

## **EURACOAL Position Paper**

### **on the Fitness Check review of the EU Water Framework Directive (WFD – 2000/60/EC)**

The EU Water Framework Directive (WFD – 2000/60/EC) is the central instrument of water law in the European Union. From the perspective of operators of coal and lignite mines, as well as operators of power plants and public authorities managing abandoned mines, it has contributed significantly to the protection of water, as well as the animals and plants living in water, and improved the possibilities to use water properly. The current provisions of the WFD provide an essential framework for a sustainable water policy in the European Union *inter alia* through the integrated management of river basins and scope for action at the member state level to achieve an overall sustainable balance for the protection and use of their waters.

EURACOAL welcomes and fully supports the European Union commitment to achieve a good qualitative and quantitative status of all water bodies. A balance must also be achieved between improving the status of water bodies and ensuring planning and legal certainty for industry.

However, since the Weser case ruling of the European Court of Justice in 2015 (C-461/13), there has been legal insecurity on how water management should be regulated under the WFD, especially when looking beyond 2027. The interpretation and application of

- the non-deterioration principle,
- the requirement for enhancement,
- the less stringent environmental objectives,
- the extension of deadlines, and
- exemptions

are all highly questionable. Yet, their interpretation and application are decisive for permits in the field of coal and lignite extraction.

Permits for water use, *e.g.* discharge of mine water into surface water bodies, will continue to be needed, even after mine closures, but are endangered by the current provisions of the WFD, as well as their interpretation by the courts, particularly the European Court.

**We would like to support this scheduled review, coming as it does nineteen years after the date of the Directive's entry into force. During the review process, it will be crucial to take into account the following four points.**

## 1. “Non-deterioration principle” – no clear definition

The term “deterioration” is not defined in the WFD, although this is a key legal term used in the Directive. The Weser case ruling (C-461/13) has addressed the term “deterioration”, but still there is no clear definition.

According to the definition understood by the European Court of Justice, it is still not clear *e.g.* whether deterioration should be applied only to the chemical status of surface waters or whether the definition of the Court also has to be applied to groundwater. Besides, the Court’s definition is itself very strict and will lead to disproportionate legal consequences in practice. It is very much unclear how permits for water use, such as in the example below, will be granted beyond the 2027 deadline and even before then, if the WFD remains unchanged.

## 2. Less stringent objectives (WFD Art. 4.5) – usually not possible

Less stringent environmental objectives, such as those for heavily modified water bodies, are unlikely to be a legally reliable option, because permits can only be granted if no further deterioration occurs. Hence, this provision of Article 4.5(c) of the WFD prevents the Directive’s originally intended purpose of serving as a management planning tool. To be a useful management planning tool, one which balances environmental and socioeconomic considerations, the contradiction in Article 4.5(c) of the WFD should be clarified.

## 3. Postponing the achievement of good water status (WFD Art. 4.4) – to beyond 2027

Many mine operators increasingly rely on exemptions. In many EU regions – including mining regions – good water status will not be fully achieved by 2021 or 2027. To go beyond 2027 with a status that is not regarded as “good” is only allowed under the current WFD if it can be shown that the objectives cannot be achieved by the deadline due to “natural conditions”. There are only rare cases which would fulfil the definition of “natural conditions”. Therefore, the mining industry needs time extensions beyond 2027 in order to continue mining. Public authorities managing mine water after mine closures are similarly concerned as pumping and discharge must continue in perpetuity.

From the perspective of power plant operators, the objectives of the WFD should also be maintained beyond 2027, based on the polluter-pays and precautionary principles. The European Commission should support member states in their implementation of the Directive through enhanced options for the management of their waters.

## 4. Exemption clause (WFD Art. 4.7) – many cases not covered

The example below shows *inter alia* that under a strict interpretation of WFD Article 4.7, as discussed in the Commission’s Common Implementation Strategy (CIS) guidance documents, only a few scenarios could be covered under the wording of Article 4.7 of the WFD. The limited exemption clause speaks about “new modifications” and “physical characteristics of the surface water body”. Under physical characteristics is the hydromorphological quality such as changes in

the quantity and dynamics of water flow. If the hydromorphological quality were to be changed, the provision of Article 4.7 of the WFD would be applicable, but it remains unclear whether this would be possible if the chemical or biological characteristics were to be changed. These limitations lead to the result that typical mining projects are increasingly at risk of not fulfilling the requirements of the exemption clause and therefore of not being granted the necessary water permits.

#### Illustrative example

An operator applies for a permit to discharge mine water into a surface water body. The surface water body is already in the lowest chemical status (“Failing to achieve good”) as one of the environmental quality standards (EQS) *e.g.* for Ni, Pb, Hg, Cd, *etc.* is exceeded due to the many different past and current activities in Europe’s industrialised regions. If the discharge of mine water only slightly increases the concentration of just one EQS that is already in the lowest class, then this constitutes a forbidden deterioration according to the deterioration concept understood in the ECJ’s Weser ruling. It does not matter whether the mine water improves other EQS *e.g.* by mine rehabilitation measures, because the WFD does not allow for an integrated approach under its “one-out, all-out” principle. Such an integrated approach might evaluate the attainment of certain stress indicators (*e.g.* reduction of nutrient load).

According to Article 4.5 of the WFD, there is no possibility of setting a less stringent objective for the affected water body in this example, as less stringent objectives are only permissible if no further deterioration occurs (see Article 4.5(c)). Hence, use of the water body is constrained by the objective to achieve a good chemical status. The option for member states to postpone the date of achieving good status definitively comes to an end in 2027 according to Article 4.4 of the WFD. Thus, the last remaining option is an exemption under Article 4.7 of the WFD. Unfortunately, it is completely unclear whether exemptions can be granted for the failure to achieve the good chemical status of a surface water body. Moreover, exemptions are unlikely in most cases, because the Commission guidance document on Article 4.7 of the WFD follows the article’s wording very closely and leaves no room for considering whether a particular requirement is proportionate. Apart from that, the guidance documents are not a reliable basis for permitting as they are not legally binding on member states or the courts.

#### **Therefore the European Union needs solutions for the following aspects:**

- The central legal term of “deterioration” needs to be defined practicably and proportionately, WFD Art. 4.1.
- Time extensions beyond 2027 are needed to balance water quality objectives with ongoing water management at mines and power plants, WFD Art. 4.4.
- The provision of WFD Art. 4.5 should be modified to resolve its contradiction.
- WFD Art. 4.7 should be reviewed so that it can be applied to all water uses.

The review process should not only analyse the *status quo* as, according to Article 19 of the WFD, any necessary amendments should be proposed by the European Commission. Against this background, the aspects mentioned above should be resolved adequately for the coal and lignite mining industry, as well as the public authorities responsible for mine-water management.

The current Fitness Check review gives the chance to find a way of balancing ongoing mining and power generation activities with the aims of the WFD. The Directive should express more strongly its aim to integrate the protection and sustainable management of water, taking into account the diverse needs of water users such as the mining industry and power generators. Together, we should take the opportunity to find the right balance.

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