with fishing rights from initiating a review procedure is compatible with provisions governing the

access to justice of private parties under the ELD.

In a nutshell: The questions concern mainly whether and under which conditions a permitted activity which causes environmental damage can be subjected to environmental liability according to

Directive 2004/35/EC. The possible exceptions and defences (Article 8(4)(a) ELD and Article 4(7) WFD) have to be considered. The reference includes also a question on the temporal scope of the ELD (for continuing activities) and a question on the interpretation of the scope of enabled parties to request action by the competent authority and to review that decision (Articles 12 and 13 ELD).

Questions asked to the CJEU:

15. In this context, the referring court decided to stay proceedings and to refer the following questions for a preliminary ruling:

‘(1) Does [the ELD] apply also to damage which, although it arises after the date specified in Article 19(1) of [the ELD], none the less results from the operation of a facility (a hydroelectric power station) authorised and brought into operation prior to that date and is covered by an authorisation granted under the law governing matters relating to water?

(2) Does [the ELD], in particular Articles 12 and 13 thereof, stand in the way of a national provision which precludes persons holding fishing rights from initiating a review procedure within the meaning of Article 13 of [the ELD] in relation to environmental damage as defined in Article 2(1)(b) of the Directive?

(3) Does [the ELD], in particular Article 2(1)(b) thereof, preclude a national provision which excludes damage that has a significant adverse effect on the ecological, chemical or quantitative status or ecological potential of the water in question from the notion of “environmental damage”, in the case where that damage is covered by an authorisation granted under a national legislative provision?

(4) If Question 3 is answered in the affirmative:

In cases where, in the granting of an authorisation under provisions of national law, no assessment has been made of the criteria laid down by Article 4(7) of [the WFD] (or of the national measures implementing it), is, for the purpose of determining whether environmental damage

within the meaning of Article 2(1)(b) of [the ELD] has arisen, Article 4(7) of [the WFD] to be applied directly, and is it necessary to determine whether the criteria laid down by that provision are satisfied?'

According to AG Bobek "Article 2(1)(b) of the ELD does not provide for the general exclusion of damage covered by authorisation from the concept of 'environmental damage'. That provision only allows for the exclusion from the definition of water damage of the adverse effects where Article 4(7) of the WFD applies."

Waiting for the ruling of the CJEU.



Impact assessment of projects

Directive 2011/92/EC: assess impacts of projects

Integrate in other assessment procedures – parallel with Article 4(7) WFD

EIA Directive: limited number of projects but public participation.

WFD: new activities, conditions to be met

Article 2(1):

Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects.

Article 3:

The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 12, the direct and indirect effects of a project on the following factors:

- (a) human beings, fauna and flora;
- (b) soil, **water**, air, climate and the landscape;
- (c) material assets and the cultural heritage;
- (d) the interaction between the factors referred to in points (a), (b) and (c).

The projects are listed in Annexes I and II. If a project (which requires works / a physical change in the environment – see C-275/09) does not fall under one of the categories the EIA Directive doesn't apply. If it does, an assessment is required for the projects in Annex I and a screening must be made when falling under Annex II.

The WFD refers to new activities in its Article 4(7). This is understood as covering largely the notion of project under the EIA, although it cannot be excluded that some activities falling under Article 4(7) do not imply works. In such a case Article 4(7) WFD applies but not the EIA Directive.

In practice the several assessments are often combined by the authorities: EIA for the project, appropriate assessment under Article 6 of the Habitats Directive (because of effects on protected habitats or species) and assessment under Article 4 of the WFD (non-deterioration and exception of Article 4(7) WFD. However, keep a keen eye on the fact that the assessments are not necessarily 100% identical, meaning that a project may be permissible under one instrument doesn't automatically imply that it is also permissible under the others.