

**Common Implementation Strategy for the Water Framework Directive and the Floods Directive - Work Programme 2016-2018**

Terms of Reference for Ad-hoc Task Group under the Strategic Coordination Group



**Status/Version/date:** Final version agreed by the SCG on 08/03/2016

**Name of the Ad-hoc Task Group (ATG) – Guidance on implementation of article 4(7)**

**Scope of the work**

The Water Framework Directive (WFD) sets out binding<sup>1</sup> environmental objectives which have to be fulfilled, notably the requirement of non-deterioration and to enhance and restore water bodies. The binding character of the objectives in article 4(1) WFD means that Member States are under a duty to achieve such objectives, unless exemptions are applied. Article 4 environmental objectives are binding for river basin management planning, but also in the context of projects that may cause deterioration or impede the achievement of the WFD objectives.

In the framework of the CIS, the *CIS Guidance number 20 on Environmental Objectives and Exemptions*<sup>2</sup>, adopted in 2008, deals with the exemptions under article 4 of the WFD. This guidance has been a tool for the application of exemptions under the WFD.

Since this guidance was adopted, Member States have gained valuable practical experience in the implementation during the first cycle of River Basin Management Plans (RBMPs), which has shown concrete issues that would greatly benefit from an updated guidance. The gaps in the justification of exemptions have been identified as one of the areas that will need improvement in the WFD implementation<sup>3</sup>. The Commission and Member States have in particular identified the need to develop such guidelines for the application of article 4(7) for new modifications to the physical characteristics of water bodies and for new sustainable human development activities.

The scope of this guidance document will therefore cover the application of article 4(7) and its interplay with other relevant EU environmental Directives, including the Habitats Directive, the EIA and the SEA Directives, as well as the Floods Directive. The application of the exemption under article 4(7) should also be seen in the context of implementation of other EU or international policies and funding mechanisms, such as the Renewable Energies Directive, TEN-T and TEN-E, CEF, Rural Development Programmes, etc.

Article 4(7) deals with (1) the new modifications to the physical characteristics of water bodies, which may be liable to cause deterioration on the ecological status, groundwater status or put at risk the achievement of the environmental objectives; and (2) failure to prevent deterioration from high status to good status of a body of surface water due to new sustainable human development activities. It is a key provision given the application of WFD environmental objectives not only to general programmes of measures, but also to concrete

<sup>1</sup> The binding nature of these objectives has been confirmed by Court of Justice in case C-461/13

<sup>2</sup> See: [http://ec.europa.eu/environment/water/water-framework/objectives/pdf/Guidance\\_document\\_20.pdf](http://ec.europa.eu/environment/water/water-framework/objectives/pdf/Guidance_document_20.pdf).

<sup>3</sup> See Commission implementation reports, in particular the 3<sup>rd</sup> and 4<sup>th</sup> published respectively in 2012 and 2015

projects. And it is unique in the Directive insofar it is the only exemption to the principle of non-deterioration.

The application of article 4(7) has proved quite challenging in a number of Member States, in particular for projects related inter alia to hydropower, navigation, gravel extraction, water abstraction and flood protection. When these projects are liable to cause a deterioration or put at risk the achievement of the environmental objectives, they may only be authorised if all the conditions under article 4(7) are met. Given the challenges identified in the application of this exemption, the objective of this updated guidance document is to provide to competent authorities guidelines to help for an appropriate implementation. It should cover the following matters<sup>4</sup>:

- Clarify the scope of application of the exemption under article 4(7):
  - The nature and scale of the impacts of projects that fall within the remit of Article 4(7).
  - Definition of sustainable human development activities.
  - The assessment of possible deterioration or compromise of achieving of the objectives, including best ways to assess impacts of hydromorphological pressures on Biological Quality Elements and water status (both surface and ground waters), and dealing with uncertainty in this context. This is linked to the different approaches used for the delineation of water bodies, as depending on the approach used in Member States, the size of the water bodies may have an influence on the assessment of the potential impacts of the projects on the status. The assessment of whether a particular project (including mitigation measures already integrated in it) is likely to cause impact on the status of water bodies is essential to decide on whether article 4(7) applies to specific projects.
  - Considerations related to Heavily Modified Water Bodies (HMWBs) and artificial water bodies (AWBs): the application of article 4(7) also applies to HMWBs and AWBs if there is a potential deterioration or a risk of not achieving the objective of good ecological potential. On the other hand, natural water bodies subject to an exemption of article 4(7) are likely to be designated as HMWBs after the project is implemented. The assessment of the impacts of the project on surface waters should therefore be coherent with HMWB designation criteria.
  - Clarification of maintenance works vs new projects, in particular how the WFD deals with maintenance and how this is handled in the context of Article 4(7) and related obligations.
- Clarify justification requirements :
  - Guidance on the establishment of all practicable steps to mitigate the adverse impacts on the status of the water body as an integral part of the project. The guidance will not deal with technical matters regarding the type of mitigation measures, but how and when these should be established, inserted, considered and monitored within the entire project cycle and the permitting process.
  - On the inclusion of the project, including of its justification, in the River Basin Management Plan, clear guidance is needed on how to deal with different

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<sup>4</sup> Although in drafting these Terms of Reference care has been taken to be as comprehensive as possible, discussions may bring additional issues that may be propose for inclusion in the guidance if considered appropriate by the ATG members.

stages of development of the plan or project in relation to its inclusion in the plan, including guidance on how to deal with (urgent) projects with a different timing and planning than the cycle for water plans. Guidance should also be provided on the inclusion of projects where no significant impacts have been assessed or foreseen.

- Guidance on how to apply the concept of overriding public interest and how to best assess the benefits and the impacts associated to specific projects.
- Guidance on how to perform an assessment of other means offering better environmental options. According to the existing guidance, the requirements under article 4(7)(d) go beyond considerations of variations of a given project. The assessment should include different locations, technologies, but also different type of projects to achieve the benefits pursued by the intervention. This guidance document will provide orientations on how to assess such alternatives, including the strategic assessment, the evaluation of cumulative impacts, but also on how to determine whether the costs are deemed disproportionate. Sector specific information and examples should be included.
- Clarify other linked aspects
  - Relations with other exemptions under articles 4(4), 4(5) and 4(6) of the WFD.
  - Links to other assessments required under other EU environmental legislation, in particular the Birds and Habitats Directives, the Environmental Impact Assessment, the Strategic Environmental Assessment Directive, the Environmental Liability Directive, the Floods Directive and the Marine Strategy Framework Directive. Particular attention should be given to the interplay with the application of exemptions under other relevant EU legislation, i.e. articles 6(3) and 6(4) of Habitats Directive.
  - Examples of best practices will be included in the guidance document, as well as information on how often this exemption has been applied both in the first and the second RBMPs.
  - Timeline for when the exemption under article 4(7) starts to apply, in particular for projects that were authorised before the WFD was fully transposed or implemented in Member States.
  - This guidance document will provide useful advice for competent authorities. However, it cannot provide an exhaustive methodology for all potential cases, as there are many elements of the implementation that will depend on the specific project and on the way the Member States implement and interpret the relevant concepts of the WFD. The discussions in the ATG will define precisely the level of detail that can be achieved in the CIS guidance.

### ***Working method***

The development of this guidance document should include a wide participation from Member State experts and relevant stakeholders, including those representing the main sectors and interests. The ATG will be responsible for drafting the guidance and should involve the SCG members or the experts appointed by them. The members of the ATG should ensure that input is gathered from the relevant competent authorities at national and regional level responsible for water planning and nature protection and the authorities responsible for the development and operation of projects. The implementation of the exemption under article 4(7) requires an integrated approach of different sectors and water

planning. Therefore there is a need to gather the views of all relevant stakeholders, including representatives from the main sectors triggering the application of this exemption (such as navigation, hydropower, flood protection, agriculture) and the NGOs community. Representatives of other sectors affected by the projects may also be consulted through the SCG, such as fishery, aquaculture, forestry and recreational activities.

The involvement of experts on hydromorphology from ECOSTAT will be necessary (in particular for the issues related to status assessment), as well as the input from the Groundwater Working Group. The ATG leads will discuss with the ECOSTAT and the Groundwater Working Group leads the most appropriate way and timeline for the consultations.

The work of this ATG will start with a 2 days workshop in autumn 2016. This workshop will serve as a first stock-taking of the experience on implementation and interpretation of Article 4(7). The ATG leads will prepare in advance of this workshop:

- A key issues paper where all the relevant aspects will be presented and discussed, and that will serve as a basis for discussion. The key issues paper will provide a first draft and framework of the structure of the guidance document.
- Collection of case studies for the different chapters. From the approval of these Terms of Reference until the workshop the ATG leads, with the support of all ATG members, will collect case studies and examples of experiences and tools that are relevant for the application of Article 4(7). The intention is to identify the issues for discussion.

The outcome of the workshop is expected to provide a clear overview of the issues for which there is a wide consensus, and those other issues for which further work is needed. In the further meetings the focus of the work and discussions will lie on the latter. It is expected that at least two further meetings (one in spring and one in autumn 2017) will be necessary.

***Expected deliverables and timetable***

The deliverable of this ad-hoc activity will be a supplementary CIS guidance on the application of the exemption under article 4(7) WFD.

The guidance is expected to be finalised by the second semester 2017.

***ATG leads***

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***Involvement of other CIS partners***

The following Member States and/or organisations have indicated they will be actively participating in this activity: AT, BE, CY, CZ, DE, DK, ES, FI, FR, HR, HU, IT, LT, NL, NO, PL, RO, SE, SL, SK, UK, EEB, EWA, NAVI, WWF

The following Member States and/or organisations have indicated they will not expect to actively participating in this activity but are interested in using the results:

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