

Water Directors of the EU Member States  
and other countries members of the EU CIS process

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Members of the SCG of the EU Member  
States and other countries members of the EU CIS process

## Re: Input to the joint Water and Marine Directors' meeting, 29 November

Brussels, 23 November 2022

Dear Water Director,

On behalf of the Living Rivers Europe Coalition I am writing to share with you our views on some of the issues on the agenda of the forthcoming joint Water and Marine Directors' meeting that will be held online on 29 November 2022.

### 1. EC proposal for the Nature Restoration Law

The fitness check of the Water Framework Directive concluded that restoring freshwater ecosystems is a necessity to sustain the natural functions of rivers, lakes and wetlands. Only with healthy, biodiverse water bodies can we allow nature to thrive, ensure clean and sufficient water supply, and resilience to climate change impacts. The EU Nature Restoration Law proposed by the European Commission introduces new obligations to restore the health of fresh waters. It sets targets for the restoration of freshwater ecosystems alongside coastal and terrestrial ones, which include the restoration and re-establishment of areas, the restoration of habitats of species and the non-deterioration of the areas after restoration (article 4). It also sets obligations to remove river barriers in order to improve the natural longitudinal and lateral connectivity of rivers and contribute to the EU's objective of restoring at least 25,000 km of free-flowing rivers by 2030 (article 7). Those targets complement the obligations of the Water Framework Directive and the Nature Directives, and will contribute to improving the ecological status and the biological diversity of rivers, lakes and wetlands. While it is positive and important that the proposal contains a focus on restoring freshwater ecosystems, we strongly believe those targets fall short of the rate and to the extent that is currently needed recognising the significant degradation of our water environment.

***We therefore call upon the Water Directors to engage in the Council deliberations on the European Commission proposal for the Nature Restoration Law to:***

- Raise the barrier removal target to 15% of EU river length (178,000 km) restored to a free-flowing state by 2030 and make it legally binding;
- Remove the highlight given to exemptions to the Water Framework Directive objectives and TEN-T regulation to ensure proper implementation;

- Prioritise barrier removals according to the ecological potential of the removal, in particular the connectivity between marine and freshwater ecosystems;
- Increase the intermediary percentage targets laid out in Article 4 for the restoration and re-establishment of areas and the restoration of habitats of species, and shorten the timeline for reaching 100%, as this article also covers some freshwater ecosystems and those restoration actions would also complement the action on river connectivity;
- Recognise the need to expand the EU financing support available for free-flowing river restoration in addition to the sources identified in the EU Guidance on barrier removal for river restoration, for example, through the establishment of dedicated funding for nature restoration, pursuant to the mid-term review of the Multiannual Financial Framework.

*Please see Annex 1 to this letter with additional justifications for the recommendations to restore the natural connectivity of rivers and natural functions of the related floodplains in the Nature Restoration Law*

## **2. Exemptions from the WFD objectives**

We understand that during your recent informal meeting of the EU Water Directors in Prague, you discussed the need to have a political discussion on the application of exemptions from reaching the objectives of the Water Framework Directive. The principal deadline for achieving the objective of the WFD was 2015, but more than 20 years after the adoption of the WFD it is clear that not only the state of Europe's waters is far from good but also that exemptions have been used excessively instead of exceptionally, thus hampering the effective implementation of the Water Framework Directive. In order to inform the upcoming political debate on application of WFD exemptions, we would like to bring to your attention our legal analysis of the application of Art. 4.4 and 4.5 exemptions and how that in our view makes it hard to argue that these can be applied for impacts related to the coal sector without further measures in place.

We believe that many of the arguments are also relevant for other sectors and we hope that it can be useful in the urgently needed efforts to bring Europe's waters to good status by 2027 and to reduce the reliance on exemptions.

***We therefore call upon the Water Directors to:***

- Make full use of the measures provided by the Water Framework Directive and other EU rules to bring Europe's waters to good status as soon as possible and by 2027 the latest
- Do proper cost benefit analysis before applying exemptions and include long-term costs such as costs related to climate change in the decision-making
- Do proper economic analysis and put in place economic instruments for cost recovery for the coal sector, including mine drainage fees and adequate fees for cooling water abstraction that account for the external costs of operation. Earmark the revenues for restoration measures.

*Please see Annex 2 to this letter with analysis of excessive use of exemptions from reaching the objectives of the Water Framework Directive due to coal mining and combustion*

Thank you in advance for your consideration of these points which support the ambitions of the European Green Deal and the need to protect and restore freshwater ecosystems that our economy, livelihoods and wildlife all depend on.

Yours sincerely,



Ester Asin  
Director,  
WWF European Policy Office  
On behalf of *Living Rivers Europe*<sup>1</sup>



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<sup>1</sup> Living Rivers Europe, a coalition of five environmental and angling organisations: [WWF's European network](#), the [European Anglers Alliance](#), [European Environmental Bureau](#), [European Rivers Network](#), and [Wetlands International](#). We represent a movement of over 40 million people across Europe and, together, we started the #ProtectWater campaign.

## Annex 1:

# Restoration of the natural connectivity of rivers and natural functions of the related floodplains in the Nature

## Restoration Law

Briefing paper

September 2022

Freshwater ecosystems are one of the most degraded in Europe, with freshwater molluscs and fish the two most threatened animal groups and 60% of surface waters failing to reach good ecological status. The fitness check of the Water Framework Directive concluded that the main reasons for failure are for a large part connected to insufficient measures to tackle diffuse pollution coming from agriculture, and the hydromorphological changes affecting water bodies. Restoring freshwater ecosystems is therefore a necessity to sustain the natural functions of rivers, lakes and wetlands. Only with healthy, biodiverse water bodies can we allow nature to thrive, ensure clean and sufficient water supply, and resilience to climate change impacts.

The EU Nature Restoration Law proposed by the European Commission in June 2022 introduces new obligations to restore the health of fresh waters. It sets targets for the restoration of freshwater ecosystems alongside coastal and terrestrial ones, which include the restoration and re-establishment of areas, the restoration of habitats of species and the non-deterioration of the areas after restoration (article 4). It also sets obligations to remove river barriers in order to improve the natural longitudinal and lateral connectivity of rivers and contribute to the EU's objective of restoring at least 25,000 km of free-flowing rivers by 2030 (article 7). Those targets complement the obligations of the Water Framework Directive and the Nature Directives, and will contribute to improving the ecological status and the biological diversity of rivers, lakes and wetlands. While it is positive and important that the proposal contains a focus on restoring freshwater ecosystems, we strongly believe those targets fall short of the rate and to the extent that is currently needed recognising the significant degradation of our water environment.

We urge the European Parliament and the Council, acting as co-legislators on the EU Nature Restoration Law, to:

- **Raise the barrier removal target to 15% of EU river length (178,000 km) restored to a free-flowing state by 2030 and make it legally binding;**
- Remove the highlight given to exemptions to the Water Framework Directive and TEN-T regulation to ensure proper implementation.
- Ask Member States to prioritise barrier removals according to the ecological potential of the removal, in particular the connectivity between marine and freshwater ecosystems.
- Ask Member States to include in their national restoration plans a description of the simplification of procedures and skill-building measures necessary to enable river restoration projects to be carried out efficiently and with the necessary public engagement.
- Increase the intermediary percentage targets laid out in Article 4 for the restoration and re-establishment of areas and the restoration of habitats of species, and shorten the timeline for reaching 100%, as this article also covers some freshwater ecosystems and those restoration actions would also complement the action on river connectivity.
- Call on the European institutions to expand the EU financing support available for free-flowing river restoration in addition to the sources identified in the EU [Guidance on barrier removal](#)

[for river restoration](#), for example, through the establishment of dedicated funding for nature restoration, pursuant to the mid-term review of the Multiannual Financial Framework.

## Benefits of free-flowing rivers and river restoration

River regulation has been a common practice in European rivers in the previous decades, resulting in heavy river fragmentation and floodplain degradation. Restoring the connectivity of European rivers and the natural functions of their related floodplains has many benefits for nature and for society in general.

- Free-flowing rivers support biodiverse aquatic and terrestrial ecosystems. They ensure nutrient balance, sediment transport, and ecological flows that are necessary for rivers, floodplains, lakes and wetlands to thrive, directly and indirectly contributing to human well-being as well.
- Free-flowing rivers help protect and restore threatened species, in particular migratory fish which are able to safely reach their spawning and feeding grounds. Freshwater migratory fish populations have declined by 93% in Europe within the last 50 years. In Europe, all 8 sturgeon species are endangered and the latest update of the IUCN Red list declared the ship sturgeon extinct in the Danube, with the excessive fragmentation of rivers as one of the main causes.
- Restoring free-flowing rivers supports the achievement of many pieces of existing EU legislation or action plans, such as: reaching favourable conservation status for specific habitat types and species of interest under the Birds & Habitats Directive; achieving good ecological status under the Water Framework Directive; achieving the objectives of the Eel Regulation and of the Pan-European Action Plan for Sturgeons.
- In addition, removing river barriers can help improve water quality as it avoids nutrient loading and eutrophication processes in reservoirs or in backwaters.
- Free-flowing rivers help reduce greenhouse gas emissions. Reservoirs in dammed rivers emit considerable amounts of methane, even in European latitudes, as a result of mud formation. Also, removing lateral barriers to reconnect floodplains to the river sustains wetlands which, when properly managed, store significant amounts of carbon.
- Free-flowing rivers help alleviate the increase in water temperatures, which has deadly consequences for many fish species.
- Rivers that are free-flowing until the sea help protect against storm surges and rising sea levels, as they can carry sediments downstream that replenish deltas and estuaries.
- Free-flowing rivers and reactivation of floodplains improve the water supply of groundwaters and soil and contribute to reducing water scarcity risks. Indeed, having rivers with sufficient flow levels, and which are able to overflow, improves the conditions of habitats and agriculture lands, provides a natural way of water retention, and can ultimately replenish aquifers. In addition, it reduces irrigation demands, which have costly development and maintenance costs, and includes the risk of overusing the water resources.
- Free-flowing rivers reduce risks of flooding. Indeed, measures to restore the natural functions of floodplains, such as removing or relocating lateral river barriers such as dykes, and/or re-meandering channelised rivers, allows the river to overflow and creates “sponges”, which can absorb excess water in case of flooding. Restoring floodplains can avoid millions of euros of flood damage, and is often less costly than having to fix embankments destroyed by flooding events.

- Removing dams can avoid significant maintenance costs, and create short and long term jobs. Studies conducted in the US show that dam removals are 60% less expensive than repair and maintenance over 30 years.
- Free-flowing rivers provide opportunities for tourism and recreation, support the maintenance and preservation of other valuable ecosystem services such as drinking water purification and regulation of heat waves. Free-flowing rivers allow citizens to access the river. Studies conducted in Austria on the Mur river showed that free-flowing river sections have more recreational value than dammed sections.

## Shortcomings of the proposed targets on river connectivity

### Lack of robust quantitative target on barrier removal

The European Commission's proposal contains obligation for Member States to carry out an inventory of river barriers identifying those that need to be removed (article 7(1)), to proceed to the actual removal (article 7(2)), and to take the measures necessary to improve the natural functions of the related floodplains (article 7(3)). However, the level of the barrier removal effort, set in Article 7(1), is only specified for the barrier inventory, and based on two indications: it should "contribute to the achievement of the restoration targets set out in Article 4 of this Regulation"; and it should contribute to the achievement of the objective of restoring at least 25,000 km of rivers into free flowing rivers in the Union by 2030. Thus unlike some other targets in the Commission's proposal, the target to restore the natural connectivity of rivers and natural functions of the related floodplains is not quantified robustly. This risks failing to drive large-scale barrier removal forward.

In addition, the references to the exemptions under the Water Framework Directive and TEN-T Regulation in the text weaken the obligation to remove barriers. During the Water Framework Directive's fitness check, the European Commission and the European Parliament flagged the excessive and unjustified use of the exemptions which, in some EU Member States, result that up to 90% of water bodies are exempt from reaching the WFD objectives. Those exemptions shall not become a blank cheque for not planning the barrier removals necessary to restore free-flowing rivers, and the references to the exemptions regimes should therefore be removed and all stringent conditions in applying exemptions should be met.

### Low level of the barrier removal target

The EU Biodiversity Strategy politically endorsed goal of 25,000 km of rivers returned to free-flowing state would represent only around 2% of rivers across the EU. This is far too low when you consider that hydromorphological pressures act as significant pressures for 34 % of European surface water bodies, and that out of those 34 % surface water bodies, 20 % failed to reach good ecological status because of the presence of barriers.

There is also a lack of long-term vision for barrier removal, as no indication is given to quantify the effort needed after 2030, while article 12 of the Commission's proposal states that the national restoration plans should include an estimate of the length of free-flowing rivers to be achieved by the removal of [...] barriers by 2030 and by 2050.

### Prioritisation of barrier removal

The European Commission's proposal states that Member States shall primarily address the removal of obsolete barriers, defined as "those that are no longer needed for renewable energy generation, inland navigation, water supply or other uses". Although obsolete barriers, which are delivering little

or no benefits to society, can indeed be considered as low-hanging fruits for removal, their identification should not be the only criteria for prioritising barriers to be removed.

First, the appreciation of whether a barrier is no longer needed or not leaves a very large room for interpretation. Member States might for instance claim that some obsolete barriers might be “needed” in the future for hydropower plants retrofitting or new reservoirs for irrigation, therefore reducing the scope of barriers available for removal. Also, the obsolescence of a barrier is not always the most relevant criteria for identifying barriers to be removed - instead, the primary criteria guiding the identification of barriers for removal should be the ecological benefits of the removal.

In particular, barrier removal should be strategically planned at river basin level in order to restore ecological connectivity along fish migration routes between marine and freshwater ecosystems. This is crucial for diadromous fish - those migrating between freshwater and saltwater, which are particularly affected. For instance, the European eel is listed as Critically Endangered by the IUCN Red List of Threatened Species due to a decline of 90-95% in species populations in the last 45 years, and the Living Planet index of migratory fishes suggest similar decline for other migratory species as well. The systemic restoration of migratory corridors for those species should therefore be seen as a priority for barrier removal.

## Why the law must set a binding and higher target on river connectivity

The barrier removal target should be made legally binding. It should be raised to 15% of EU river length (178,000 km) restored to a free-flowing state by 2030, broken down to 15% of river length at Member State level, and duly evaluated by the European Commission in their assessment of the draft national restoration plans.

### Restoring 15% of EU river length into free-flowing rivers is ambitious but achievable by 2030.

A WWF [study](#) analysed a sample of 30,000 river barriers (3% of the estimated 1 million barriers in Europe) on large and medium-sized rivers in Europe and assessed their reconnection potential. Within this sample alone, removing the barriers identified as having high or good reconnection potential would achieve 49,000 km of free-flowing river stretches in the EU (twice the EU Biodiversity Strategy target of 25,000 km).

### Large free-flowing river stretches are needed to effectively complement the Water Framework Directive.

Europe's rivers are the most fragmented in the world. In fact, the vast majority of rivers in Europe are not free-flowing. The EU [Guidance on barrier removal for river restoration](#) released in December 2021 states that “[...] the aim of the Biodiversity Strategy when it comes to freshwater ecosystems is to be understood as going beyond the concept of continuity of the WFD, which does not necessarily require barriers to be removed. It is to focus on the overall connectivity of the river system, intended as free from artificial barriers, including in its lateral dimension.”

The stretches of free-flowing rivers, deprived of any artificial obstacles, must therefore be large enough to deliver this overall connectivity of the river system, otherwise the nature restoration law will only deliver isolated free-flowing segments of rivers, lost in a network of more or less continuous rivers where barriers are adapted, but never fully removed. Delivering only 2% of additional free-

flowing stretches - the level of ambition proposed by the European Commission for 2030, will not change the picture to the extent that is needed to restore the connectivity of rivers.

Large free-flowing river stretches are necessary to substantially improve connectivity for fish.

1.2 million instream barriers are reported in 36 European countries, with a mean density of 0.74 barriers per kilometre. Large variations in barrier density are observed, with higher barrier densities in the heavily modified water bodies of Central Europe, and relatively unfragmented rivers still found in the Balkans, Baltic states, and parts of Scandinavia and Southern Europe. Still, the high density of barriers in various European rivers means that migratory fish species have to go through many obstacles before reaching their spawning grounds - with mortality rates getting higher at each passage.

Adapting river barriers with fish protection and guidance facilities might reduce fish mortality rates but not avoid impacts on fish - especially because of the cumulative impact of a series of dams. High-technology fish protection and guidance facilities also come at a substantial cost which should be balanced with the ecological benefits they provide. There will always be barriers which are not to be removed, and for those ones fish protection and guidance are the best possible option, worth the cost. But adapting a barrier is never as efficient, and therefore large, fully free-flowing segments are very often the best and most cost-effective option to deliver better connectivity for fish at a basin level.

Dam removal is gaining momentum in Europe.

The Dam Removal Europe movement reported at least 239 dams removed in 2021 only across Europe, a 137% increase from the previous year (101 barrier removals in 2020). Those numbers are probably underestimated, due to the complexities of barrier removal tracking. But they show that the movement is growing, and that an adequate policy framework can amplify it.

Living Rivers Europe is a coalition of six environmental and angling organisations: WWF's European network, the European Anglers Alliance, European Environmental Bureau, European Rivers Network, Wetlands International Europe and The Nature Conservancy. Living Rivers Europe puts forward a strong vision of healthy river ecosystems flourishing with wildlife to the benefit of society at large, the economy and sustainable development in Europe. To make this vision a reality and give our water ecosystems a real future we stress the importance of an ambitious implementation of the EU Water Framework Directive and related policies. Together with our members and supporters, representing a dedicated movement of over 40 million people across Europe, we aim to ensure that the loss of aquatic wildlife is halted and reversed and that European waters are managed more sustainably.





**Annex 2:**

**Overuse of exemptions from reaching the objectives of the  
Water Framework Directive due to coal mining and  
combustion**

Briefing paper  
November 2022



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# When the exception becomes the rule

Overuse of exemptions from reaching the  
objectives of the Water Framework Directive  
due to coal mining and combustion



## When the exception becomes the rule

### Overuse of exemptions from reaching the objectives of the Water Framework Directive due to coal mining and combustion

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# Member States not on track to deliver on WFD objectives

The overarching objective of the Water Framework Directive (WFD) is to achieve good status of Europe's waters. The deadline was set for 2015, but the Directive also allows the use of exemptions on certain grounds for reaching the goals. More than 20 years after the adoption of the WFD it is clear that not only the state of Europe's waters is far from good but also that exemptions have been used excessively instead of exceptionally.

After the 2<sup>nd</sup> round River Basin Management Plans (RBMPs), two thirds of Europe's surface water bodies and one quarter of groundwater bodies are not in good status.<sup>1</sup> More than half of Europe's water bodies are under exemptions.<sup>2</sup> In its assessment of the 2<sup>nd</sup> RBMPs, the Commission recommended that Member States should reduce the reliance on exemptions and improve transparency in relation to the justifications used.<sup>3</sup>

Member States were due to update their RBMPs by December 2021. This 3<sup>rd</sup> cycle of RBMPs is crucial as it is the last chance for Member States to put measures in place to achieve the legally binding objective to reach good status by 2027. An NGO assessment of selected draft RBMPs did not give a promising picture: out of 21 RBMPs analysed, all but two were set to miss the legally binding target to restore Europe's waters.<sup>4</sup> There is a continuous reliance on exemptions rather than action. Additionally, there are flaws in the justifications of granted exemptions, with poor reasoning or even complete lack of justifications. Additionally, several Member States are late with the 3<sup>rd</sup> cycle RBMPs.<sup>5</sup>

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<sup>1</sup> EEA (2021). Report No 09/2021, [Drivers of and pressures arising from selected key water management challenges: A European overview](#).

<sup>2</sup> European Commission (2019). [Fitness Check of the Water Framework Directive, Groundwater Directive, Environmental Quality Standards Directive and Floods Directive](#).

<sup>3</sup> European Commission (2019). [5th report on the implementation of the WFD](#).

<sup>4</sup> EEB (2021). [Living Rivers Europe, The Final Sprint for Europe's Rivers](#). <https://eeb.org/library/the-final-sprint-for-europes-rivers-report/>

<sup>5</sup> European Commission [Status of implementation of the WFD in the Member States](#)

# Coal mining and combustion: reasons for poor water status

Energy generation from coal impacts water throughout the value chain, from mining to combustion and final ash storage.<sup>6</sup> Many of these impacts are so severe that they result in failure of good status requirements set under the WFD and have led to extensive use of exemptions by water authorities.

Lignite mining inevitably affects the **quantitative status of groundwater** as the groundwater level is regulated to avoid swamping the mine. The effect can extend kilometres away, over neighbouring groundwater bodies, across river basins and national borders. Many groundwater bodies are also assigned less stringent objectives due to poor **chemical status**, most notably linked to high levels of sulphates. Furthermore, mines can continue to impact the quantitative and qualitative status of water decades after closure.

Atmospheric deposition from mercury is a Europe-wide significant water management issue and the main reason why 30% of Europe's surface water bodies fail to reach good **chemical status**.<sup>7</sup> Thermal combustion plants are the main anthropogenic source of mercury in the EU, responsible for more than half of total reported emissions to air in 2017, with the main part coming from coal plants.<sup>8</sup> Out of the top-10 emitters of mercury to air, nine are lignite plants located in Poland, Germany, Czechia and Bulgaria, the EU's largest coal countries.<sup>9</sup> The Betchatów plant in Poland alone emits more than two tonnes of toxic mercury a year, more than most individual countries.

Mercury is a Priority Hazardous Substance under the WFD and therefore under a phase-out obligation.

Discharge of mine waters into rivers or streams negatively affect the **ecological status** of the water body, for example due to the contamination with sulphates impairing water quality including water intended for human consumption.<sup>10</sup>

In addition to exemptions, several surface water bodies located (or formerly located) where mine pits had been created, have been channelized and been designated as **artificial or heavily modified water bodies**. The management objectives for these water bodies are thereby set to reach good ecological potential (rather than good status).

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<sup>6</sup> See EEB (2020). [Mind the Gap, Mapping hidden subsidies for the coal and lignite industry](#) for more extensive examples.

<sup>7</sup> EEA (2021). Report No 09/2021, [Drivers of and pressures arising from selected key water management challenges: A European overview](#).

<sup>8</sup> EEA. [Industrial Reporting under the Industrial Emissions Directive 2010/75/EU and European Pollutant Release and Transfer Register Regulation \(EC\) No 166/2006](#) version 17 May 2022

<sup>9</sup> EEB (2021). [Tackling Mercury Pollution of EU Waters - Why coal combustion must end by 2027 at the latest](#).

<sup>10</sup> BMUV/ UBA (2022). [Die Wasserrahmenrichtlinie – Gewässer in Deutschland 2021](#). Fortschritte und Herausforderungen, p. 32.

# 1. Legal Background

## 1.1. Environmental objectives

The legally binding<sup>11</sup> environmental objectives in Article 4(1) WFD are the centrepiece of the WFD. Among others, Article 4(1) WFD obliges Member States to:

- **prevent deterioration** of the status of both surface and groundwater bodies (Article 4(1)(a)(i), (b)(i) WFD).
- **achieve good status** for both surface and groundwater bodies, except for artificial and heavily modified bodies of surface water (Art. 4(1)(a)(ii), (b)(ii) WFD). The principal deadline for achieving good status was 2015.

What does good status mean? For surface water bodies the good status requires both the chemical and the ecological status to be good.<sup>12</sup> A special objective applies for surface water bodies that are artificial and heavily modified – here the benchmark aim is a specific objective i.e. good chemical status and good ecological potential.<sup>13</sup> A body of groundwater is considered to be in good status when both its chemical and quantitative status is good.<sup>14</sup>

Put shortly, the **chemical status** of a body of water depends on the concentration of certain pollutants in it: Section 2.3.2 Annex V WFD and Article 4 Groundwater Directive<sup>15</sup> determine the conditions under which a body of groundwater is in chemical good status, in particular by setting environmental quality standards for nitrates and pesticides. For bodies of surface waters, the Environmental Quality Standards Directive<sup>16</sup> lays down environmental quality standards which have to be met regarding the 45 pollutants - so-called priority substances - listed in Annex X of the WFD, such as mercury.

Annex V WFD also specifies the biological quality elements that are important for the classification of a body of surface water to be in good **ecological status**.<sup>17</sup>

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<sup>11</sup> Confirmed by the CJEU in Judgement of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland e.V. v Bundesrepublik Deutschland*, C-461/13, EU:C:2015:433, para. 43; Judgement of 28 May 2020, *IL and Others v Land Nordrhein-Westfalen*, C-535/18, EU:C:2020:39, para. 72; Judgement of 24 June 2021, *European Commission v Kingdom of Spain*, C-559/19, EU:C:2021:512, para. 43.

<sup>12</sup> See Article 2(18.) WFD.

<sup>13</sup> Article 4(1)(a)(iii) See Ginzky (2015). *Ausnahmen zu den Bewirtschaftungszielen im Wasserrecht*, Zeitschrift für Umweltrecht, 515, p. 516.

<sup>14</sup> See definition in Article 2(20.) WFD.

<sup>15</sup> Directive 2006/118/EC of the European Parliament and of the Council of 12 December 2006 on the protection of groundwater against pollution and deterioration (OJ L 372, 27.12.2006, p.19)

<sup>16</sup> Directive 2008/105/EC of the European Parliament and of the Council of 16 December 2008 on environmental quality standards in the field of water policy, amending and subsequently repealing Council Directives 82/176/EEC, 83/513/EEC, 84/156/EEC, 84/491/EEC, 86/280/EEC and amending Directive 2000/60/EC of the European Parliament and of the Council (OJ L 348, 24.12.2008, p.84).

<sup>17</sup> Article 2 (22.) WFD.



The **quantitative status** reflects how much a body of groundwater is affected by abstractions and is specified in table 2.1.2 Annex V WFD<sup>18</sup>

The WFD does not only regulate the quality of water bodies: it also strives to tackle the sources of surface water pollution by regulating the emission of water pollutants. Particularly important is the obligation to cease or **phase-out** the emissions, discharges and losses of certain surface water pollutants, the so called priority hazardous substances (phase-out requirement, Article 4(1)(a)(iv) WFD). There are different views amongst legal experts on the exact deadline for the phase-out. While there are legal arguments to ask for a phase-out by 23.12.2026, even according to the opposing view the deadline for this phase-out is 18.12.2028.<sup>19</sup>

The wording “cease or phase-out” indicates that Member States have to initiate the necessary measures with the appropriate timing before this ultimate deadline, to ensure that there will be no emissions, discharges or losses after 2028 at the latest.<sup>20</sup>

## 1.2. Exemptions

Article 4(4)-4(7) WFD list how and under which conditions Member States may deviate from certain objectives set in Article 4(1):

Article 4(4) allows for an extension of the deadline after 2015, Article 4(5) allows for less stringent objectives to be applied. Article 4(6) allows for temporary deterioration due to natural causes or force majeure. Article 4(7) allows for deterioration of the status or failure to achieve good status as the result of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater.

In addition to those exemptions, Article 4(3) allows Member States to designate a body of surface water as artificial or heavily modified under certain conditions. This sets a specific lower objective to be achieved for the water body

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<sup>18</sup> Article 2 (26., 28.) WFD.

<sup>19</sup> See for the legal debate EEB (2021). [Tackling Mercury Pollution of EU Waters - Why coal combustion must end by 2027 at the latest](#), p. 8; Köck, Möckel (2010). Quecksilberbelastungen von Gewässern durch Kohlekraftwerke – Auswirkungen auf die Genehmigungsfähigkeit, Neue Zeitschrift für Verwaltungsrecht, 1390, p. 1393.

<sup>20</sup> Köck, Möckel (2010). Quecksilberbelastungen von Gewässern durch Kohlekraftwerke – Auswirkungen auf die Genehmigungsfähigkeit, Neue Zeitschrift für Verwaltungsrecht, 1390, p. 1393; Kremer (2013). The Prohibition of Mercury Discharges from Coal-Fired Power Stations under European Law, Journal for European Environmental & Planning Law, 10(2), 132-151, pp. 142–44. The opposite view is held by: Spieth, Ipsen (2011). Verbieta die Wasserrahmenrichtlinie den Bau von Kohlekraftwerken?, Neue Zeitschrift für Verwaltungsrecht, 536.



### 1.2.1.Procedure and general remarks

The central instrument to reach the objectives of the WFD are the RBMPs.<sup>21</sup> An RBMP has to be produced for each river basin district and updated every six years. In 2021, the Member States had to adopt their third RBMPs for the third management cycle 2022-2027. A river basin district is composed of an area of land and sea, made up of one or more neighboring river basins together with their associated groundwaters and coastal waters.<sup>22</sup>

Besides the water planning level, the objectives of the WFD have to be respected in singular permitting procedures for projects affecting water quality or quantity.

The potential scope of application depends on the respective exemption: whereas Article 4(7) WFD can be applied both in the singular permit procedure of the 'project' causing the failure to achieve the objectives of the WFD and in the relevant RBMP<sup>23</sup>, Article 4(4) and Article (5) WFD may solely be applied in the RBMP.<sup>24</sup> In contrast, Article 4(6) WFD is not relevant when a RBMP is produced because it can only justify a failure to reach the objectives retrospectively after the occurrence of unforeseeable natural circumstances or force majeure.

Common to all these exemptions are strict conditions to be met and a justification to be included in the RBMP.

The following remarks will focus on Article 4(4) and (5) WFD, because those are the one mostly used in the latest update of RBMPs and the CJEU has already given some guidance on the application of Article 4(7) WFD.<sup>25</sup>

When putting a body of water under exemption, Article 4(4)(b), (5)(d) WFD require Member States to specifically set out the reasons in the RBMP and their updates.<sup>26</sup> Recitals 30 and 31 indicate that this should include applying appropriate and evident criteria in the decision making and making transparent those criteria, the underlying data and assessment made.<sup>27</sup>

The main objective of the WFD was to achieve 'good status' for all EU surface waters and groundwater by 2015.<sup>28</sup> It follows from this purpose of the WFD and the strict and cumulative conditions in Article 4(4)-4(7)<sup>29</sup> that the use of exemptions should not be the rule, but exceptional.<sup>30</sup> The CJEU has held that exceptions are to be interpreted strictly so that general rules

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<sup>21</sup> See Article 13 WFD.

<sup>22</sup> Article 2(15.) WFD.

<sup>23</sup> CJEU, Judgement of 11 September 2012, C-43/10, EU:C:2012:560, para. 62.

<sup>24</sup> Breuer, Gärditz (2017). *Öffentliches und privates Wasserrecht*, para. 168.

<sup>25</sup> See for example CJEU, Judgement of 4 May 2016, *European Commission v Republic of Austria*, C-346/14, EU:C:2016:322.

<sup>26</sup> European Commission and Directorate-General for the Environment (2009). *Guidance document on exemptions to the environmental objectives*. Guidance document No 20, p. 16.

<sup>27</sup> European Commission and Directorate-General for the Environment (2009). *Guidance document on exemptions to the environmental objectives*. Guidance document No 20, p. 16.

<sup>28</sup> CJEU, Judgement of 28 May 2020, *IL and Others v Land Nordrhein-Westfalen*, C-535/18, EU:C:2020:39, para. 71.

<sup>29</sup> Reese (2016). *Voraussetzungen für verminderte Gewässerschutzziele nach Art. 4 Abs. 5 WRRL*, *Zeitschrift für Umweltrecht*, 203-15, p. 206.

<sup>30</sup> See also European Commission and Directorate-General for the Environment (2009). *Guidance document on exemptions to the environmental objectives*. Guidance document No 20, p. 12.

are not negated.<sup>31</sup> Consequently, the exemptions in Article 4 need to be applied and interpreted **restrictively**.<sup>32</sup>

In addition, this hierarchy between Article 4(1) and the exemptions is supported by Article 4(8) WFD which obliges Member States to ensure that the application of paragraphs (3)-(7) does not permanently exclude or compromise the achievement of the objectives of WFD in other bodies of water within the same river basin district. Since the WFD aims at an overall protection of European waters, Article 4(8) should also be applied to water bodies of other river basin districts.<sup>33</sup> Further, according to Article 4(8) WFD, the application of exemptions has to be consistent with the implementation of other Community environmental legislation. This means that exemptions cannot justify a deviation from other obligations or standards, e.g. from the Habitats Directive.<sup>34</sup>

Importantly, the exemptions under Article 4(4) – 4(7) WFD **may not be applied to all objectives** stated in Article 4(1) WFD<sup>35</sup>. This follows from the fact that some of the objectives listed in Article 4(1) refer to all or some of the exemptions in Article 4(4) – 4(7) and others do not.<sup>36</sup> Consequently, whereas relying on an exemption regarding the achievement of good status of a water body is possible, there is no legal way to derogate from the phase-out requirement of certain pollutants, such as mercury, after 2028 the latest.<sup>37</sup>

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<sup>31</sup> See CJEU, Judgement of 26 February 2015, *Wucher Helicopter GmbH/Euro-Aviation Versicherungs-AG v Fridolin Santer*, C-6/14, EU:C:2015:122, para. 24.

<sup>32</sup> See Reese (2016). Voraussetzungen für verminderte Gewässerschutzziele nach Art. 4 Abs. 5 WRRL, *Zeitschrift für Umweltrecht*, 203–15, p. 206; Reese (2018). Die Wasserrahmenrichtlinie in der Umsetzungskrise - Fortbestehende Umsetzungsdefizite und rechtlicher Handlungsbedarf zur ökologischen Gewässerentwicklung, *Neue Zeitschrift für Verwaltungsrecht*, 1592, p. 1596. For a different interpretation see: Spieth, Ipsen (2011). Verbiendet die Wasserrahmenrichtlinie den Bau von Kohlekraftwerken?, *Neue Zeitschrift für Verwaltungsrecht*, 536, p. 537.

<sup>33</sup> Ginzky (2015). Ausnahmen zu den Bewirtschaftungszielen im Wasserrecht, *Zeitschrift für Umweltrecht*, 515, p. 521.

<sup>34</sup> European Commission and Directorate-General for the Environment (2009). European Commission, Directorate-General for Environment, Guidance document on exemptions to the environmental objectives. Guidance document No 20, p. 11.

<sup>35</sup> CJEU, Judgement of 24 June 2021, *European Commission v Kingdom of Spain*, C-559/19, EU:C:2021:512, para. 45. A different interpretation is stated in European Commission and Directorate-General for the Environment (2009). Guidance document on exemptions to the environmental objectives. Guidance document No 20, p. 11.

<sup>36</sup> See Köck, Möckel (2010). Quecksilberbelastungen von Gewässern durch Kohlekraftwerke – Auswirkungen auf die Genehmigungsfähigkeit, *Neue Zeitschrift für Verwaltungsrecht*, 1390, p. 1391.

<sup>37</sup> Kremer (2013). The Prohibition of Mercury Discharges from Coal-Fired Power Stations under European Law, *Journal for European Environmental & Planning Law*, 10(2), 132-151, p. 141.

Objective	Type of water body	Applicable exemption
Achieve good status	Surface waters and groundwater	Article 4(4), (5), (6), (7) WFD
Achieve good ecological potential and good chemical status	Artificial and heavily modified bodies of surface water	Article 4(4), (5), (6), (7) WFD
Prevent deterioration	Surface waters and groundwater	Article 4(6), (7) WFD
Prevent and limit input of pollutants	Groundwater	Article 4(6), (7) WFD
Phase-out emissions, discharges and losses of priority hazardous substances	Surface waters	No exemption possible
Trend reversal in the concentration of pollutants	Groundwater	No exemption possible
Protection standards and objectives	Protected area	No exemption possible

The Commission has given some guidance on the interpretation of the exemptions<sup>38</sup>. However, this guidance “as useful as it may be, has no binding effect”.<sup>39</sup> It presents an informal consensus at the time on common understanding of the WFD provisions and best practice agreed by all partners such as European Commission, Member States, stakeholders.

### 1.2.2. Article 4(4) WFD

Three alternative reasons may lead to a situation where the necessary improvements of bodies of water cannot reasonably be achieved within the prescribed timeframe:

- technical feasibility (Article 4(a)(i) WFD)
- disproportionate costs (Article 4(a)(ii) WFD) or
- natural conditions (Article 4(a)(iii) WFD).

All reasons assume that measures have already been taken, but the recovery of a water body takes more time.<sup>40</sup> Even if one of the three reasons of Article 4(4) is given, Article 4(4) WFD requires

<sup>38</sup> European Commission and Directorate-General for the Environment (2009). Guidance document on exemptions to the environmental objectives. Guidance document No 20.

<sup>39</sup> See Kremer (2013). The Prohibition of Mercury Discharges from Coal-Fired Power Stations under European Law, *Journal for European Environmental & Planning Law*, 10(2), 132-151, p. 147.

<sup>40</sup> See also Clarification on the application of WFD Article 4(4) time extensions in the 2021 RBMPs and practical considerations regarding the 2027 deadline, Document endorsed by EU Water Directors at their meeting in Malta on 15-16 June 2017, p. 6.

Member States to ensure that **no further deterioration** occurs in the status of the affected water body.<sup>41</sup>

From the 4<sup>th</sup> management cycle starting in 2028, extensions of the deadline may not be granted due to technical infeasibility or disproportionate costs, but only due to **natural conditions** (Article 4(4) (c) WFD). Therefore, the meaning of this alternative will now be most important within the scope of Article 4(4) WFD. It can be difficult to distinguish between a situation of technical infeasibility and natural conditions, because both are based on factual circumstances.<sup>42</sup> Nevertheless, this fact must not lead to interpreting every technical difficulty as the result of natural conditions. This would deprive Article 4(4)(a)(i) WFD and circumvent the intention of the EU legislator that no deadline extension is possible beyond 2027 in the event of technical difficulties.<sup>43</sup> Natural conditions are those factors that cannot be influenced by humans, such as climatic, geological or hydrological conditions.<sup>44</sup> Reasons of technical feasibility, on the other hand, rather stem from anthropogenic causes; for example, when a remediation technique typically takes a couple of years to be completed.<sup>45</sup>

Besides the general procedural requirements outlined above, when extending the deadline, Member States, are required to:

**summarize** the **measures** they envisage as necessary to bring the bodies of water under exemption progressively to the required status by the extended deadline in the RBMP.

summarize the **reasons** for any significant **delay** in making these measures operational, and the expected timetable for the implementation of those delayed<sup>46</sup> measures in the RBMP

include a **review** of the implementation of those measures and a summary of additional measures in the following updates of the RBMP.

All of these formalities are conditional for the application of the extension. Therefore, if Member States claim to rely on the time extension without, for example, outlining concrete measures to reach the objective and when they expect them to take full effect<sup>47</sup>, they act unlawfully.<sup>48</sup>

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<sup>41</sup> As this already follows from Article 4(1)(a)(i) and (b)(i) WFD the independent meaning of this condition remains unclear, see Port (2011). Die Umweltziele der Wasserrahmenrichtlinie, p. 158.

<sup>42</sup> Czychowski, Reinhardt (2019). Wasserhaushaltsgesetz, § 29, para. 9.

<sup>43</sup> Ginzky (2015). Ausnahmen zu den Bewirtschaftungszielen im Wasserrecht, Zeitschrift für Umweltrecht, 515, p. 521.

<sup>44</sup> See also Clarification on the application of WFD Article 4(4) time extensions in the 2021 RBMPs and practical considerations regarding the 2027 deadline, Document endorsed by EU Water Directors at their meeting in Malta on 15-16 June 2017, p. 5.

<sup>45</sup> Ginzky (2015). Ausnahmen zu den Bewirtschaftungszielen im Wasserrecht, Zeitschrift für Umweltrecht, 515, p. 521.

<sup>46</sup> See European Commission and Directorate-General for the Environment (2009). Guidance document on exemptions to the environmental objectives. Guidance document No 20, p. 16.

<sup>47</sup> Ginzky (2015). Ausnahmen zu den Bewirtschaftungszielen im Wasserrecht, Zeitschrift für Umweltrecht, 515, p. 521.

<sup>48</sup> Kremer (2013). The Prohibition of Mercury Discharges from Coal-Fired Power Stations under European Law, Journal for European Environmental & Planning Law, 10(2), 132-151, p. 147. For a different view see Port (2011). Die Umweltziele der Wasserrahmenrichtlinie, p. 158. There is some debate, however, around whether an infringement of these procedural requirements renders a time extension invalid. The wording of Article 4 (4) WFD, which lists these conditions on the same level as, for example, the material reasons of natural conditions

To conclude, when Member States extend the deadline to reach good status they have to take **concrete measures** to bring the water bodies progressively to good status by **the extended deadline**. Article 4(4) WFD stipulates that the time limits may be extended for the purposes of the phased *achievement* of the objectives of bodies of water. Thus, even when all the conditions in Article 4(4) are given, Member States have to plan how and when to achieve good status/ potential for a body of water.

### 1.2.3. Article 4(5) WFD

Given four, cumulative conditions stated in Article 4(5) Member States may aim to achieve less stringent environmental objectives.

First, the respective water body has to be so affected by human activity or its natural condition to be such that the achievement of the objectives would be infeasible or disproportionately expensive. Human activities include past, current and future activities irrespective of whether they are voluntary or not.<sup>49</sup> Natural conditions can be interpreted as in Article 4(4) WFD. The term “infeasible” does not only include technical infeasibility, but also situations where a Member State cannot, at least partially, control a problem.<sup>50</sup>

Of high practical importance is the determination of **disproportionate costs**. This alternative refers to a situation where measures to reach the objective exist, but are associated with relatively high costs.<sup>51</sup>

Relying on disproportionate costs requires a thorough **quantitative and qualitative analysis** of the costs and benefits of the measure(s) that would lead to reaching the objective.<sup>52</sup> When assessing the relevant **costs**, only the specific costs of the supplementary measures (Article 11(4) WFD) are decisive. The costs of the so-called basic measures (Article 11(3) WFD) are irrelevant, because those measures were already to be taken under other directives.<sup>53</sup> It should further be considered that implementation costs can be spread over several planning cycles and distributed amongst different stakeholders, including the state.<sup>54</sup> Even harder is the assessment of the **benefits** of the

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etc., indicates that this is the case; Federal Administrative Court of Germany, Judgement of 2 November 2017, 7 C 25/15, para. 63.

<sup>49</sup> Giesberts, Reinhardt (2020). BeckOK Umweltrecht, WHG § 30, para. 4. That past activities are also covered, follows from the wording of Article 4(5)(a) WFD as well as the reference to the stocktaking provided for in Article 5(1) WFD, which logically must refer to the past, see Ginzky (2015). *Ausnahmen zu den Bewirtschaftungszielen im Wasserrecht*, Zeitschrift für Umweltrecht, 515, p. 522.

<sup>50</sup> See European Commission and Directorate-General for the Environment (2009). Guidance document on exemptions to the environmental objectives. Guidance document No 20, p. 13.

<sup>51</sup> Ginzky (2015). *Ausnahmen zu den Bewirtschaftungszielen im Wasserrecht*, Zeitschrift für Umweltrecht, 515, p. 519.

<sup>52</sup> Critically about the possibility to assess ecological benefits in quantitative terms: Ginzky (2015). *Ausnahmen zu den Bewirtschaftungszielen im Wasserrecht*, Zeitschrift für Umweltrecht, 515, p. 519.

<sup>53</sup> Reese (2016). *Voraussetzungen für verminderte Gewässerschutzziele nach Art. 4 Abs. 5 WRRL*, Zeitschrift für Umweltrecht, 203–15, p. 208.

<sup>54</sup> European Commission and Directorate-General for the Environment (2009). Guidance document on exemptions to the environmental objectives. Guidance document No 20, pp. 13–

measure in question. Also, long term benefits, such as mitigating the impacts from climate change, should be taken into account.<sup>55</sup> Finally, the costs and benefits of the measure have to be compared: the costs have to appear disproportionate in comparison to the benefits. It can be argued that the adoption of the WFD includes the European legislator's assessment that the costs associated with the implementation of the objectives are generally justified by the ecological benefits.<sup>56</sup> Hence, the margin by which costs exceed benefits should be appreciable and have a high level of confidence.<sup>57</sup>

Secondly, Article 4(5) requires that the environmental and socioeconomic – public or private<sup>58</sup> – needs served by the human activity cannot be achieved by **other means**, which are a significantly better environmental option not entailing disproportionate costs. Since the exemptions have to be interpreted narrowly, alternatives within the meaning of Article 4(5) have to be interpreted widely and include other types of measures and measures in other locations.<sup>59</sup> For that reason, it can well be argued that, for example, the use of coal for energy generation cannot fall under Article 4(5) because energy can be generated by other means, e.g. renewables.<sup>60</sup>

As a third condition<sup>61</sup>, Member States have to ensure that the **best possible status** is achieved with only inevitable impacts due to the nature of the human activity or pollution (Article 4(5)(b) WFD).

Finally, Article 4(5)(c) WFD clarifies that also when the further conditions of Article 4(5) are met, **no further deterioration** may occur in the affected body of water.

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14; Ginzky (2015). Ausnahmen zu den Bewirtschaftungszielen im Wasserrecht, Zeitschrift für Umweltrecht, 515, p. 519.

<sup>55</sup> See European Commission and Directorate-General for the Environment (2009). Guidance document on exemptions to the environmental objectives. Guidance document No 20, p. 33.

<sup>56</sup> Reese (2018). Die Wasserrahmenrichtlinie in der Umsetzungskrise - Fortbestehende Umsetzungsdefizite und rechtlicher Handlungsbedarf zur ökologischen Gewässerentwicklung, Neue Zeitschrift für Verwaltungsrecht, 1592, p. 1596.

<sup>57</sup> European Commission and Directorate-General for the Environment (2009). Guidance document on exemptions to the environmental objectives. Guidance document No 20, p. 13.

<sup>58</sup> Ginzky (2015). Ausnahmen zu den Bewirtschaftungszielen im Wasserrecht, Zeitschrift für Umweltrecht, 515, p. 522.

<sup>59</sup> European Commission and Directorate-General for the Environment (2009). Guidance document on exemptions to the environmental objectives. Guidance document No 20, p. 15; Ginzky (2015). Ausnahmen zu den Bewirtschaftungszielen im Wasserrecht, Zeitschrift für Umweltrecht, 515, pp. 519–20.

<sup>60</sup> Kremer (2013). The Prohibition of Mercury Discharges from Coal-Fired Power Stations under European Law, Journal for European Environmental & Planning Law, 10(2), 132–151, p. 147. See also Köck, Möckel (2010). Quecksilberbelastungen von Gewässern durch Kohlekraftwerke – Auswirkungen auf die Genehmigungsfähigkeit, Neue Zeitschrift für Verwaltungsrecht, 1390, p. 1395. Different view Administrative Court of Cottbus, Judgement of 23 October 2012, VG 4 K 312/10: In this case, the court refused to consider alternatives arguing with the general planning decisions from the government of Brandenburg. This approach seems to conflict with the fact that the WFD addresses Member States as a whole to implement the WFD.

<sup>61</sup> It is doubtful whether Article 4(5)(b) WFD constitutes a material condition or limits the legal consequence, see Port (2011). Die Umweltziele der Wasserrahmenrichtlinie, p. 162.

## 2. Case studies

### 2.1 Poor groundwater status due to lignite mining

In Germany and Poland, all active lignite mines are impacting groundwater bodies to such an extent that exemptions have been applied. In the Polish part of Oder, the Bełchatów and Turów lignite mines alone are reason for groundwater area of 2752 km<sup>2</sup> to be under Article 4(5) exemptions due to 'technical feasibility'.<sup>62</sup> In the German part of Elbe and Oder, a groundwater area of 5727 km<sup>2</sup> is under Article 4(5) exemptions due to poor quantitative and/or poor chemical status because of lignite mining.<sup>63</sup> It is argued that, since the WFD's objectives cannot be achieved even within extended deadlines, due to lack of technical feasibility, less stringent objectives must be applied. It is stated that lignite mining has been determined as superior public interest by the respective federal states and that this remains valid despite the German coal phase out, as power generation by lignite combustion plays a vital role in the security of an affordable power supply until 2038. This reasoning is not in line with the condition (for Article 4(5) application) that human and societal needs cannot be achieved by other means, as the lignite mine is intended for energy generation which could instead be achieved by employment of renewable energy sources which constitutes a better environmental option and does not come at a disproportionate cost.

The authorities have also failed to consider the benefits of early coal mine closure. Not only will the remediation costs be lower the smaller the mine pit is, but the costs related to climate change, in Germany and globally cannot be ignored.

Additionally, in the federal states of Saxony and Saxony-Anhalt and in all of Poland, lignite mine drainage is exempt from fees.<sup>64</sup> In the federal state of Brandenburg, lignite mine drainage is subjected to fees only if the water is further used, e.g. for drinking water. By granting the lignite sector free mine drainage, Poland and Germany have failed to put in place basic measures. In the case of Germany, this cannot be seen as other than a political choice, as the federal state of North Rhine-Westphalia introduced a water fee for lignite mine drainage in 2011.

Not only does a lack of water fees for water-intensive industry fail to set incentives for efficient water use, it also deprives the authorities of revenues to fund measures. Lack of finances was stated as a significant water management issue in the draft RBMP for the Polish Oder, while a water abstraction fee for coal mine drainage could have brought in an estimated 20 million euro per year.

### 2.2 – Poor surface water chemical status due to mercury deposition

In the Elbe river basin, almost every case where extended deadline under Article 4(4) has been requested or granted, is due to failure to meet environmental quality standards for mercury or brominated diphenyl ethers.<sup>65</sup> This means that up to 88% of surface water bodies in the Elbe could

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<sup>62</sup> Polish Waters [draft 3rd cycle RBMP for Oder](#)

<sup>63</sup> River Basin Community Elbe, [3rd cycle RBMP for Elbe](#)

<sup>64</sup> European Environmental Bureau ([Mind the Gap](#), 2020)

<sup>65</sup> International Commission for the Protection of the Elbe River [International management plan for the Elbe river basin district](#)

be under exemptions due to mercury pollution. In the German part of the Elbe river basin, none of the surface water bodies are in good chemical status, with mercury as main cause for failure, and are therefore all placed under Article 4(4) exemptions.<sup>66</sup> However, the presence of mercury pollution is not linked to coal combustion, but its presence is described as 'ubiquitous' despite the fact that three of the EU's top-10 mercury-emitting facilities are lignite power plants in the German part of the Elbe river basin, together responsible for close to 2 tonnes of mercury per year.<sup>67</sup>

In the whole Elbe river basin, 3% of surface waters are expected to reach good chemical status by 2027, but as the international RBMP for Elbe notes, this is due to national methodology, as the Czech Republic does not apply monitoring of mercury and brominated diphenyl ether (BDE) in biota to all water bodies. Mercury bioaccumulates and can therefore be found in high concentrations in fish even if the quality standard in water is not exceeded.

In the German part of Elbe, technical feasibility and natural conditions are used as justification for deadline extension, but it is hard to see that Germany really has been taking the necessary measures to curb mercury emissions as Germany was among the countries that waited until the last minute to implement EU emission limit values for mercury (required by August 2021) and still does not require coal plants to install the best available mercury control techniques.

Germany is aiming for a 2030 coal exit, and the German programme of measures states that the coal phase-out eventually will contribute to a reduction of mercury pollution, but this will surpass even the latest phasing out-deadline by two years. In case the lower range BAT is not adhered to, this will result in several tonnes of mercury emissions that could have been avoided – in times where Germany is even burning more coal due to the current energy crisis. Several other countries are sticking to late coal exits, including Romania (2032), Bulgaria (2038 to 2040) and Poland (sometime in the 2040s).<sup>68</sup> These countries are bound to continue emitting mercury beyond the phase-out deadline set by the WFD.

## 2.3 Article 4(7) exemptions for new coal projects

The Polish authorities decided last minute to delay the publishing of the 3<sup>rd</sup> cycle RBMP by one year.<sup>69</sup> The draft River Basin Management Plan for Oder includes five Article 4(7) exemptions for mining projects.<sup>70</sup> Two of these are new for this planning cycle: the Złoczew lignite mine and the expansion of the "Borynia/Szeroka I" hard coal mine. The justifications given are very extensive, but do not bring enough evidence that the exemptions are actually justified. They typically include energy security and social importance (employment in coal regions) and cite many strategic documents. Moreover, all Article 4(7) exemptions that have been granted in the previous planning cycles, have been rewritten without any analysis if they are still justified and necessary even though Article 4(7)(b) WFD requires a review of the objectives every six years.

Additionally, in some cases the authorities rely on the argument that refraining from extracting the mineral, when the necessary infrastructure for extraction already exists, would not be rational and therefore would breach the Environment protection law. This seems to be insufficient from a legal perspective because Member States need to justify that all the conditions of Art. 4(7) WFD are met - which is already questionable because Article 4(7) WFD only applies to "new" projects.

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<sup>66</sup> River Basin Community Elbe [3rd cycle RBMP](#)

<sup>67</sup> EEA [Industrial Emissions Portal](#)

<sup>68</sup> Europe Beyond Coal, [Coal Exit Tracker](#)

<sup>69</sup> See aPGW [The validity period of the 2016 water management plans was extended until 22.12.2022](#)

<sup>70</sup> Polish Waters [draft 3rd cycle Oder RBMP](#)



# Way forward

What can and should Member States do to comply with the WFD, in particular to reach good status/ potential of bodies of water, instead of trying to rely on exemptions? Article 11(1) WFD stipulates that for a river basin district, a programme of measures is to be produced in order to achieve the objectives under Article 4. Each programme of measures should include certain basic measures and, as necessary, supplementary measures (Article 11(2) WFD).

Basic measures are the minimum requirements to be complied with in the programme of measures and are spelled out in Article 11(3) WFD. The list includes, among others, measures implementing the principle of recovery of the costs of water services (Article 11(3)(b), 9(1) WFD). Measures implementing this principle may also contribute to reaching the objectives of Article 4(1) WFD.<sup>71</sup> Supplementary measures are designed and implemented in addition to achieve the objectives of Article 4 and include, for example, administrative, legislative instruments or emission controls (Article 11(4) sentence 2, Annex IV, Part B (i), (ii), (v) WFD).

The restoration of good water ecology is not only the responsibility of the authority producing the programme of measures, but of the state or country as a whole.<sup>72</sup> This is illustrated by a decision of the ECJ stating that Member States are required to refuse authorisation for a project, where it is such as to result in deterioration of the status of the body of water concerned or to jeopardise the attainment of good surface water status (if this is not justified under Article 4(4)-(7) WFD).<sup>73</sup> Since it is usually not one single project that leads to the failure to achieve the WFD's objectives, permits have to take into account cumulative effects.<sup>74</sup> Article 11(5) WFD explicitly states that when there's indication that the Article 4(1) objectives are unlikely to be achieved Member States shall, among others, ensure that relevant permits and authorisations are examined and reviewed as appropriate and introduce additional measures to achieve those objectives: including the establishment of stricter environmental quality standards.

In particular, when it comes to large industrial activities, it also follows from Art. 14(1), 18 Industrial Emissions Directive (IED) that Member States shall ensure that permits for those activities include all measures necessary to comply with environmental quality standards, such as Article 4(1) WFD, even if those require stricter conditions than those achievable by the use of best available techniques as required under the IED.<sup>75</sup>

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<sup>71</sup> See Article 9(2) WFD.

<sup>72</sup> Reese (2018). Die Wasserrahmenrichtlinie in der Umsetzungskrise - Fortbestehende Umsetzungsdefizite und rechtlicher Handlungsbedarf zur ökologischen Gewässerentwicklung, *Neue Zeitschrift für Verwaltungsrecht*, 1592, p. 1598.

<sup>73</sup> CJEU, Judgement of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland e.V. v Bundesrepublik Deutschland*, C-461/13, EU:C:2015:433, para. 50, 51.

<sup>74</sup> See from a practical perspective A. Anapyanova and T. Ormond, 'Conference report: Protection of groundwater under the Water Framework Directive: Member States Obligations and recent judgements' (2021) *elni Review* 41-47.

<sup>75</sup> See Köck, Möckel (2010). Quecksilberbelastungen von Gewässern durch Kohlekraftwerke - Auswirkungen auf die Genehmigungsfähigkeit, *Neue Zeitschrift für Verwaltungsrecht*, 1390, p. 1396.

# Recommendations for Member States

Make full use of the measures provided by the Water Framework Directive and other EU rules to bring EU waters to good status as soon as possible and by 2027 at the latest. For the coal sector, this includes:

- Do not approve any new coal projects and close existing coal mines and plants
- Require large combustion plants to abate mercury emissions as much as technically possible (down to 1µg/Nm<sup>3</sup>).<sup>76</sup> Implement and effectively use Article 18 IED by setting stricter emission limit values for industrial activities where needed. Require closer cooperation between IED and water authorities.
- Establish pathway emission inventories for mercury and other priority substances and take clear measures now to reduce and phase out their emissions, discharges and losses.
- Do proper cost benefit analysis before applying exemptions and include the long-term costs related to climate change in the decision-making
- Do proper economic analysis and put in place economic instruments for cost recovery for the coal sector, including mine drainage fees and adequate fees for cooling water abstraction that account for the external costs of operation. Earmark the revenues for restoration measures.

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<sup>76</sup> Commission Implementing Decision (EU) 2017/1442 of 31 July 2017 establishing best available techniques (BAT) conclusions for [large combustion plants](#)



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