

LEGAL STUDY OF THE ABUSIVE USE OF EXEMPTIONS TO THE WATER FRAMEWORK DIRECTIVE IN SWEDEN

2022-04-05



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CLIENT

WWF European Policy Office

CONSULTANT

WSP Advisory

121 88 Stockholm-Globen
Besök: Arenavägen 7
Tel: +46 10-722 50 00
WSP Sverige AB
Org nr: 556057-4880
wsp.com

CONTACTS

Henrik Josefsson, henrik.josefsson@wsp.com

Victoria Viklund, victoria.viklund@wsp.com

Karin Glaumann, karin.glaumann@wwf.se

ASSIGNMENT NAME

Legal study of the abusive use
of exemptions to the Water
Framework Directive in
Sweden

ASSIGNMENT NO

10332339

AUTHOR

Henrik Josefsson, Victoria
Viklund

DATE

2022-04-05

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1 BACKGROUND

The misuse and abuse of exemptions to the Water Framework Directive (WFD) 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 5th 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.”¹

On behalf of WWF, WSP has conducted a legal study of the exemptions to achieving good ecological status for hydropower, which have been proposed by the Swedish government, to analyze whether they can be properly justified. The aim of the legal study was to provide support for building a legal case challenging the application of the national decision on limiting the relicensing of the hydropower sector in Sweden. According to WWF, the following questions were of special interest:

1. Is the cap for electricity production loss contrary to WFD article 4(7)(a) stating that "all practicable steps are taken to mitigate the adverse impact on the status of the body of water"?
2. Does the WFD obligations take precedent over any national decree capping electricity production loss resulting from the applications of the WFD?
3. Can grid stabilization/regulation by itself exclude or override the consideration of "other means, which are a significantly better environmental option" as required by Article 4(7)(d) of the WFD?
4. Is the review of permits for hydropower plants correctly outlined and justified in the 2021-2027 River Basin Management Plans, which is required by Article 4(7)(b) of the WFD imposing that "(b) the reasons for those modifications or alterations are specifically set out and explained in the river basin management plan required under Article 13 and the objectives are reviewed every six years"?

The legal study was conducted from January to March of 2022.

2 THE SWEDISH CONTEXT

Sweden is rich with lakes and freshwater streams. Sweden has approximately 1800 hydropower plants and 600 regulation dams.² According to the Swedish Agency for Marine and Water Management, almost 4000 river water bodies and 1000 lakes are affected by water regulation or lack of connectivity. Hydropower is therefore considered the most extensive pressure on lake and river water bodies in Sweden.

¹ European Commission, 2019, pp. 4-5.

² Swedish Agency Marine and Water Management.

In 2014, the Swedish Agency for Marine and Water Management and the Swedish Energy Agency suggested a national strategy for revising hydropower plants licenses in Sweden for the purpose of decreasing the environmental impact as well as ensure compliance with the WFD.

2.1 SWEDISH NATIONAL PLAN FOR SUSTAINABLE HYDROPOWER

On 1st of October 2019, the national plan for modern environmental conditions for hydropower plants was submitted to the government. The plan follows from legislative amendments implemented in 2019 and aims to balance the need for improved ecological status to the need of hydropower by a systematic revision of hydropower plants licenses to the year of 2040. The goal is to reach environmental objectives set out in the WFD, the Habitat Directive (HD), and other relevant environmental directives.

Over the next 20 years, most of Sweden's hydropower plants and regulatory dams will obtain 'modern environmental conditions' through legal procedures in Swedish Land and Environmental Courts. However, as part of the national plan, the responsible authorities are required by the government to make use of the derogation regime and lower the ambitions of the environmental objectives in accordance with the possibilities found in the WFD. In line with this the Swedish government also expressed the desire to promote an extensive use of the exemption opportunities established in Article 4(7) WFD when the requirement of modern environmental conditions was transposed into Swedish law.³ Through amendments to the Swedish Water Management Regulation (2004:660, in Swedish '*Vattenförvaltningsförrordningen*'), an obligation was introduced for the Water Authorities (in Swedish '*Vattenmyndigheterna*') to make full use of all the possibilities in the WFD regarding exemptions and the designation of heavily modified water bodies.⁴

The national plan also establishes a reference value of 1.5 TWh for what can be considered a significant negative impact on hydropower production on a yearly basis as a result of environmental measures. The value is distributed per main river basin area and serves as a planning goal for decisions regarding designation of heavily modified water and decision on exemption. Special consideration must be given to the impact on the main river basin areas that have power plants that are judged to make the greatest contribution to balancing of the electricity system, so-called class 1 power plants. However, the reference value is not established by any national legislation.

The current legislation states that the Water Authorities cannot declare a body of water to be heavily modified if it hinders or jeopardizes a quality requirement under EU legislation.⁵ Also, according to the Swedish Water Management Regulation, if a body of water is covered by several quality requirements, the most stringent requirement shall apply.⁶

Permit procedures relating to water usually requires a specific environmental impact assessment according to the Environmental Impact Assessment Directive (EIA, 2011/92/EU). However, an application for reconsideration for modern environmental conditions for hydropower does not need to contain

³ Prop. 2017/18:243, p. 76.

⁴ Ibid.

⁵ See 24 Ch. 10 § of the Swedish Environmental Code.

⁶ See 4 Ch. 7 § of the Swedish Water Management Regulation.

such an assessment.⁷ However, this does not free the hydropower operator from the obligation to provide the necessary investigation of the activity and other relevant circumstances.⁸ As many older hydropower plants holds permits in accordance with old legislation, they have not been tried in accordance with the Swedish Environmental Code. It is therefore possible to questions whether the permit procedure in these cases concerns a new permit rather than the reconsideration of an old permit.

Installations for hydroelectric energy production is listed in Annex II of the EIA, which means that the assessment is not mandatory for such projects but shall be determined either through a case-by-case examination or thresholds/criteria set by the Member State.⁹ It can be discussed whether Sweden fulfills these criteria in practice and if, but due to limitations in this report we will not discuss this further. However, for the selection of case law, we have limited this to WFD, and HD as EIA's relevance can be questioned considering this.

In March 2022, initiatives were taken by several Swedish parties to pause the process for modern environmental conditions and not be resumed until it can be done in a way that “provides better conditions” for the small-scale hydropower.¹⁰ The question has yet to be debated and decided on, but it is reasonable to assume that any kind of delays in the schedule for reconsideration of hydropower jeopardizes the achievement of the requirements and environmental obligations of the WFD. We also note that the Water Authorities, in order to comply with the National Plan, already is overstepping the time exemption in Article 4(4) WFD by applying the exemption of natural condition on bodies of water that are affected by hydropower activities as part of the plan.

2.2 JUDICIAL REVIEW OF THE NATIONAL PLAN

In 2021, the Swedish National Plan for sustainable hydropower was appealed to the Supreme Administrative Court. A non-profit environmental organization (Älvräddarnas samorganisation) requested judicial review of the government's decision to adopt the national plan for sustainable hydropower.¹¹

In Sweden, the provisions of the Aarhus Convention concerning access to justice have been transposed into national law. National legislation grants environmental NGOs the right to appeal judgements and decisions on permits, approvals, and exemptions¹² as well as the opportunity to ask for judicial review of certain permit decisions by the government covered by Article 9(2) of the Aarhus Convention¹³. The Aarhus Convention creates a wide right of access to justice of environmental NGOs at the national level and the scope of this right has in the last years been broadened by

⁷ See 6 Ch. 20 § and 24 Ch. 10 § of the Swedish Environmental Code.

⁸ Prop. 2017/18:243 p. 120.

⁹ Article 4(2) EIA.

¹⁰ Altinget, 2022.

¹¹ HFD 2021 not. 19.

¹² See 16 Ch. 13 § of the Swedish Environmental Code.

¹³ See 2 § of the Swedish Act (2006:304) on judicial review of certain government decisions,

consistent case law, both by Swedish courts and the European Court of Justice.¹⁴

Although the Supreme Administrative Court ruled that the NGO had a right to access of justice under Swedish law in this case, the Court concluded that the decision to adopt the national plan was of general character and did not constitute such a permit decision that can be subject to judicial review. The application was therefore rejected. The current legal situation in Sweden therefore seems to be that it is not possible to appeal the national plan as a whole, but that environmental NGOs instead must appeal decisions in individual permit processes in individual cases.

Another mechanism for compliance review is the EU infringement procedure. The European Commission can initiate an infringement procedure either on its own initiative or following complaints from the public. However, the European Commission has no obligation to act on such complaints. Infringement procedures are often a result of significant external pressure being put on Commissioners by environmental NGOs through complaints with demands on compliance review where they believe Member States are not abiding with EU law.¹⁵

2.3 CRITICISM FROM THE EUROPEAN COMMISSION REGARDING WFD

On 25th of January 2018, after almost 11 years of discussions with the Swedish government, the European Commission issued a reasoned opinion in its ongoing infringement procedure against Sweden due to failure to correctly implement Article 4(7) WFD, as well as several other provision in the WFD.¹⁶

According to the Commission, Swedish legislation lacked a provision which states that new development activities that might cause deterioration of the water status may only be permitted if the established conditions set out in Article 4(7) WFD are fulfilled (this will be explained further in section 3).¹⁷ Consequently, the derogation regime had been transposed in a way that made it inapplicable in individual permit processes. Furthermore, the Commission argued that the environmental objectives set out in Article 4(1) WFD had not been given sufficient legal status.¹⁸ Prior to the reasoned opinion, the Swedish government had responded to the Commissions' letters of formal notice and informed that amendments of the Swedish legislation would be proposed and enter in to force at the beginning of 2019 at the latest.

Accordingly, the legal status of the environmental objectives in Article 4(1) WFD and the principle of non-deterioration, which was clarified as to its meaning by the European Court of Justice in the *Weser* case, are now established in 5 Ch. 4 § of the Swedish Environmental Code (1998:808, in Swedish '*Miljöbalken*'). According to the provision, it is not permitted to deteriorate the aquatic environment in an impermissible manner, i.e., in

¹⁴ For example, see Judgement of 15 October 2009, *Djurgården-Lilla Värtans Miljöskyddsförening*, Case C-263/08, ECLI:EU:C:2009:631, where the European Court of Justice stressed that Member States must ensure that environmental NGOs have a wide access to justice.

¹⁵ Krämer, 2011, pp. 402-405.

¹⁶ Infringement procedure 2007/2239.

¹⁷ Reasoned opinion 25.1.2018 C(2018) 309 final (2007/2239), para 35.

¹⁸ *Ibid*, para 97-98.

violation of the deterioration prohibition set out in Article 4(1) WFD. It is also not permitted to jeopardize the achievement of the correct quality of the aquatic environment. *'The correct quality'* refers to the status that according to WFD is to be achieved in terms of status or potential. The provision shall be applied in individual permit procedures and may be satisfied either by far-reaching permit conditions or the denial of permits. The general requirement for Member States to establish River Basin Management Plans (RBMP) and follow them also follows from the provision, as they form an additional part of the objectives in Article 4(1) WFD.

The derogation regime of Article 4(7) WFD was transposed by new provisions in 4 Ch. 11-12 §§ of the Swedish Water Management Regulation, which essentially lists the conditions set out in Article 4(7) WFD in relation to 5 Ch. 4 § of the Swedish Environmental Code. In the government bill introducing the amendments, it was noted that the Commission had expressed that the derogations and the approval of a project that affects a water body cannot be examined separately from each other.¹⁹ Thus, there is a pronounced political clarification that the exceptions and the individual permits under the WFD are closely connected.

2.4 RIVER BASIN MANAGEMENT PLANS

One of the conditions that must be met for a derogation to be granted is that the reasons for the exemption are specifically set out and explained. This is done in RBMP for designated river basin districts. Sweden has 5 designated river basin districts:

- Bothnian Bay
- Bothnian Sea
- Northern Baltic Sea
- Southern Baltic Sea
- Skagerrak and Kattegatt

In consultation documents for the development of RBMP for the period 2021–2027, it was noted that the Bothnian Sea and the Bothnian Bay have several water bodies with a significantly changed physical character due to the impact of hydropower operations.²⁰ According to the Water Authorities, in the absence of other technically feasible alternatives that are significantly better for the environment to replace the benefit that the activities contribute to in the form of regulatory capacity, there are grounds to designate a total of 56 of the concerned water bodies as heavily modified water bodies (HMWB).²¹ As 54 of these are found in the Bothnian Sea river basin district, our analysis in this part will focus on the Bothnian Sea river basin management plan.

It should be noted that the Water Authorities' conclusion in the consultation document on environmental quality standards for water affected by hydropower is that only a very extensive negative impact on electricity production in individual plants would be difficult to replace with other

¹⁹ Prop. 2017/18:243, p. 70.

²⁰ Vattenmyndigheterna, 2021, p. 16.

²¹ Ibid.

alternatives.²² The Water Authorities' assessment is also that they currently lack evidence that shows that there would generally be high socio-economic costs of replacing electricity production in individual plants with electricity production in other hydropower plants or with alternative types of energy. Only in some class 1 power plants is it considered that there is a close connection between measures affecting production and the impact on hydropower's regulatory capacity, which is difficult to replace with other alternatives, mainly for technical reasons.²³

As the development of the new management plans for the period 2021-2027 is still ongoing, only a draft of the RBMP for the Bothnian Sea is available. The final draft management plan has yet to be published.

The draft contains a list of the water bodies where deviations from the prohibition of deterioration have been permitted in the water district's water district according to 4 Ch. 11-12 §§ of the Swedish Water Management Regulation. Only one body of water is listed, that is *Kerstinbomyran*.²⁴ The need for an exception for this water body was due to an increase in the water level to restore the hydrological conditions. No exceptions for water bodies affected by hydropower have been specifically set out and explained in the original draft. However, an additional consultation specifically on environmental quality standards for water bodies that are affected by hydropower was scheduled to take place between 1 Mars until 30 April of 2021.²⁵ Additional bodies of water may thus be added to the list in the RBMP in the final draft. When the RBMP will be finalized is not clear.

3 WATER FRAMEWORK DIRECTIVE

The primary legislation of relevance is the EU Water Framework Directive (WFD, 2000/60/EC). The main objective of the WFD is to achieve good surface and groundwater water status. There are two main surface water obligations on the EU Member States:

- to prevent deterioration of the status of all surface waters and groundwater within the EU, **and**
- to protect, enhance and restore all water bodies to achieve “good status” by 2027.

Under certain circumstances, Article 4(3) allows Member States to designate a body of surface water as artificial or heavily modified and then the obligation is to achieve good ecological potential in accordance with Article 4(1)(a)(iii). Article 4(5) allows Member States to set less stringent environmental objectives and Article 4(7) allows Member States to grant permission to projects that causes deterioration or threatens the achievement of good status or potential for a body of surface water. Common to these exemptions are that strict conditions must be met, and a justification must be included in the River Basin Management Plan.

²² Ibid, p. 15.

²³ Ibid.

²⁴ Vattenmyndigheten Bottenhavet, 2020, pp. 148-149.

²⁵ Ibid, p. 165.

3.1 THE DEROGATION REGIME UNDER ARTICLE 4(7) WFD

Article 4(7) WFD provides an assessment for when a derogation could be granted if:

- new modifications to the physical characteristics of a body of surface water or alterations to the level of bodies of groundwater might lead to deterioration/non-achievement of good ecological status/potential or good groundwater status, **or**
- a new sustainable human development activity might lead to deterioration from high status to good status (note that a derogation cannot be granted if deterioration drives the water status below good status).

An Article 4(7) test must be applied in cases where a proposed modification prevents the achievement of good status/potential irrespectively of whether it is a new activity or amendments to already existing activities or infrastructures.

All the following cumulative conditions must be met for a derogation to be granted:

- all practicable steps are taken to lessen the negative impact on the status of the body of water;
- the reasons for the modifications/alterations are specifically set out and explained as well as the conditions reviewed every six years;
- the modifications/alterations are of overriding public interest, **and**
- the purpose of the modifications/alterations may not be achieved in any other way that is significantly better for the environment due to technical reasons or unreasonable costs.

Out of the four above-mentioned conditions for the Article 4(7) derogation regime, we consider condition three and four to be the most important for this report regarding hydropower. However, case law concerning the WFD is still limited, as the European Court of Justice only recently began to further interpret the directive's concepts and conditions. In the Swedish context, Article 4(7) was not transposed until 2019, which has resulted in that Swedish courts only recently began to apply and thus interpret it.

However, for condition three and four it could be argued that the Habitats Directive (92/43/EEC, HD) can be applied by analogy regarding what is the considered necessary arguments and supporting documents to fulfil the conditions. The HD contains a derogation regime similarly to the one in WFD. Relevant case law under the HD will therefore also be analyzed.

Regarding condition one, it should be noted that the European Court of Justice in the *Weser* case defined good status as an object of results. The objectives set out in Article 4(1) WFD is therefore not only to be seen as something that Member States must strive to achieve through programs of measures; the goals are to be regarded as quality requirements that also apply in individual cases, such as when granting individual permits.

However, if condition three and four are fulfilled, the formulation of condition one indicates that this no longer is a result to be achieved or attained. Instead, this is rather an obligation to endeavor or to do ones best to realize a certain result. As the WFD has high ambitions for the water environment, we emphasize that achieving condition one is not a simple task. The condition should be understood in accordance with European Court of Justice established case law as that Member States must do all in their power to lessen the impact on the body of water without ultimately committing to achieve good status. This gives Member States the possibility to, in line with Annex V, adapt the measures to each body of water impacted using the derogation regime. Still, as there is no excuse to fail, and Member States must prove that all reasonable measures have been taken in each individual case. What is reasonable or not will ultimately be determined in a court of law, based on the arguments of the parties with reference to what the purpose of the WFD is. As the WFD in general, and Article 4(7) in particular, focus on the condition and impact of a specific body of water, it is impossible to conclude that the derogations should be used in a generic way. The selection of measures must be site-specific for the body/bodies of water concerned and the assessment under Article 4(7) needs to be performed during the authorization procedure of the specific plan or project. Furthermore, even if standards such as best available technique (BAT) can be used as reference, it does not constitute a strict limitation as to what measures that Article 4(7) requires for the derogation to be applicable and/or granted.

3.2 COMMON IMPLEMENTATION STRATEGY FOR THE WFD

The Common Implementation Strategy for the Water Framework Directive (CIS), which is a framework of technical documents of informal consensus position on best practice agreed by the European Commission, representatives of EU Member States and other stakeholders, provides guidance on the WFD. Although the CIS is not legally binding, it could be argued that it serves as an indication of how the obligations and exemptions of the directive ought to be interpreted, and possibly also the Commission's opinion of compliance and non-compliance of the directive.

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) WFD.²⁶ Projects of any size may fall under the provision.²⁷ However, the use of exemptions is only allowed when they guarantee at least the same level of protection as existing EU law and provided that they do not permanently exclude or compromise the achievement of the wider objectives of the WFD in other bodies of water within the same river basin district.²⁸ Consequently, if modifications are undertaken across several water bodies, the conditions of Article 4(7) must be fulfilled for all water bodies in which deterioration occurs for a project to be authorized.²⁹ If another water body than the one where the proposed modification is located, and Article 4(7) test must be applied for the water body which could deteriorate.³⁰ Note

²⁶ European Commission, 2009, p. 24.

²⁷ Ibid, p. 25.

²⁸ See Article 4(8) and 4(9) WFD.

²⁹ European Commission, 2017, p. 34.

³⁰ Ibid, p. 35.

that a derogation on the basis of Article 4(7) cannot be applied when the provisions of Article 4(8) and 4(9) are not fulfilled.

The concept “*all practicable steps to mitigate adverse impacts*” should be interpreted as potentially a wide range of measures in all phases of development, which are taken must be to avoid or reduce an identified potential effect on the status of a WFD quality element.³¹ “All practicable steps” implies that only measures which are technically feasible, do not lead to disproportionate costs and are compatible with the new modification are required.³² This includes facilities’ design, maintenance and operation conditions, restoration and creation of habitats.³³ Mitigation measures in cases of hydropower plants normally include the construction of fish migration aids for relevant fish species and/or establishment of ecological flows.³⁴ In the CIS, it is stressed that the selection of practicable mitigation measures has a case-specific component as certain measures may not be technically feasible or reasonable in a specific location.³⁵ For example, fishways are required within fish regions but will not be reasonable outside such regions.

The concept “*overriding public interest*”, which is also used in the HD, refers towards, according to CIS document, situations where plans or projects are essential with regards to:

- Actions or policies aiming to protect fundamental value for citizen’s lives, including health, safety and environment,
- Fundamental policies for the state and the society, **and/or**
- Carrying out activities of an economic or social nature, fulfilling specific obligations of public services.³⁶

“Overriding” should be understood as the public interest concern overrides achieving the objectives of the WFD. Member States have been allowed a *certain* margin of discretion for determining what constitutes an overriding public interest.³⁷ At a CIS workshop, it was concluded that hydropower activity is not automatically of overriding public interest just because it generates renewable energy.³⁸ The European Court of Justice has acknowledged in the *Schwarze Sulm*³⁹ case that the construction of a hydropower plant *may* be of overriding public interest, which will be examined further in section 4.2.1. Nonetheless, it is reasonable to conclude that one cannot successfully declare a new modification a “overriding public interest” without further well-grounded assessments which is documented in a clear and transparent way.⁴⁰

The concept “*significantly better environmental options*” requires an assessment of alternative means for the proposed new modification. According to Article 4(7)(d) WFD, “*the beneficial objectives served by those modifications or alterations of the water body cannot for reasons of technical*

³¹ Ibid, p. 51.

³² European Commission, 2009, p. 27.

³³ European Commission, 2017, p. 52.

³⁴ Ibid, p. 53.

³⁵ Ibid, p. 56.

³⁶ European Commission, 2009, p. 27.

³⁷ European Commission, 2017, p. 59.

³⁸ Dworak, Kampa, & von der Weppen, 2011, p. 59.

³⁹ Judgement of 4 May 2016, *Commission v Austria*, Case C-346/14, ECLI:EU:C:2016:322.

⁴⁰ European Commission, 2017, p. 59.

feasibility or disproportionate cost be achieved by other means, which are a significantly better environmental option". Alternative means could involve alternative locations, different scales or designs of development, or alternative processes. These should be assessed in the early stages of development and at the appropriate geographical level.⁴¹

3.3 SIMILARITIES WITH THE HABITATS DIRECTIVE

Both the WFD and the HD allow for the use of exemptions under certain conditions, although there are some variances in the procedure and conditions. Under the HD, Article 6(3) and 6(4) establishes a derogation regime for the assessment and authorization of new modifications that may affect rare, threatened, or endemic animal and plant species. For example, Article 6(4) establishes that:

"If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.[...]"

It should be noted that the derogation regime of the HD and the WFD include similar concepts, which is why it could be argued that guidance documents and case law under the HD, especially with reference to the concepts "*overriding public interest*" and "*alternative solutions*" (which resembles the WFD concept "*significantly better environmental options*"), should be possible to apply by analogy in procedures under the derogation regime of WFD. The HD concept "compensatory measures" is not required by the WFD and is distinctly different from mitigation measures. Whilst mitigation measures aim to minimize or even cancel the adverse impact on the water status, compensatory measures aim to compensate the "net negative effects" of a project and its associated mitigation measures.⁴² However, the assessment of the respective types of measures could potentially be similar, which will be discussed under section 4.2.2.

According to Guidance document on Article 6(4) of the Habitats Directive, the Commission's view is that the concept "*imperative reasons of overriding public interest*" should be interpreted as certain public interests, such as public health, environmental protection, and the pursuit of legitimate goals of economic and social policy and regardless of if it is promoted by public or private bodies, can be balanced against the conservation aims of the HD.⁴³ The concept does not include every kind of public interest, as it must be overriding, and it is reasonable to assume that it must be a long-term public interest to outweigh the long-term conservation interests of the HD.⁴⁴

These are a few examples of what have been considered potential imperative reasons of overriding public interests in Opinions delivered by the European Commission in accordance with HD:

⁴¹ Ibid, p. 56.

⁴² European Commission, 2009, p. 27.

⁴³ European Commission, 2007, s. 7.

⁴⁴ Ibid, p. 8.

- Establishment of an intersection of a 20 motorway, as the motorway was part of the trans-European road network and would link a region with exceptionally high unemployment with central regions of the EU.
- Development of the Rotterdam port, as the portuary and industrial activity was one of the main pillars of Dutch economy, was of importance for the EU and would shift freight from road to water with considerable environmental benefits.
- The operation of a coal mine, as its mining activities would contribute to achieving the general objectives of the German long term energy policy at the federal and regional level and because the closure of the mine would have unacceptable economic and social consequences.

The term “*examining alternative solutions*” should be interpreted as a requirement of thorough revision and/or withdrawal of a proposed measure or project when significant negative effects of a site have been identified.⁴⁵ All feasible alternatives and their relative performance with regard to the conservation objectives of the site, the site’s integrity and its contribution to the overall coherence of the Natura 2000 Network must be analyzed. Solutions could involve alternative location or routes, different scales of designs of development or alternative processes. However, the solution does not have to be determined by which alternative that least adversely affects the site concerned but is a compromise between the adverse effect on the integrity of the site and the relevant reasons of the overriding public interest.⁴⁶

4 RELEVANT CASE LAW

As the provisions in the WFD, as well as the Swedish legislation that transposes the provisions, are brief, there are ambiguities and room for interpretation that require clarification. In this chapter, case law of relevance for hydropower permit procedures has been compiled and summarized from both Swedish courts and the European Court of Justice.

4.1 SWEDISH CASE LAW

The Swedish Land and Environment Court of Appeal (MÖD), together with the Swedish Supreme Court, has a decisive role in the guidance regarding the interpretation of Swedish environmental law. The first instance is the Land and Environment Courts, the second instance the Land and Environment Court of Appeal and the last instance is the Supreme Court. However, the Supreme Court rarely review cases as, generally, an appeal is only granted if the judgment or decision can be assumed to have significance as a precedent. The Supreme Court has yet to try a case which concerns the derogation regime of Article 4(7) WFD.

As previously mentioned, Article 4(7) was transposed in the beginning of 2019, which has resulted in that Swedish courts only recently began to apply and interpret it. Because of this, few cases on this matter have been appealed to MÖD for the time being. There is more case law from Land and

⁴⁵ Ibid, p. 6.

⁴⁶ Opinion of AG Kokott, *Commission v Portugal*, Case C-239/04, ECLI:EU:C:2006:255, para 44.

Environment Courts, which we have chosen to include in this legal study. However, it should be noted that decisions from these courts are not to be considered to set a precedence as they are courts of first instance. We have also chosen to include relevant case law from MÖD and European Court of Justice related to the HD about derogation concepts similar to those of the WFD.

4.1.1 Land and Environment Court of Appeal

In one case⁴⁷, the Land and Environment Court of Appeal discussed the derogation regime of Article 4(7) WFD and the corresponding Swedish provisions. The case concerned a permit for excavation work in a river. MÖD concluded that, in an overall assessment of the written investigation and observations during site visits, the excavation work will result in that the status of the morphological condition will go from good to moderate and that the conditions for maintaining good ecological status will decline, with the risk that good ecological status will not be achieved in the water body. The Court's opinion was that the applicant had not shown that the new modifications could be realized without deterioration of the body of water.⁴⁸

Although the now existing provisions, which transposes Article 4(7) WFD, had not been implemented when the case was tried, MÖD interpreted the Swedish legislation in light of the WFD. In terms of proportionality, the Court's assessment was that the applicant had been given relatively extensive measures by the Land and Environment Court to mitigate the negative consequences on the status and had also undertaken to relocate mussels from the work area before the excavation work began. The conclusion was that all feasible mitigation measures would be taken.⁴⁹

In terms of "overriding public interest", the Court considered that the investigation had shown that an implementation of the proposed measures was of crucial importance for the planned control and operational monitoring system for better regulation of the Möndalsån to fulfill its function.⁵⁰ Already existing measures would also largely become ineffective if the proposed measures were not taken, and ultimately, floods of the river would not be prevented in the intended way. MÖD concluded that the proposed measures constituted an overriding public interest. It also considered that the possibility to prevent future flooding of nearby cities outweighed the conflicting interest set out in Article 1 WFD.⁵¹

In terms of alternative means, MÖD considered that the investigation was sufficient to determine that it was not technical feasible or economically reasonable to achieve a reduced flood risk by other means, which are a significantly better environmental option. An alternative of constructing floodgates that open only when there is a need for larger water spill was rejected as it had major disadvantages on operation and maintenance and would lead to increased environmental impact and deteriorating hydromorphological status of several water bodies.⁵² MÖD considered that other types of alternative means proposed by the complainants (two nature conservation organisations), such as the construction of stormwater

⁴⁷ MÖD 2018:28.

⁴⁸ *Ibid.*, p. 12.

⁴⁹ *Ibid.*, p. 14.

⁵⁰ *Ibid.*, p. 15.

⁵¹ *Ibid.*, p. 14.

⁵² *Ibid.*, p. 14.

reservoirs, wetlands, green roofs and permeable pavement on e.g. parking spaces, were insufficiently effective measures that could not be taken within a reasonable time to deal with the acute flood risk.⁵³

The conclusion of MÖD was that there were conditions for granting permission for the proposed measures with regard to Article 4(7) WFD but that it was up to the responsible Water Authority to, in accordance with Article 4(7)(b) WFD, clarify the reasons in the management plan for granting permission for the excavation work.⁵⁴

Due to the scarce case law regarding the derogation regime under Article 4(7) WFD from MÖD, we have compiled a few cases that discuss the derogation regime under HD that could be argued have relevance for the interpretation of exceptions under the WFD.

With regard to the concept of “overriding public interest”, MÖD has found in two different cases that neither a wind farm nor a tourist and ski resort constitute such an interest. In the first case⁵⁵, MÖD agreed with the Land and Environment Court’s assessment that the wind farm in question could not constitute an overriding public interest because it was only intended to be operated for a short period of time and the electricity production that the plant would contribute to was considered to be relatively limited and could most likely be met in other ways. In the second case⁵⁶, MÖD argued that the concept should be given a strict interpretation and determined that the establishment of a new tourist and ski resort did not constitute an overriding public interest, although it would entail about 300 new jobs and a continued development of tourism with long-term economic and other developmental benefits for the concerned municipality, as well as lasting contribution to an increased population and more jobs.

4.1.2 Land and Environment Courts

The Land and Environment Court in Växjö has discussed and decided on the issue of the derogation regime of Article 4(7) WFD in three specific cases. In the latest decision from 21st of January 2022⁵⁷, the Court denied permission to expand a port area in Malmö. As the cumulative effect of the expansion was considered to result in a further deterioration of the morphological condition, permission could only be granted if all the criteria in 4 Ch. 12 § of the Swedish Water Management Regulation, which transposes the conditions of Article 4(7) WFD into Swedish law, was met. With reference to CIS No. 20 and CIS No. 36, as well as guidance from the Swedish National Sea and Water Authority, the Court determined that housing did not constitute an overriding public interest. According to the Court, the applicant had not shown that the need to be able to use the port area for housing and offices outweighed the obligations Sweden has under the WFD.⁵⁸ The Court also considered that the applicant did not have sufficiently strong arguments as to why they considered that it would be better for the environment to exploit a body of water protected by the WFD compared to unprotected land proposed in other alternatives.⁵⁹ In terms of mitigation measures, the applicant had

⁵³ Ibid, p. 15.

⁵⁴ Ibid, p. 16.

⁵⁵ MÖD M 8428-06.

⁵⁶ MÖD 2015:3.

⁵⁷ Växjö tingsrätt judgment of 21 January 2022 in case M 788-20.

⁵⁸ Ibid, p. 118.

⁵⁹ Ibid, p. 122.

examined and proposed measures mainly linked to the prevention of sediment dispersal. The Court ruled that not all practicable steps to mitigate the negative effects had been investigated, such as "creation of habitats" and establishment and restoration of eelgrass meadows.⁶⁰

In one case, the Land and Environment Court in Växjö granted a derogation for the construction of wells as well as drainage of brackish groundwater from the wells, which would cause saltwater intrusion.⁶¹ The body of water concerned had unsatisfactory quantitative status and good groundwater chemical status. There was therefore a risk that it would not acquire good quantitative and chemical groundwater status by 2027. According to the Court, the WFD must be interpreted as meaning that saltwater intrusion due to human activity could not be allowed, not even in terms of local impact.⁶² In accordance with the opinion of the Water Authority, the Court considered that a derogation could be made regarding the quantitative status. The Water Authority's assessment was that drinking water supply is an overriding public interest and that all alternative solutions and locations that were technically possible and economically reasonable had been examined.⁶³

In another case, the Land and Environment Court in Växjö considered the expansion of a wastewater treatment plant in connection with the establishment of a new leisure village.⁶⁴ Investigations showed that the status of phytoplankton and nutrients was moderate and the status for the benthic fauna was unsatisfactory. The status of practically all quality factors regarding ecological status was feared to deteriorate by the proposed expansion. With consideration of the *Weser* case and the *Schwarze Sulm* case, the Court held that the expansion would result in such a deterioration that can only be permitted in exceptional cases, but that the development of a leisure village does not constitute an overriding public interest.⁶⁵

The Land and Environment Court in Vänersborg has tried the question of the derogation regime two times, both times during 2019. The first case concerned a permit to move and rebuild a concrete gutter and construction of bypass piping.⁶⁶ The ecological status of the body of water concerned was moderate. In the case, the Water Authority had proposed several mitigation measures to achieve good status, although with some doubt, such as restoration of the culverted part, supply of various habitat structures, nature-based solutions for erosion control, wider watercourses and floodplains. The Court concluded that it could not be ruled out that the proposed measures would jeopardize the possibility of achieving good status. Regarding the derogation regime, the Court noted that the criteria for the possibility of a permit based on the exception rule is relatively high.⁶⁷ Although the permit application only concerned water activities, the Court considered that the underlying purpose of the application, i.e., to develop the area for housing purposes, etc., should be considered. Furthermore, the proposed mitigation measures for the already existing flood risks would remedy land areas from pollution. In addition, the Court noted that the cultural history of the environment, namely its industrial character and its close connection to the

⁶⁰ Ibid, pp. 122-123.

⁶¹ Växjö tingsrätt judgment of 14 November 2019 in case M 832-19.

⁶² Ibid, p. 19.

⁶³ Ibid, pp. 13-15.

⁶⁴ Växjö tingsrätt judgment of 6 October 2016 in case M 1340-15.

⁶⁵ Ibid, pp. 7-8.

⁶⁶ Vänersborgs tingsrätt judgment of 4 June 2019 in case M 33-18.

⁶⁷ Ibid, p. 86.

water, would be preserved. It was concluded that these constituted several public interests which meant that the proposed measures should be allowed.⁶⁸ In terms of mitigation measures, the Court considered it necessary that the area with concrete deck, concrete culvert and concrete gutter be restored to a nature-like furrow. On the other hand, extensive removal of concrete and extensive slope reinforcement measures was considered unreasonable to implement at an affordable cost.

In the second case in Vänersborg, permission had been sought for the demolition of several water facilities from a previous power station.⁶⁹ Two of the water bodies had moderate ecological status with the quality requirement good ecological status in 2021 but would stop to be bodies of water after the demolition. As the Court's assessment must be founded on the environmental quality standard that applies at the time of the permit procedure, the Court ruled that the termination should be regarded as both a threat of the possibility of achieving the standard as well as an impermissible deterioration of the water body.⁷⁰ It also considered that the benefits of the proposed measures, which would improve human safety from a dam safety perspective and also increase sustainable development through demolition, resulting in better conditions for connectivity and restoring natural flows, clearly outweighed the disadvantages of the demolition/deterioration of two bodies of water.⁷¹ The Court further makes the assessment that it was not possible, neither of technical reasons or due to unreasonable costs, to fulfill the purpose with the measures in some other way that was significantly better for the environment.

It should be mentioned that in most cases, the Court has used the Common Implementation Strategy for the WFD as guidance for the interpretation of several of the conditions for granting a derogation. Thus, although the CIS is not legally binding in itself, they indirectly become legally binding through case law when courts explicitly use them as an interpretive tool.

4.2 EUROPEAN CASE LAW

The European Court of Justice is the judicial institution at the EU level which ensures that EU law is enforced, understood, and uniformly applied in all Member States. In the past years, an increasing number of cases concerning substantial aspects rather than procedural or technical aspects of the WFD have been brought before the European Court of Justice. Despite this, the amount of case law is still small. We have identified two cases of relevance on the issue of the derogation regime under Article 4(7) WFD. Due to the scarce quantity of derogation related case law under the WFD, and taking into account the similarities previously mentioned between WFD and HD, we will also compile relevant practice under HD.

4.2.1 Water Framework Directive

Through the *Weser* case⁷², the European Court of Justice clarified several of the substantial requirements of the WFD. The Court established that the

⁶⁸ Ibid, p. 87.

⁶⁹ Vänersborgs tingsrätt judgment of 27 April 2019 in case M 4861-16.

⁷⁰ Ibid, p. 64.

⁷¹ Ibid, pp. 66-67.

⁷² Judgement of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland*, Case C-461/13, ECLI:EU:C:2015:433.

prevention of deterioration is binding in nature and that a Member State must refuse authorization for individual projects that would contradict or jeopardize these objectives unless a derogation is applicable.⁷³ It was also established that deterioration of the water status occurs as soon as one of the quality elements falls by one class, and if a quality element is already classified as the lowest class, any deterioration will be considered as a deterioration of the water status.⁷⁴ The scope of the derogations is rather narrow and requires the individual projects to be subject to both an applicability assessment and a complementary conditions test. The *Weser* judgement could likely be used to call for stricter compliance and further implementation on the national level, which has been the case in Sweden, as mentioned in section 2.2. As regards Article 4(7), the European Court of Justice emphasizes that the structure of the categories of the derogation regime in Article 4 shows that the WFD does not only contain basic obligations but also concerns individual projects.⁷⁵ Article 4(7) allows for deterioration due to new modifications, which follows from individual projects, and the exception possibility is therefore closely interconnected to the individual project at the specific body of water(s). This indicates that the assessment should be site-specific.

In *Schwarze Sulm*⁷⁶, the European Court of Justice shed more light on the derogation regime of Article 4(7) WFD. The case concerned the construction of a hydropower plant in Austria. The Court first settled that the contested project was liable to cause a deterioration of the water status.⁷⁷ It then emphasized that, when a project causes adverse effects of a water body, it can only be authorized provided that the conditions set out in Article 4(7) are all satisfied.⁷⁸ The European Court of Justice argued, in general terms, that the construction of a hydropower plant *may be* an overriding public interest and that Member States must be allowed a certain margin of discretion for the assessment if a specific project is of such interest.⁷⁹ In the specific case, the European Court of Justice held that responsible national authorities in Austria had satisfied the conditions set out in Article 4(7) by conducting a thorough revision of the direct and indirect impact on the environmental objectives of the WFD and showed that the public interests clearly outweighed the negative impact of the contested project.⁸⁰ According to the Commission, Austria had failed to motivate why the specific project would fall within the scope of the derogation regime and had only stated that renewable energy is generally of overriding public interest. The Court found this objection to be unfounded, as the decision had been based on detailed and specific scientific analysis of the specific project.⁸¹ This judgement indicates that hydropower could constitute an overriding public interest, and that Member States enjoy a certain margin of discretion in such an assessment, but that the concept “overriding public interest” requires detailed and specific analysis linked to the site-specific circumstances of the concerned body of water. The fact that the Commission’s infringement procedure was dismissed on the basis that it had failed to establish the infringement through evidence indicates that the construction of a hydropower plant could be contrary to EU

⁷³ Ibid, para 50.

⁷⁴ Ibid, para 59.

⁷⁵ Ibid, para 47.

⁷⁶ Judgement of 4 May 2016, *Commission v Austria*, Case C-346-14, ECLI:EU:C:2016:322.

⁷⁷ Ibid, para 63.

⁷⁸ Ibid, para. 65.

⁷⁹ Ibid, para. 69-70.

⁸⁰ Ibid, para. 74 and 80-81.

⁸¹ Ibid, para. 67 and 80.

law, if a Member States fails to carry out a site-specific assessment which satisfies all the derogation conditions.

4.2.2 Habitats Directive

In *Commission v Portugal*⁸², the European Court of Justice underlined that the derogation regime under Article 6(4) HD, as it is a derogation from the criterion for authorization laid down in Article 6(3), must be interpreted strictly. It also held that the absence of alternatives must be demonstrated to satisfy the relevant condition.⁸³ Thus, it can not only be stated that there are no other alternatives but must be thoroughly investigated and proved. The fact that national authorities have not examined solutions outside of the area in question may be considered as a failure to demonstrate the absence of alternative solutions.

In *Commission v Italy*⁸⁴, the European Court of Justice concluded that the exception under Article 6(4) HD only applies after an Appropriate Assessment under Article 6(3) HD has been made. Thus, the implications of a specific plan or project is a prerequisite for the application of the exception since, in the absence of implications, no condition for the derogation provision can be assessed. The Court also stated that the assessment of any imperative reasons of overriding public interest and of less harmful alternatives require a weighing up against the damage caused to the site by the plan or project under consideration. In addition, in order to determine the nature of any compensatory measures, the damage to the site must be precisely identified.⁸⁵ This emphasis on site specificity was also confirmed in later court cases, such as *Commission v Spain*⁸⁶ and *Sweetman and Others*⁸⁷.

In *Solvay and Others*⁸⁸, the European Court of Justice held that the concept of “imperative reason of overriding public interest” should be interpreted as that the public interest is of such importance that it can be weighed up against the HD’s objective of conservation of natural habitats and wild fauna and flora. Works intended for the establishment or expansion of an undertaking can only satisfy that condition in exceptional cases.⁸⁹ This can also include projects of private character that, by its very nature and by its economic and social context, presents an overriding public interest.⁹⁰

In *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*⁹¹, the Court held that irrigation and the supply of drinking water may constitute imperative reason of overriding public interest, which could justify the implementation of a project with adversely effects of the integrity of a site, if other alternatives do not exist.⁹² However, the European Court of Justice made a distinction

⁸² Judgement of 26 October 2006, *Commission v Portugal*, Case C-239/04, ECLI:EU:C:2006:665, para. 35.

⁸³ *Ibid*, para. 36.

⁸⁴ Judgement of 20 September 2007, *Commission v Italy*, Case C-304/05, ECLI:EU:C:2007:532.

⁸⁵ *Ibid*, para. 83.

⁸⁶ Judgement of 24 November 2011, *Commission v Spain*, Case C-404/09, ECLI:EU:C:2011:768, para 109.

⁸⁷ Judgement of 11 April 2013, *Sweetman and Others*, Case C-258/11, ECLI:EU:C:2013:220, para 35.

⁸⁸ Judgement of 16 February 2012, *Solvay and Others*, Case C-182/10, ECLI:EU:C:2012:82.

⁸⁹ *Ibid*, para. 75-76.

⁹⁰ *Ibid*, para. 77.

⁹¹ Judgement of 11 September 2012, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*, Case C-43/10, ECLI:EU:C:2012:560.

⁹² *Ibid*, para. 122.

between the two measures and argued that the supply of drinking water largely always included in the considerations concerning people's health, but that irrigation can, under certain conditions, have significant consequences for the environment.⁹³

In *Briels and Others*⁹⁴, the European Court of Justice elaborated a bit on what principles should drive the assessment under the HD as well as the distinction between compensatory measures and mitigation measures. When a plan or project is likely to have a significant impact on the site, the European Court of Justice established that the appropriate assessment of the implications for the site's conservation objectives "*cannot have lacunae and must contain complete, precise and definite findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned*".⁹⁵ The Court also stated that if protective measures are not aimed at either avoiding or reducing the significant adverse effects for a habitat type, they constitute compensatory measures.⁹⁶

5 DISCUSSION

In light of what has been identified in this report, several aspects of particular interest can be highlighted when discussing the abusive use of exceptions under the WFD in the Swedish context. These following aspects illustrates how the Swedish national plan for sustainable hydropower, and the political strategy in general regarding this, could potentially be in conflict with the WFD and other relevant EU legislation or legal principles.

5.1 DEROGATIONS ARE THE EXCEPTION

One of the first and most fundamental principles set out by the Commission in the Common Implementation Strategy for the WFD is the following:

*"When discussing exemptions, it should be taken into account that the WFD is an environmental directive and exempting from its objectives should not be the rule but exceptional."*⁹⁷

The intention that the Water Authorities are to make full use of all the exemption possibilities in the WFD can become contrary to this if an extensive use of exemptions for countless hydropower plants in Sweden are done without fulfilling the derogation regime. As the WFD aims at a high level of environmental protection through maintaining and improving the aquatic environment in the EU, the derogation regime is intended to be the last resort if all else fails. It could be argued, considering the many steps and strict conditions for the derogation regime, that it should be difficult to justify exemptions that exempt a Member State from fulfilling its obligations under EU law.

⁹³ Ibid, para. 125-126.

⁹⁴ Judgement of 15 May 2014, *Briels and Others*, Case C-521/12, ECLI:EU:C:2014:330.

⁹⁵ Ibid, para. 27.

⁹⁶ Ibid, para. 29-31.

⁹⁷ European Commission, 2009, p. 10.

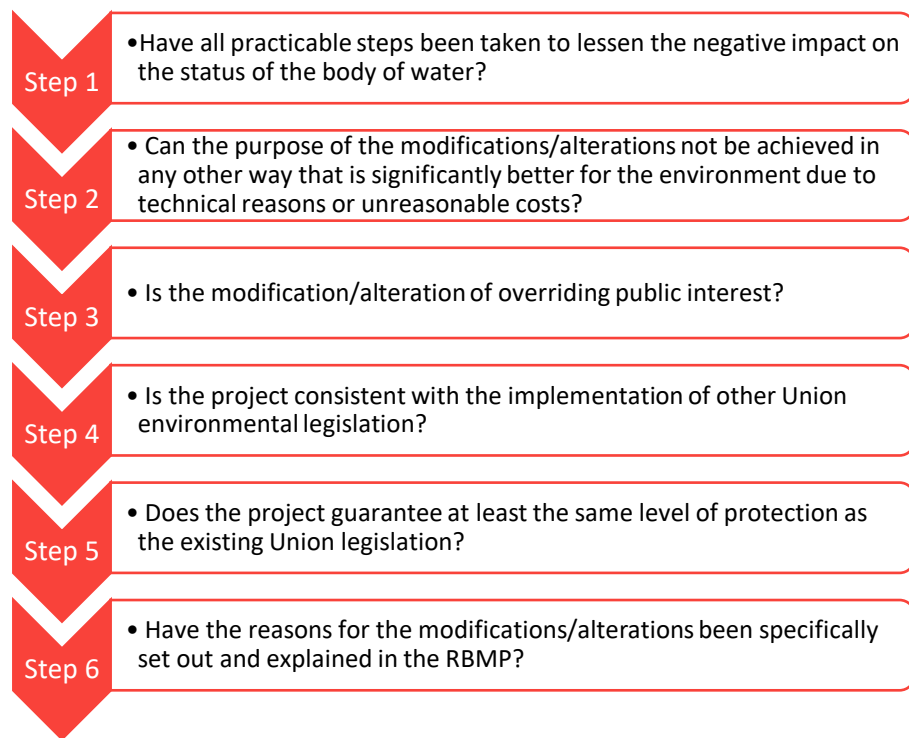


Figure 1. The stepwise approach for an Article 4(7) Test

The extraordinary nature and strict interpretation of the derogation regimes under environmental law has been confirmed by the European Court of Justice in cases under the HD such as *Commission v Portugal* and *Commission v Italy*. It could also be argued that such an interpretation is well in line with the precautionary principle, which is one of the fundamental principles of EU environmental legislation. Article 4(7) should therefore only be used as a last resort, when all other policy options are exhausted.⁹⁸

One should also bear in mind the conclusions of the Water Authorities in the consultation document on environmental quality standards for water affected by hydropower, that nothing points to anything other than a very extensive negative impact on electricity production in individual plants would be difficult to replace with other alternatives. The Water Authorities have identified a total of 56 water bodies (out of almost 2000) that have a close connection with hydropower that could potentially motivate a derogation. Furthermore, the authorities noted that there is currently a lack of evidence that show that there would generally be high socio-economic costs of replacing electricity production in individual plants with electricity production in other hydropower plants or with alternative types of energy. This implies that the beneficial objectives of hydroelectric energy production can be achieved by other means that are deemed to be technically feasible and not of disproportionate cost.

5.2 THE WFD IS SITE-SPECIFIC

The obligation for Member States to take all practicable steps to lessen the negative impact on the status of the specific body of water that is to be

⁹⁸ van Hees, 2017, p. 338.

granted a derogation, the burden of proofs lies heavily on the Member States to show that a detailed and thorough analyze of site-specific circumstances of the concerned body of water has been conducted. The importance of site-specific circumstance in individual permit procedures is supported by the European Court of Justice's reasoning in both *Weser* and *Schwarze Sulm*.

Neither legislation nor case law supports the conclusion that a politically defined guideline value of 1.5 TWh/year for electricity production loss is enough to motivate an exception under Article 4(7) WFD. Furthermore, the European Commission has clarified that the exceptions and the individual permits under the WFD are closely connected and cannot be applied separately. A general exception for hydropower, which has been established beforehand, is contrary to the site-specific nature of the WFD obligations.

5.3 HYDROPOWER PLANTS MAY BE, BUT MUST NOT BE, OF OVERRIDING PUBLIC INTEREST

One of the essential conditions for applying the derogation regime under Article 4(7) WFD is that the new modification constitutes an overriding public interest. Like the CIS on the WFD states, this requires a high degree of social, economic and/or environmental benefits of particular importance. These benefits must also be long-term in order to be able to outweigh the long-term goals established in ambitious environmental legislation at EU level, such as WFD and HD. This has been highlighted by the European Court of Justice in cases such as *Solvay and Others* and *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*.

In *Schwarze Sulm*, the European Court of Justice established that hydropower *may* be of an overriding public interest. However, the wording of the judgement indicates that that one cannot successfully declare a new modification a “overriding public interest” without further well-grounded assessments which are documented in a clear and transparent way. Renewable energy production cannot be used as a general argument in a permit procedure but must be justified and proven in the light of site-specific circumstances, which was the case in *Schwarze Sulm*.

It can also be noted that the Swedish Land and Environmental Court of Appeal has ruled that the establishment of wind turbines does not constitute an overriding public interest, although it is a renewable energy type that contributes to reduced climate impact, when it is only intended to operate for a shorter period of time and the capacity of the turbines is relatively small. This raises the question whether only large-scale installations of renewable energy can be considered an overriding public interest, as noted by a legal scholar in relation to the derogating regime under the HD.⁹⁹

On 8th of March 2022, following the Russian invasion of Ukraine, the European Commission launched a communication in which it stressed the need for faster measures to reduce the need for Russian gas in the EU.¹⁰⁰ Amongst other things, the Commission proposes reducing the dependence on fossil fuels (including gas) by rolling out solar, wind and heat pumps.¹⁰¹ Contextually, the Commission's proposal can give operators an additional argument to advocate the usefulness of their facility (such as an overriding

⁹⁹ Malafray, 2016, p. 199.

¹⁰⁰ European Commission, 2022.

¹⁰¹ *Ibid*, p. 8.

public interest) and thus try to make 'their' water body covered by the exceptions in 4 (7) and 4 (5) WFD. But regardless, everything must take place within the framework of existing EU law, including the present case law referred to in this report.

5.4 THE REFERENCE VALUE IS NOT LEGALLY BINDING

As previously mentioned, the reference value is not legally binding as it is not established in any national legislation. The preparatory work for the current legislation states that the reference value shall only be a guide for the Water Authorities when assessing and designating heavily modified water bodies and exemptions in accordance with WFD. Even if the reference value would be transposed into Swedish law, this does not change that fact since EU law shall take precedence over Swedish law in accordance with the doctrine of supremacy of EU law, which has consequently been confirmed by the European Court of Justice. Also, national legislation prohibits the Water Authorities from designating a water body as heavily modified if it hinders or jeopardizes quality requirements in accordance with EU legislation. This means that an exemption may not be granted if it means that a favorable conservation status cannot be achieved, even if other conditions are met.

According to both national legislation and Article 4(8) WFD, a derogation may therefore not be granted if it permanently excludes or compromises the achievement of the objectives of the WFD and the HD. However, as the relevant authorities have been given instructions that they shall strive to ensure that the reference value of 1.5 TWh is not exceeded when the permit for hydropower is reconsidered, there is an imminent risk that the obligations of the WFD is down prioritized in favor of electricity production. In addition, the permit procedure risks being characterized by the pre-determined perception that particularly important hydropower plants should not be subject to high environmental requirements and that exception opportunities must be fully utilized, putting improved water status and the protection of biodiversity at a clear disadvantage. Such a course of action would likely be contrary to EU law.

5.5 SCIENTIFIC EVIDENCE SHOULD DRIVE THE ASSESSMENTS

As the European Court of Justice indicates in *Briels and Others*, assessments of implications on a protected site should be complete, precise, and science driven. It could be argued that this “no reasonable scientific doubt” interpretation should also be applied to the WFD. This could include the assessment of what mitigation measures are necessary/appropriate to take and whether there are other means to investigate. Although the European Court of Justice leaves the assessment of the existence of suitable alternatives in the specific case to the Member States¹⁰², it could be argued that this practice established by *Briels and Others* should apply for the conditions set out in the WFD in each specific case as the final decision has to be well-founded. The decisive factor in individual permit procedures

¹⁰² See *Schwarze Sulm*, para. 74.

should therefore be what the available science suggests, not what current political decisions stipulate.

In *Schwarze Sulm*, the Commission's allegations that the Austrian authorities had not fulfilled the fourth condition to investigate alternative means was dismissed by the European Court of Justice due to insufficient arguments. The Commission argument was that the authorities had to investigate other renewable energy sources in order to fulfill the condition. As a result, the scope of the fourth condition remains unclear, but the Commission's reasoning suggests that the Commission's opinion is that hydropower could potentially be disregarded in favor of other means such as wind or solar power and that future infringement procedures in similar hydropower cases are plausible.

6 CONCLUSIONS

With regard to the questions specially asked by the WWF, the following conclusions can be drawn in light of the information presented and analyzed in this report:

- ⇒ Using the reference value for electricity production loss as the sole or primary basis for a derogation is contrary to Article 4(7)(a) WFD, as it is not legally binding and cannot take precedence over the legally binding conditions set out in Article 4(7) WFD. Even if the reference value would be transposed into Swedish legislation, EU law has primacy over national law.
- ⇒ Due to the wording of Article 4(8) WFD, the obligations set out in the WFD (as well as other EU legislation) take precedence over the reference value capping electricity production loss resulting from the application of the WFD.
- ⇒ The Water Authorities' statement of the potential to replace hydropower with other alternatives and the Commission's suggestion in *Schwarze Sulm* that other renewable energy sources ought to be investigated as alternatives to hydropower indicate that grid stabilization/regulation cannot by itself exclude or override the consideration the condition set out in Article 4(7)(d) of the WFD.
- ⇒ In the original draft for the RBMP for the Bothnian Sea, where the absolute majority of the water bodies with potential of being designated heavily modified is located, the exceptions are not outlined and justified in the 2021-2027 River Basin Management Plans. However, this could change in the final draft which are yet to be published.

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WSP Sverige AB

121 88 Stockholm-Globen
Visit: Arenavägen 7
T: +46 10-722 50 00

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