Position

BDI's proposals for the review of the Water Framework Directive (WFD)

Bundesverband der Deutschen Industrie e.V.

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The Water Framework Directive (WFD) has proved its worth as an instrument of European water law. It sets out the central framework conditions in Europe and has made a substantial contribution to a sustainable water policy. WFD contains important requirements for water management. BDI is therefore in favour of maintenance and further development of WFD. This further development must comprise amendments such that authorisations including water management permits for industrial installations continue to be possible.

Environment policy is a decisive locational factor for manufacturing industry and hence also constitutes an important component of the overall economic development. German and European environmental law, and also water law in particular, is of great significance for Germany as an industrial location. At long last, environment law decides on whether and how industrial installations are authorised and operated – in other words, on the future development of Germany as a production location and the associated safeguarding of jobs.

A large proportion of water bodies in Europe will not meet the objectives of the Water Framework Directive by 2027. In the face of this missed goalage, critical questions need to be asked about both the regulatory approach and the regulatory objective of WFD. In particular, the interaction between objectives and exceptions in WFD have to be subjected to a thorough review. This includes a review and recast of the provisions on "exceptional management objectives" and "derogations". Economic and industrial activities must continue to be approvable for authorisations in order to do adequate justice to the economic aspect of sustainability.

The position set out below therefore highlights the current problems with the WFD requirements in authorisation procedures. BDI remains open to a discussion on further development of its wishes.

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1. Maintain the broad thrust of WFD but review the interaction between objectives and derogations (articles 4.5 and 4.7 WFD)

Broadly speaking, German industry does not question the Water Framework Directive (WFD). However, as WFD is currently framed, a large proportion of water uses are covered by the derogation comprised in article 4.7 WFD. And this despite the fact, that Article 4.5 WFD sets out conditions, which essentially enable discretion and consideration in water management. As a result, the derogation becomes the rule. But the rule-exception ratio should not be reversed. A derogation possibility must exist for all essential industrial activities of water use.

1.1. Less stringent environmental objectives (divergent management objectives) - Art 4.5 WFD

The overwhelming majority of water bodies in Europe will probably not achieve a good status. This means that a large portion of water uses will necessarily have to be managed via derogations in accordance with article 4.7 WFD. This cannot have been the original intention of WFD. Article 4.5 WFD in particular enables discretion and assessment in water management taking adequate account of socio-economic requirements without the regular need to apply a derogation.

In accordance with article 4.5 WFD, authorities can set less stringent objectives for specific bodies of water. Industry welcomes this, but the conditions of article 4.5(c) WFD mean that this provision has hardly ever been applied in practice. From an industrial point of view, this is partly due to the condition referred to in Article 4 (5c) of the WFD ("no further deterioration"), which makes the application of this balancing act considerably more difficult.

Article 4.5 WFD must in future play a much greater role in management practice with a view to economic and industrial activities continuing to be possible. Industrial activities which already exist can trigger divergent management objectives. Accordingly, it is therefore absolutely essential to modify the conditions of article 4.5 WFD in such a way that the management instrument can be used better.

1.2. Formulation of the derogation in article 4.7 WFD

In the first place, the current formulation of the derogation under article 4.7 WFD is problematic for industrial authorisation procedures. It should be made clear that the conditions for the derogation in accordance with article 4.7 WFD must essentially be open for all industrial activities. In particular, this means that not only changes to physical characteristics in terms of purely hydromorphological characteristics should be eligible for the derogation.

Rather, all changes to characteristics including chemical, physico-chemical and biological changes in the framework of ecological status (annex V WFD) and changes to characteristics in the framework of chemical status (environmental quality standards under directive 2008/105/EC) of bodies of surface water as well as all material changes to bodies of surface water (inter alia as a result of substances being introduced) must be eligible for the derogation in accordance with article 4.7 WFD.

In the second place, the derogation provision in article 4.7 WFD should be framed in such a way that a derogation can also be granted for economic reasons. Granting derogations only on the basis of overriding public interest is not in line with the principle of proportionality.

2. Frame deterioration ban and improvement aim in more practical terms (article 4 WFD)

Since the ECJ's 1 July 2015 ruling in the *Weservertiefung* case, the deterioration ban and improvement aim need to be discussed as a separate, unconnected point for examination in the authorisation procedure. Industrial companies demonstrate in a comprehensive expert opinion that a deterioration will not occur or that an improvement of the body of water will not be impeded due to the project. This creates further uncertainties in relation to the outcome of the procedure and leads to serious delays in the authorisation procedure.

In some cases, the WFD requirements on the deterioration ban and enhancement aim lead to industrial authorisations being refused. Or it leads to the difficult exemption test under Article 4.7 WFD, the outcome of which is uncertain in many cases. It may be mentioned as an example that the water law permit for the power plant Moorburg was refused by the Higher Administrative Court Hamburg based on the cooling system used. Therefore, in order to carry on industrial activities, the relevant rules should be reviewed and revised.

To enable industrial activities to be practised, the corresponding provisions should therefore be revisited and reworked.

In addition, temporary deteriorations and improvements must be compatible with the deterioration ban. If discharges are halted and it can be foreseen that discharges will once more occur after a certain period (e.g. when production is resumed), this should not be impeded by the deterioration ban.

3. Review phasing-out obligation (article 16.6 WFD) and delete if appropriate

The phasing-out aim for priority substances (article 4.1, article 16.6 and 16.8 WFD) needs to be reviewed. In any event, there should be a clarification that WFD does not contain an aim for emissions of priority substances to be completely halted. The verification effort for companies arising from the phasing-out aim must remain within the bounds of technical and economic possibilities. Ubiquitous and naturally occurring substances – such as all heavy metals – should essentially be excluded from the phasing-out aim. Zero pollution is not possible here.

4. Modify “one out-all out”

The “one out-all out” approach arises from point 1.4.2(i) annex V WFD which governs the presentation of monitoring results and classification of the ecological status and ecological potential. The worst quality component determines the classification of ecological status. Enhancements in the other quality components do nothing to change the classification of the body of water. By analogy, the same applies for the chemical status. This means that real progress made in water quality is not reflected in the overall assessment. It follows on from this approach that improvements and deteriorations are inadequately captured. A review process must therefore deliberate on how improvements to individual components can in future be recognised.

Plans with broadly positive effects on the overall water balance can even be impeded due to a deterioration in an individual quality component or quality standard. Example: The cooling water inlet of a power plant violates temperature specifications, but conversely leads to an oxygen enrichment and an increase in water quantity. Or due to a water discharge, an EQS (like a single heavy metal value) is exceeded. There is a violation of the improvement aim. Simultaneously, the inlet leads to a significant reduction of other pollutants parameters such as iron, pH, turbidity or TOC in the overall balance.

Thus the overall balance of a project may improve the water body. In this case, there is a lack of discretion and consideration possibilities within approval procedures for industrial projects.

5. Mechanisms for assessment of chemical status

Division of the chemical status into two categories (good and not good) sometimes lead to results which are objectively difficult to understand, in particular in connection with ECJ law in the *Weservertiefung* case. ECJ assumes a deterioration in the status of a water body if the classification of at least one of the relevant quality components deteriorates by one category. If the quality component in question is already in the worst category any further

impairment would constitute a deterioration in the status. Given the bad chemical status of many bodies of surface water, a further deterioration – however small – will trigger an infringement of the deterioration ban. Thus, in the "not good" status, no measurable increase is allowed, even if this has no consequences for the water body.

As a result, the chemical status is assessed much more strictly than the five-stage ecological status (very good/good/moderate/poor/bad). An individual pollutant is assigned the same significance as, for example, an entire population of fish. Due to the interpretation of the deterioration ban (see point 2), the environmental quality standard originally conceived as an assessment benchmark is becoming a limit value which leads to a complete discharge ban if exceeded. It would be helpful to have further differentiation in the "not good" status. This would enable concentration increases also within the "not good" status.

6. Improve possibility to designate artificial / heavily modified water bodies

Many water bodies are located in areas which have been subject to human activity and have had an industrial character for many decades. WFD therefore distinguishes between natural water bodies on the one hand and artificial or heavily modified water bodies on the other hand. The fundamental management objective of a good ecological status cannot be achieved in artificial and heavily modified water bodies without disadvantageous consequences for existing uses. WFD takes this restriction into account. In accordance with article 2.9 and article 4.1(a)(iii) WFD, relevant surface water bodies can be designated as "heavily modified" to which a divergent management objective applies, i.e. a "good ecological potential". Here, too, as for the ecological status, the fauna and flora of the water body have to be investigated and evaluated. However, as compared with the ecological status, different and less stringent requirements apply which take the consequences of de facto irreversible water impairment into account.

In the eyes of German industry, greater use should be made of the designation of heavily modified or artificial water body. The definition of a heavily modified water body under article 2.9 WFD should be extended to include material/chemical changes to surface waters and to include groundwater bodies. A designation is currently possible only on the basis of physical changes. It is difficult to understand why, for example, straightening a watercourse is deemed to be a heavy modification and hence accepted as a long-term change whereas it is not possible to classify abstraction of water for drinking, raw material extraction or as an input for industrial production as a heavy modification.

About BDI

BDI communicates the interests of German industry to policy-makers. In so doing, it supports companies in global competition. It has access to a widely connected network in Germany and Europe, on all markets and in international organisations. BDI provides policy flanking for the opening of international markets. And it offers information and policy guidance for all industry-relevant issues. BDI is the leading organisation representing German industry and industrial service providers. It is the voice of 36 sectoral associations and more than 100,000 companies with around 8 million employees. Membership is voluntary. Business interests are represented at regional level through 15 representations in Germany's federal states.

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