

Co-operation with national judges in the field of environmental law under the European Commission Framework Contract ENV.A.I/FRA/2012/0018

Training module

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

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The Nitrates Directive

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Introduction

- Challenge
- Outline of the Nitrates Directive
- Conflicts



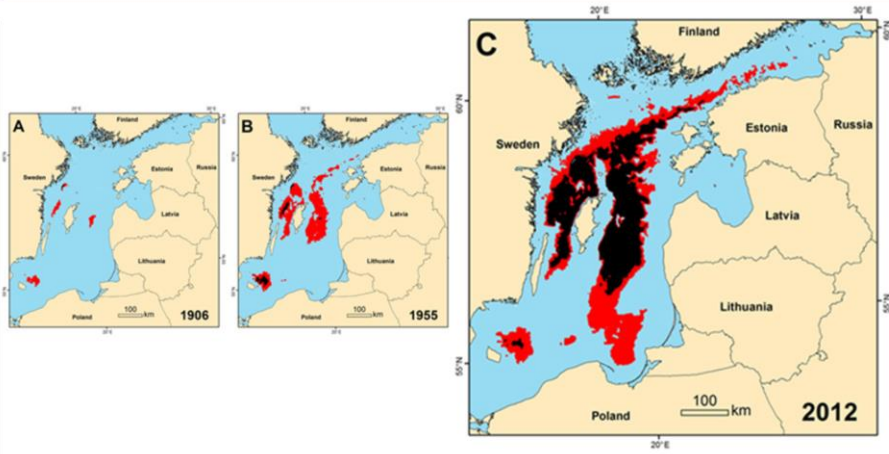
The challenge

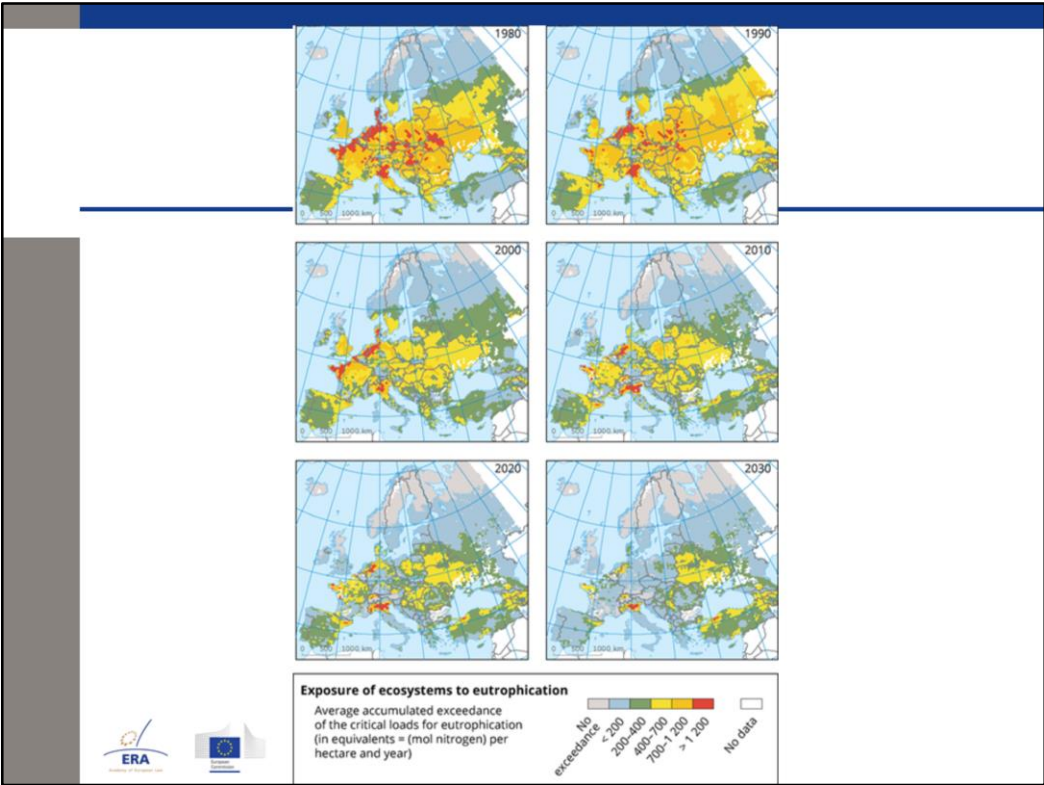
Nutrients from agriculture are a major source of eutrophication (algae blooms, dead zones, disruption of aquatic ecosystems) and a threat to drinking water quality.

<http://www.fao.org/docrep/w2598e/w2598e04.htm>



Dead zones in the Baltic Sea





Nitrates Directive: 91/676/EEC

Objective:

- reduce water pollution caused or induced by nitrates from agricultural sources
- prevent further such pollution

Important definitions:

- Fertilizer
- Pollution
- Vulnerable zone



Please note that there is no deadline in the objective and that it does not describe what level of reduction suffices to meet this obligation. So it is an ongoing obligation to reduce and prevent water pollution caused or induced by agriculture.

Vulnerable zones

Vulnerable zones: designated areas

1. Member States identify waters which are affected by pollution or could be affected if relevant action is not taken.

In accordance with the criteria set out in the Annex

2. Member States designate as vulnerable zones all known areas of land in their territories which drain into the waters identified according to paragraph 1 and which contribute to pollution.



Vulnerable zone refers to an area where agricultural activities take place and which drains into waters suffering from pollution with nutrients, caused partly by agriculture. The main other source of nutrients is human waste water, which is covered by the Urban Waste Water Treatment Directive (91/271/EEC).

Indicators (Annex)

- More than 50 mg/l nitrate in surface water
 - More than 50 mg/l nitrate in ground water
 - Eutrophication of surface water (incl coastal waters) -> WFD & MSFD
- Drinking water
Directive

Designation, monitoring & reporting obligations



These indicators identify whether action should be taken. And be aware (return to the previous slide) that achievement of these indicators does not imply that the Nitrates Directive can be set aside. That depends on whether they would also be met if action were not taken.

Action programme & Code of good agricultural practices

- Norms for application of manure and fertilisers (170 kg nitrogen/ha/year)
- Balanced fertilisation
- Periods when fertilisation is banned
- Minimum storage capacity per farm
- Buffer zones
- Keeping records
- **Additional measures**



Additional measures are necessary when the basic measures do not suffice to achieve a downward trend in nitrate pollution.

Reduce or increase

Reduce use of manure/fertiliser depending on:

- 1 Soil type, slope angle, etc.
- 2 Climatic circumstances, rainfall patterns, irrigation needs
- 3 Land use and agricultural practices, including crop shifts and mineral balance
- 4 Water quality problems

Or increase:

Derogation: apply more than 170 kg N/ha PROVIDED that it does not imperil achievement of the ND objectives AND justified on the basis of objective criteria

E.g.: long growth periods, crops with high nitrogen uptake, soil type, rainfall pattern



These rules differ depending on the local circumstances.

Differentiation

**A Application in vulnerable zones
and between vulnerable zones**

B Application in the entire territory



This is an important distinction (see the next slides for the implications).

Differences

Regime	Designation vulnerable zones	Not designated (not vulnerable) areas	Application on the entire territory
Action programme	Applicable	Not applicable	Applicable on the entire territory
Code good agricultural practices	Mandatory application	Voluntary application	Applicable on the entire territory
Monitoring	Representative monitoring -> extent of nitrate pollution in all the waters from agricultural sources .	Representative monitoring -> extent of nitrate pollution in all the waters from agricultural sources .	Representative monitoring -> extent of nitrate pollution in all the waters from agricultural sources .



It makes a difference whether or not an area is designated or not.

Conclusions

- The unofficial ND objective is 50 mg/l nitrates = drinking water norm.
- It is not met everywhere.
- And the ecological norm <eutrophication> is much LOWER.



Conflicts

1. The correct designation of vulnerable zones
2. The application of measures



I will discuss landmark CJEU cases on these topics.

1. Designation

- Article 3(1) of the Directive requires the Member States to identify surface freshwaters as waters which are or could be affected by pollution only if they exceed, or could exceed if relevant action were not taken, the threshold for nitrates of **50 mg/l** by reason of the direct or indirect discharge of nitrogen compounds from agricultural sources.
- 1. The Member States must therefore establish the **source** of the nitrates which cause that threshold to be exceeded
- 2. The **measures** provided for by the action programme are to take account of the quantities of nitrogen originating from agricultural and other sources.



Questions

- Should agricultural pollution be the only source of pollution?
- Are the indicators only intended for water used for drinking water production or in case eutrophication is caused by nitrogen?



The answers to these questions can be found in the CJEU case law (see the next slides).

C-293/97 Standley e.a.

- Identification of proportion of agricultural pollution or exclusiveness does not follow from the system of the Directive.
- ND grants a Member State a wide discretion in determining what is significant -> meant to create the instruments to deal with agricultural pollution



C-258/00 Commission v France

- France limited use of the 50 mg/l to waters intended as a source of drinking water.
- France limited the identification of eutrophic waters to zones in which nitrogen is the controlling factor in the eutrophication (coastal zones and shallow stagnant, brackish waters).

Is this an infringement of the Nitrates Directive?



C-258/00 Commission v France

- Both limitations infringe the Nitrates Directive.
- MS are obliged to respect the objectives of the Directive, namely, the reduction of water pollution caused by nitrates from agricultural sources.
- Thus, the exercise of their discretion may not result in a large portion of nitrogen-bearing waters falling outside the scope of the Directive.



C-194/14 Commission v Greece

- Use of 50 mg/l and/or eutrophication to assess need for designation
- It is not necessary that agricultural pollution is the only source, as long as it is a significant contribution

Reference to Standley e.a. (C-293/97)



Despite earlier court judgments on these topics, designation conflicts can still pop up.

Trends

Infringement procedures on designation ->

- Increase in size of vulnerable zones
- Increase in application to the entire territory



2. Application

- Transposition failures
- Failure to establish an action programme, failure to establish monitoring etc.

E.g. C-127/99 Commission v Italy

- **What constitutes a failure to take additional measures?**
- Non-compliance by farmers (case study)



Article 5 (5) Nitrates Directive

- “Member States shall moreover take, in the framework of the action programmes, such additional measures or reinforced actions as they consider necessary
- if, at the outset or in the light of experience gained in implementing the action programmes,
- it becomes apparent that the measures referred to in paragraph 4 will not be sufficient for achieving the objectives specified in Article 1.
- In selecting these measures or actions, Member States shall take into account their effectiveness and their cost relative to other possible preventive measures.”

Discretionary room?



Failure to take additional measures

- Article 5(5) ND: application of additional measures is not a choice. It must be done as soon as the need is identified to achieve the objectives of the ND.

C-322/00 Commission v Netherlands

Case E-7/15 EFTA Surveillance Authority [2015],
para. 40

Pending case against Germany



Right to property

- Can designation as a vulnerable zone and application of the nitrate action programme and code of good agricultural practice infringe the property rights of land owners?



Right to property

- It is a general principle of EU law
- It is not an absolute right
- It must be viewed in relation to its social function
- Its exercise may be restricted, provided that
 - Restrictions correspond to objectives of general interest pursued by the EU
 - and do not constitute a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed

C-293/97 Standley e.a.
(including a proportionality test)



The end?

- Nitrates Directive: any questions?
- Case study on non-compliance by farmers
- But first: relation between ND and other EU legislation
 - the Drinking Water Directive



Relation of the ND & other EU legislation

- **Integration into the WFD**
- **Integration into the Common Agricultural Policy (CAP)**
- **Drinking Water Directive**



50 mg/l is the drinking water norm for sources of drinking water, which is established by the Drinking Water Directive

The ND is older than the WFD. It is now a daughter Directive. Its measures are basic (mandatory) under the WFD. Note that the planning period of the ND and the WFD are different. The inclusion means that the ND is complemented with a deadline, while the ND contains a simple reduce and prevent obligation.

Cross-compliance obligation means that income support can be reduced in case of non-compliance with the ND obligations

WFD & ND

- WFD elaborates ND eutrophication norms to operationalize the WFD goal of good ecological status
- ND measures are basic measures under the WFD programme of measures
- WFD obligations are complementary
 - Good status & no deterioration
 - 2015 deadline + exemptions
 - Article 11(5) WFD: additional measures



We will take a closer look at this relationship in the case study.

Drinking Water Directive: 98/83/EC (80/778 EEC)

Objective

- to protect human health from the adverse effects of any contamination of water intended for human consumption by ensuring that it is wholesome and clean.



Basics

- **Essential EU quality standards for**
- All distribution systems serving more than 50 people or supplying more than 10 cubic meter per day
- Smaller distribution systems if the water is supplied as part of an economic activity;
- Drinking water from tankers, in bottles or containers;
- Water used in the food-processing industry
- Not applicable to bottled natural mineral water or medicinal water
- **Monitoring and reporting requirements**



There is separate EU legislation on natural mineral water and spring water: Directive 2009/54/EC and Directive 2003/40/EC.

Safety requirements

- HACCP
- Monitoring & reporting
- Transparency: adequate & up to date information is available to consumers
- In case of non-compliance: investigation, remedial action and restrictions in use



HACCP refers to hazard analysis and critical control points and contains rules on hygiene for the purpose of food safety.

Differences

Minimum requirements

- Member States can set **higher** standards
- Member States can **add** standards
- Member States cannot set lower standards, but they can request a **temporary derogation**
 - Not a (potential) danger to human health
 - Provision of drinking water is not possible by any other means



The end

