



FACTSHEET

EU WATER LAW • JUNE 2022

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EU COUNTRIES ARE FAILING FRESHWATER ECOSYSTEMS

THE OVERUSE OF EXEMPTIONS TO THE WATER FRAMEWORK DIRECTIVE

Across Europe, national water authorities are failing to improve the health of European rivers, wetlands and aquifers by systematically applying exemptions to the EU's Water Framework Directive (WFD)¹. The WFD, which aims to bring the vast majority of European water bodies back to health by 2027, allows for some exemptions to its environmental objectives in a limited number of projects or sites.

However, the misuse and abuse of exemptions is one of the main reasons why WFD objectives are still far from being achieved in Europe. As was noted by the European Commission in its fifth WFD implementation report in February 2019: "The exemptions foreseen in Article 4 of the WFD currently cover around half of Europe's water bodies. This mainly concerns natural water bodies, but increasingly also heavily modified and artificial water bodies, next to new physical modifications. Whilst the justifications for such exemptions have overall improved, their persistent wide use is an indicator of the significant efforts still needed to achieve good status or potential by 2027."

- The misuse and abuse of exemptions is one of the main reasons why WFD objectives are still far from being achieved in Europe.
- Sweden is breaching the WFD by using exemptions as a general rule rather than applying them on a case-by-case basis.
- A general application of the OPI (overriding public interest) to justify the wide development of new harmful hydropower projects would mean a systematic suspension of the WFD.
- This could create a dangerous legal precedent, resulting in a permanent deterioration of European freshwater quality status.
- Hydropower could potentially be disregarded in favour of other renewables such as wind or solar power.

¹ The final sprint for Europe's rivers: An NGO analysis of 2022-2027 RBMPs. October 2021 <https://www.wwf.eu/?3697866/Most-of-Europes-river-basins-will-still-be-unhealthy-by-2027---new-report>



The European Court of Justice² established that the prevention of deterioration is binding and that a Member State must refuse authorisation for individual projects that would contradict water protection objectives, unless a derogation is applicable to the specific project. It was also established that deterioration of the water status occurs as soon as one of the quality elements falls by one class. The scope of the exemptions is therefore rather narrow and in order to be applied, several conditions need to be met.

THE ABUSE OF EXEMPTIONS FOR HYDROPOWER IN SWEDEN

On behalf of WWF, an environmental consultancy has conducted a [legal study](#) on the use of the exemptions for hydropower, which have been proposed by the Swedish government, to analyse whether they can be properly justified. The legal study found that water managers and decision makers are currently misusing legal flexibilities at the expense of freshwater health.

Sweden has recently started a legal process to mitigate the negative impact from hydropower on freshwater ecosystems by revising all licences for hydropower plants with new environmental conditions. However, the ecological benefit is being restricted by a political decision to make full use of the derogation regime and lower the ambitions of the environmental objectives in accordance with the possibilities found in the WFD. A planning goal has been set by the government limiting production losses to 2-3% of the annual energy production from hydropower that will come from the new modern environmental permits.

The report concludes that Sweden breaches the WFD by using exemptions as a general rule rather than applying it on a case-by-case basis. Neither legislation nor case law supports the conclusion that a politically set planning goal of 1.5 TWh/year for electricity production loss is enough to motivate an exception under Article 4(7) of the WFD. Furthermore, the European Commission has clarified that the exemptions and the individual permits under the WFD are closely connected and cannot be applied separately. A general exemption for

² Judgement of 1 July 2015, Bund für Umwelt und Naturschutz Deutschland, Case C-461/13, ECLI:EU:C:2015:433



hydropower, which has been established beforehand, is contrary to the site-specific nature of the WFD obligations.

JUSTIFYING EXEMPTIONS FOR HYDROPOWER

Hydropower is a low carbon technology with severe negative effects on the freshwater ecosystem³. According to the guidance document on exemptions of the environmental objectives of the WFD, hydropower is a form of new modification covered by Article 4(7). In order to be approved, a hydropower project should pass the 4(7) “test”. Indeed, the developer should take all practicable steps to mitigate the impact and explain the reasons for the alteration to the water body. They should also justify that the purpose of the alterations may not be achieved in any other way that is significantly better for the environment due to technical reasons or unreasonable costs, and demonstrate that the alterations are of overriding public interest (OPI). All these requirements must be fulfilled and Member States must show that a detailed and thorough analysis of site-specific circumstances of the waterbody concerned has been conducted.

In the *Schwarze Sulm* case⁴, the Commission alleged that the Austrian authorities had not fulfilled the condition to investigate alternatives, as they should have considered the feasibility of other more ecologically sustainable renewable energy sources. Even if the Commission's allegations were dismissed on the grounds of insufficient proof, the case suggests that the Commission believes that hydropower could potentially be disregarded in favour of other renewables such as wind or solar power.

The European Court of Justice⁵ also highlighted that, according to the Habitats Directive, the assessment of implications on a protected site should be complete, precise, and science driven. It could be argued that the “no reasonable scientific doubt” interpretation should also be applied to the WFD. In particular, this applies to the identification of appropriate mitigation measures and the assessment of more sustainable alternatives.

³ IGB, Feedback on the call for evidence: “renewable energy projects – permit granting processes & power purchase agreements”, April 2020

⁴ Judgement of 4 May 2016, *Commission v Austria*, Case C-346-14, ECLI:EU:C:2016:322

⁵ Judgement of 15 May 2014, *Briels and Others*, Case C-521/12, ECLI:EU:C:2014:330



Therefore, the issuing of individual permits should be based on strong scientific arguments and not on current political decisions.

The European Court of Justice⁶ has stated that hydropower might constitute an OPI only in limited, site specific and well-justified cases. This interpretation is in line with the precautionary principle, which is one of the fundamental principles of EU legislation.

A general application of the OPI to justify the wide development of new harmful hydropower projects would mean a systematic suspension of the WFD. This could create a dangerous legal precedent, resulting in a permanent deterioration of European freshwater quality status.

EUROPE'S WATER BODIES DEPEND ON THE WFD TO NURSE THEM BACK TO HEALTH

The WFD was adopted in 2000, giving European citizens the guarantee that the health of freshwater ecosystems will be improved and protected. Although further implementation is still needed for all water bodies to achieve good water status, huge steps have been made in many river basins across Europe.

In 2019, the European Commission carried out a WFD 'health check' which concluded that the WFD is fit for purpose. WWF believes that it is an ambitious legislation, which seeks to improve the health of rivers, wetlands and aquifers, whilst balancing the need to allocate and use water resources wisely for socioeconomic development.

The WFD sets national obligations on the sustainable use and management of water, allowing water managers to justify some exemptions. The path to good water status in the short, mid and longer terms under the WFD is guided by the adoption of five-year river basin management plans. The approval of the WFD was a fundamental societal gain, we cannot and do not need to weaken it.

WWF will keep defending the full implementation of WFD and will keep urging all Member States to protect and improve all their water bodies.

⁶ Judgement of 4 May 2016, Commission v Austria, Case C-346-14, ECLI:EU:C:2016:322