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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

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1. Introduction

1.1 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 2nd 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.[1] More than half of Europe's water bodies are under exemptions.[2] In its assessment of the 2nd RBMPs, the Commission recommended that Member States should reduce the reliance on exemptions and improve transparency in relation to the justifications used.[3]

Member States were due to update their RBMPs by December 2021. This 3rd 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.[4] 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 3rd cycle RBMPs.[5]

1.2 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.[6] 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**.[7] Thermal combustion plants are the main anthropogenic source of mercury in the EU, responsible

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

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

[3] European Commission (2019). 5th report on the implementation of the WFD.

[4] EEB (2021). Living Rivers Europe, The Final Sprint for Europe's Rivers.

[5] European Commission. Status of implementation of the WFD in the Member States.

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

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

for more than half of total reported emissions to air in 2017, with the main part coming from coal plants.[8] 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.[9] The Bełchatów 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.[10]

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).

[8] 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.
[9] EEB (2021). Tackling Mercury Pollution of EU Waters - Why coal combustion must end by 2027 at the latest.
[10] BMUV/ UBA (2022). Die Wasserrahmenrichtlinie – Gewässer in Deutschland 2021. Fortschritte und Herausforderungen, p. 32.

2. Legal background

2.1 Environmental objectives

The legally binding[11] 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.[12] 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.[13] A body of groundwater is considered to be in good status when both its chemical and quantitative status is good.[14]

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[15] 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[16] 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**.[17]

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.[18]

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.

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[11] 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.

[12] See Article 2(18.) WFD.

[13] Article 4(1)(a)(iii) See Ginzky (2015). Ausnahmen zu den Bewirtschaftungszielen im Wasserrecht, Zeitschrift für Umweltrecht, 515, p. 516.

[14] See definition in Article 2(20.) WFD.

[15] 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)

[16] 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).

[17] Article 2 (22.) WFD.

[18] Article 2 (26., 28.) WFD.

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.[19]

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.[20]

2.2 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.

Procedure and general remarks

The central instrument to reach the objectives of the WFD are the RBMPs.[21] 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.[22]

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[23], Article 4(4) and Article (5) WFD may solely be applied in the RBMP.[24] 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.

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[19] 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.

[20] 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). Verbietet die Wasserrahmenrichtlinie den Bau von Kohlekraftwerken?, Neue Zeitschrift für Verwaltungsrecht, 536.

[21] See Article 13 WFD.

[22] Article 2(15.) WFD.

[23] CJEU, Judgement of 11 September 2012, C-43/10, EU:C:2012:560, para. 62.

[24] Breuer, Gärditz (2017). Öffentliches und privates Wasserrecht, para. 168.

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.[25]

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.[26] 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.[27]

The main objective of the WFD was to achieve 'good status' for all EU surface waters and groundwater by 2015.[28] It follows from this purpose of the WFD and the strict and cumulative conditions in Article 4(4)-4(7)[29] that the use of exemptions should not be the rule, but exceptional.[30] The CJEU has held that exceptions are to be interpreted strictly so that general rules are not negated.[31] Consequently, the exemptions in Article 4 need to be applied and interpreted **restrictively**.[32]

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.[33] 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.[34]

Importantly, the exemptions under Article 4(4) – 4(7) WFD **may not be applied to all objectives** stated in Article 4(1) WFD[35]. 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.[36] Consequently, whereas relying on an exemption regarding the achievement of good status of a water body is

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

[26] European Commission and Directorate-General for the Environment (2009). Guidance document on exemptions to the environmental objectives. Guidance document No 20, p. 16.

[27] European Commission and Directorate-General for the Environment (2009). Guidance document on exemptions to the environmental objectives. Guidance document No 20, p. 16.

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

[29] Reese (2016). Voraussetzungen für verminderte Gewässerschutzziele nach Art. 4 Abs. 5 WRRL, Zeitschrift für Umweltrecht, 203–15, p. 206.

[30] 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.

[31] 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.

[32] 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). Verbietet die Wasserrahmenrichtlinie den Bau von Kohlekraftwerken?, Neue Zeitschrift für Verwaltungsrecht, 536, p. 537.

[33] Ginzky (2015). Ausnahmen zu den Bewirtschaftungszielen im Wasserrecht, Zeitschrift für Umweltrecht, 515, p. 521.

[34] 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.

[35] 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.

[36] See Köck, Möckel (2010). Quecksilberbelastungen von Gewässern durch Kohlekraftwerke – Auswirkungen auf die Genehmigungsfähigkeit, Neue Zeitschrift für Verwaltungsrecht, 1390, p. 1391.

possible, there is no legal way to derogate from the phase-out requirement of certain pollutants, such as mercury, after 2028 the latest.[37]

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[38]. However, this guidance "as useful as it may be, has no binding effect".[39] 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.

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.[40] Even if one of the three reasons of Article 4(4) is given, Article 4(4) WFD requires

[37] 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.
[38] European Commission and Directorate-General for the Environment (2009). Guidance document on exemptions to the environmental objectives. Guidance document No 20.
[39] 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.
[40] 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.[41]

From the 4th 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.[42] 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.[43] Natural conditions are those factors that cannot be influenced by humans, such as climatic, geological or hydrological conditions.[44] 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.[45]

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[46] 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[47], they act unlawfully.[48]

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.

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[41] 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.

[42] Czychowski, Reinhardt (2019). Wasserhaushaltsgesetz, § 29, para. 9.

[43] Ginzky (2015). Ausnahmen zu den Bewirtschaftungszielen im Wasserrecht, Zeitschrift für Umweltrecht, 515, p. 521.

[44] 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.

[45] Ginzky (2015). Ausnahmen zu den Bewirtschaftungszielen im Wasserrecht, Zeitschrift für Umweltrecht, 515, p. 521.

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

[47] Ginzky (2015). Ausnahmen zu den Bewirtschaftungszielen im Wasserrecht, Zeitschrift für Umweltrecht, 515, p. 521.

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

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.[49] 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.[50]

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.[51]

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.[52] 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.[53] It should further be considered that implementation costs can be spread over several planning cycles and distributed amongst different stakeholders, including the state.[54] Even harder is the assessment of the **benefits** of the measure in question. Also, long term benefits, such as mitigating the impacts from climate change, should be taken into account.[55] 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.[56] Hence, the margin by which costs exceed benefits should be appreciable and have a high level of confidence.[57]

Secondly, Article 4(5) requires that the environmental and socioeconomic – public or private[58] – 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

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[49] 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.

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

[51] Ginzky (2015). Ausnahmen zu den Bewirtschaftungszielen im Wasserrecht, Zeitschrift für Umweltrecht, 515, p. 519.

[52] 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.

[53] Reese (2016). Voraussetzungen für verminderte Gewässerschutzziele nach Art. 4 Abs. 5 WRRL, Zeitschrift für Umweltrecht, 203–15, p. 208.

[54] European Commission and Directorate-General for the Environment (2009). Guidance document on exemptions to the environmental objectives. Guidance document No 20, pp. 13–14; Ginzky (2015). Ausnahmen zu den Bewirtschaftungszielen im Wasserrecht, Zeitschrift für Umweltrecht, 515, p. 519.

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

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

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

[58] Ginzky (2015). Ausnahmen zu den Bewirtschaftungszielen im Wasserrecht, Zeitschrift für Umweltrecht, 515, p. 522.

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.[59] 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.[60]

As a third condition[61], 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.

[59] 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.

[60] 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.

[61] 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.

3. Case studies

3.1 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^2 to be under Article 4(5) exemptions due to 'technical feasibility'.[62] In the German part of Elbe and Oder, a groundwater area of 5727 km^2 is under Article 4(5) exemptions due to poor quantitative and/or poor chemical status because of lignite mining.[63] 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.[64] 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.

3.2 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.[65] This means that up to 88% of surface water bodies in the Elbe could 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

[62] Polish Waters. Draft 3rd cycle RBMP for Oder.
[63] River Basin Community Elbe. 3rd cycle RBMP for Elbe.
[64] EEB (2020). Mind the Gap, Mapping hidden subsidies for the coal and lignite industry.
[65] International Commission for the Protection of the Elbe River. International management plan for the Elbe river basin district.

are therefore all placed under Article 4(4) exemptions.[66] 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.[67]

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).[68] These countries are bound to continue emitting mercury beyond the phase-out deadline set by the WFD.

3.3 Article 4(7) exemptions for new coal projects

The Polish authorities decided last minute to delay the publishing of the 3rd cycle RBMP by one year.[69] The draft River Basin Management Plan for Oder includes five Article 4(7) exemptions for mining projects.[70] 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" project.

[66] River Basin Community Elbe. 3rd cycle RBMP.
[67] EEA. Industrial Emissions Portal.
[68] Europe Beyond Coal. Coal Exit Tracker.
[69] See aPGW. The validity period of the 2016 water management plans was extended until 22.12.2022.
[70] Polish Waters. Draft 3rd cycle Oder RBMP.

4. 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.[71] 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.[72] 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).[73] 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.[74] 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.[75]

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[71] See Article 9(2) WFD.

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

[73] 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.

[74] 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.

[75] See Köck, Möckel (2010). Quecksilberbelastungen von Gewässern durch Kohlekraftwerke – Auswirkungen auf die Genehmigungsfähigkeit, Neue Zeitschrift für Verwaltungsrecht, 1390, p. 1396.

5. 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/Nm³).[76] 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.

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

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