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Commissioner for Environment
Oceans and Fisheries

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Mr Magnus Heunicke
Minister of Environment of Denmark
Frederiksholms Kanal 26
1220 København K
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Dear Minister,

I would like to thank you for your letter of 30 June 2023 concerning the Water Framework Directive following our meeting of 27 June 2023. In your letter, you ask for assistance on the interpretation of the Water Framework Directive¹ (WFD), notably in relation to a recent ruling from the Danish Environment and Food Board of Appeal which you report will have major consequences for some projects related to the transition to green energy. I understand that, since the ruling deviates from the guidance of the Danish Environmental Protection Agency, this leads to legal uncertainty and suspension of permitting procedures.

Acknowledging the urgency of your request, I hereby attach the views of my services on this complex issue, while noting that only the EU Court of Justice can give an authentic interpretation of Union law.

I hope that your authorities will find them helpful.

Yours faithfully,

¹ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 327, 22.12.2000, p. 1

ANNEX

Question 1: *“When the EQS for a substance has already been exceeded and the water body has thus been classified in the lowest class:*

o Does any addition of a given substance to a water body constitute deterioration (regardless of the amount/concentration) or

o Will it only constitute deterioration contrary to Article 4 if the discharge will lead to an increase in the concentration of a given substance in the water body”?

According to Article 2(35) of the WFD, ‘environmental quality standards’ (EQS) mean “the **concentration** of a particular pollutant or group of pollutants in water, sediment or biota which should not be exceeded in order to protect human health and the environment.” EQS exceedances are therefore always to be measured based on the **concentration** of that substance in the water body in question. Therefore, where the measured concentration of a given substance already exceeds the relevant EQS, additional discharges of that substance to a water body would lead to a deterioration in breach of Article 4 of the WFD if they would lead to a further increase in concentration of that substance in that water body.

Question 2: *“In order to establish an increase in concentration — is it a requirement that it must be measurable/detectable? In most situations, it will be possible to calculate even negligible additions - does that constitute an increase and therefore a deterioration?”*

Under Directive 2008/105/EC² (EQSD), EQS are set, for each listed substance, as both maximum allowable concentration which can never be exceeded at any point in time, and as thresholds of allowable concentrations averaged over one year (see Annex I, part A).

This means that, in order to assess over time whether the status of a water body has deteriorated, it is necessary not only to carry out regular sampling activities to check whether the maximum allowable concentrations are exceeded at any point in time, but also to assess whether the measured concentration values, averaged over one year, exceed the threshold of allowable annual averages (see Annex V, point 1.3 WFD and Article 3 EQSD).

This also means that, in order to prevent possible deterioration of the chemical status of a water body, e.g., in relation to new projects, it is necessary to estimate the expected increase in concentration resulting from their implementation. It is clear from recent jurisprudence of the EU Court of Justice³ that, “*where, in the context of the authorisation procedure for a programme or project, the competent national authorities determine that it is likely to cause such deterioration, that programme or project may, even if that deterioration is of a temporary nature, be authorised only if the conditions laid down in Article 4(7) of that Directive are fulfilled*”.

The conditions laid out by Article 4(7) WFD need to be cumulatively fulfilled and are as follows:

- (a) all practicable steps are taken to mitigate the negative impact of the project on the status of the relevant water body;

² 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, OJ L 348, 24.12.2008, p. 84

³ Case C-525/20 ‘Association France Nature Environnement contre Premier ministre, Ministre de la Transition écologique et solidaire’, conclusions

(b) the reasons for the project have been specifically set out and explained in the river basin management plans (RBMPs) which Member States have to adopt and subsequently report to the Commission every six years;

(c) the project is justified on the basis of an overriding public interest and/or its benefits to human health, maintenance of human safety or sustainable development outweigh the benefits of reaching good water status; and

(d) the objective pursued by the project cannot be achieved through alternative measures which would be a significantly better environmental option, for reasons of technical feasibility or disproportionate cost.

As set out in CIS Guidance n° 36⁴, for an Article 4(7) exemption to be applicable, the deterioration needs to result from activities falling within the scope of Article 4(7), i.e. new modifications to the physical characteristics of a surface water body, alterations to the level of groundwater and/or new sustainable human development activities. If a project does not fall within the scope of Article 4(7) (e.g. because it cannot be considered as a new human sustainable development activity), it cannot be allowed if it is expected to result in breaches to the EQS. Such projects can only be allowed if further deterioration of the chemical status can be prevented, amongst others through mitigation measures which may include nature based solutions.

Finally, it is of utmost importance to secure, in line with Article 4(8) WFD, that the longer-term objective of achieving good water status is not permanently excluded or compromised in other water bodies within the same river basin district and that consistency is ensured with other EU environmental law.

Question 3: *“At what scale shall the assessment be conducted at? (water body level or other units?) Is there a distinction between surface water and bodies of ground water?”*

Under the WFD, the obligation to achieve good status and avoid deterioration is set at the level of the water body and thus any assessment should be made at the level of the water body. However, it is necessary to take account of the obligation set out in Article 4(8) WFD and avoid compromising the achievement of good status in (downstream) water bodies in the wider river basin district.

The Directive takes this approach for both groundwater and surface water bodies.

⁴ See in particular pages 30 and 52 of [Guidance n° 36](#) established in the framework of the Common Implementation Strategy