

**WATER FRAMEWORK DIRECTIVE ... EVERYWHERE, BUT NOT A DROP TO DRINK?**

**REGULATORY AND CIVIL LIABILITY FOR WATER POLLUTION**

**JARLATH FITZSIMONS S.C.**

**26 OCTOBER, 2017**

## Introduction

The Environmental Protection Agency has recently reported,<sup>1</sup> following the completion of the first six-year cycle of the Water Framework Directive (2010–2015), that the quality of surface waters in Ireland has remained relatively static since 2007–2009 and improvements, planned for under the first river basin management cycle, have not been achieved. Nationally, 91% of groundwater bodies, 57% of rivers, 46% of lakes, 31% of transitional (estuarine) waters and 79% of coastal waters are achieving either “good” or “high” status under the Water Framework Directive.

The EPA also reported that, while the national picture is relatively stable, some water bodies have improved while others have deteriorated, which highlights that not enough has been done to prevent deterioration of water quality. There were 1% and 2.6% declines respectively in “high” or “good” ecological status/potential of monitored river and lake water bodies since 2007–2009. The length of unpolluted river channel (Q4, Q4.5 and Q5 rivers) was static between 2007–2009 and 2013–2015 at 69% of the channel surveyed. There has been little net change in the quality of our monitored transitional water bodies since 2007–2009, with 69% of these water bodies classified as moderate or worse status during 2010–2015. 79% of coastal water bodies were classified as good or high status during 2010–2015. Groundwater quality remains good, with 99% of the groundwater underlying the country’s area being at good status (91% of groundwater bodies). The quality of water in canals remains very high.

The reduction in the level of seriously polluted waters has continued, with only six river water bodies assigned “bad” status under the Water Framework Directive in 2010–2015 compared to 19 in 2007–2009.

The EPA’s most recent water quality report begs the question, “how fares implementation of the Water Framework Directive in Ireland?” at the completion of the first six-year cycle and almost 18 years after its transposition into Irish law.

Questions must also be asked as to the effectiveness of the Water Framework Directive in achieving “good ecological status” and the interface with liability for water pollution in Ireland.

Like Coleridge’s *Ancient Mariner* – who, on a becalmed ship, is surrounded by salt water that he cannot drink – is Irish water law and policy becalmed and surrounded by an ineffective Water Framework Directive regime?

---

<sup>1</sup> Environmental Protection Agency, *Water Quality in Ireland 2010–2015* (2017), page 5.

## Principal Features of the Water Framework Directive<sup>2</sup>

### Introduction

Instead of a series of separate and fragmented European Union measures on water uses and on pollutant discharges, all water types and issues are dealt with in a single instrument, *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*. It should be noted from the outset, however, that the integration process is not be entirely complete since some water instruments, e.g., the Urban Waste Water Treatment Directive (91/271/EEC) and Nitrates Directive (91/676/EEC), remain outside the scope of the Water Framework Directive (WFD).

Although the WFD aims to be the framework for all water management in the EU, its main focus is on water quality issues. It is complemented by the Floods Directive, *Directive 2007/60/EC of the European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks*.

In Case C-525/12,<sup>3</sup> *European Commission v. Federal Republic of Germany*, the Court of Justice of the European Union (CJEU) considered the objectives of the WFD:

*“As evidenced by recital 19 in the preamble to Directive 2000/60, it aims at maintaining and improving the aquatic environment in the European Union. This purpose is primarily concerned with the quality of the waters concerned. Control of quantity is an ancillary element in securing good water quality and therefore measures on quantity, serving the objective of ensuring good quality, should also be established...”*

Thereafter, the CJEU held, in general terms, that the WFD is a framework directive for the protection of all water bodies and, as such, does not provide for complete harmonisation of the rules of the Member States.<sup>4</sup> Commenting on the Water Framework Directive generally, Kramer, stated:

*“As numerous provisions of the Directive are very loosely drafted, much will depend on the political will and the determination of the relevant administrations to work for the improvement of water quality rather than monitoring the status quo. Indeed, this imprecision in drafting may cause particular problems when enforcement action is considered for the failure of Member States to achieve the environmental objectives under Article 4 of the WFD.”<sup>5</sup>*

---

<sup>2</sup> The structure of this section of the paper follows Chapter 3 of *Review of monitoring and research to meet the needs of the EU Water Framework Directive*, Final Report, Prepared for the Environmental Protection Agency by Department of Zoology, Trinity College Dublin (TCD), written by the author.

<sup>3</sup> Case C-525/12 concerned Article 9(4) of the WFD, in relation to the margin of appreciation afforded to Member States to decide whether or how far cost recovery is a measure to be applied for certain water uses or services, issue which lie outside the scope of this paper.

<sup>4</sup> See also C-32/05 *Commission v. Luxembourg*.

<sup>5</sup> Kramer, *EU Environmental Law*, 8<sup>th</sup> ed. (2015), para. 7–08

It has been recently suggested that the “key distinguishing feature” of the WFD is “the focus on the protection of ecosystems instead of a sole focus on pollution control.” Moreover, the WFD has been hailed as “an example of a successful legal implementation” of integrated water resource management, because the WFD:

- (i) takes a river basin approach to enable water management across administrative borders;
- (ii) integrates the environmental regulation of industrial, household and agricultural water pollution, through the combination of chemical and ecological goals;
- (iii) emphasises sustainable and equitable water use by requiring balanced groundwater use, minimum environmental flow of surface water, prescribing economic analysis of water uses and cost recovery for water services, including environmental and resource costs;
- (iv) leaves room for economic and social concerns by containing exemptions for not achieving “good” ecological status by 2015 and by containing ambitious public participation provisions to encourage and enable citizens to be involved in waste management.<sup>6</sup>

Article 1 of the WFD provides that the purpose of the WFD is to protect inland surface waters, transitional waters, coastal waters, and groundwater bodies. Specifically, the Directive has the objective of establishing a framework that will:

- prevent further deterioration and protect and enhance the status of aquatic ecosystems;
- promote sustainable water use;
- aim at enhanced protection and improvement of the aquatic environment;
- ensure the progressive reduction of pollution of groundwater and prevent its further pollution; and
- contribute to mitigating the effects of floods and droughts.

### **Co-ordination of administrative arrangements within River Basin Districts**

Pursuant to Article 3(1), Ireland identified the individual river basins lying within its national territory and then assign these river basins to particular River Basin Districts (RBDs). Thus, small river basins were combined with larger river basins or joined with other small river basins to form individual RBDs. Moreover, groundwaters and coastal waters were identified and assigned to the nearest or most appropriate river basin district. Thus, unlike a management model based on administrative or political boundaries, the WFD establishes a scheme in which all surface and groundwater bodies that are geographically or hydrologically connected are dealt with within specific aquifer management units.<sup>7</sup>

---

<sup>6</sup> Van Rijswijk & Keessen, *“The EU Approach for Integrated Water Resource Management”* in *Routledge Handbook of Water Law and Policy*, 2017, p.51

<sup>7</sup> Grimeaud, *“Reforming EU Water Law: Towards Sustainability”* (2001) *European Environmental Law Review* 41

Eight RBDs were initially identified on the island of Ireland for the purpose of implementing the Directive. Three of these are shared with Northern Ireland (Shannon, Neagh Bann, and North Western), four RBDs are wholly within the state (Eastern, South Eastern, South Western and Western) and one is wholly within Northern Ireland (North Eastern). However, as set out in the recent draft River Basin Management Plan 2018-2021, the structure of multiple RBDs did not prove effective, either in terms of efficiency of developing the plans or in terms of implementation of those plans. As a consequence, a single national River Basin District has been defined. In addition, the existing North Western and Neagh Bann International RBDs will remain and there will be a single administrative area established in the Republic of Ireland to coordinate the management of these international RBDs with authorities in Northern Ireland.<sup>8</sup>

Accordingly, the single Irish River Basin District covers an area of 70,273 km<sup>2</sup>, has a population of around 4.75 million people, and has been broken down into 46 catchment management units. These units are, in the main, based on the hydrometric areas in use by authorities – with, for example, the River Shannon being sub-divided on the basis of the catchments of its major tributaries. The 46 catchment management units have been broken down further into 583 sub-catchments. These 583 sub-catchments contain a total of 4,832 water bodies, ranging from 3 to 15 waterbodies in each sub-catchment. Within the RBD there are 134 designated bathing waters, 64 shellfish waters, 42 nutrient sensitive areas, 358 candidate special areas of conservation (cSACs) with water dependency and 154 special protection areas (SPAs).

The Minister for Housing, Planning, Communities and Local Government is the designated competent authority for the preparation of RBMPs. Article 3(4) requires Ireland to ensure that the requirements of the WFD for the achievement of the environmental objectives under Article 4, and in particular all programmes of measures, are co-ordinated for the whole of a river basin district.

### **Environmental Objectives**

Article 4 – with its environmental objectives – is the most important provision of the WFD,<sup>9</sup> although the parameters of its application and effect remained unclear for the first fifteen years of the WFD's existence.

In Case C-461/13, *Bund für Umwelt und Naturschutz Deutschland eV v. Bundesrepublik Deutschland* (the *Weser* case), the CJEU considered the legal meaning of the environmental obligations and the WFD system generally. The request for a preliminary ruling concerned the interpretation of Article 4(1)(a)(i) to (iii) of the WFD and arose in proceedings between the German federation for the environment and the conservation of nature and the Federal Republic of Germany, concerning a scheme to deepen various parts of the River Weser in the north of Germany, intended to enable larger container vessels to call at the German ports of Bremerhaven, Brake and Bremen.

---

<sup>8</sup> *Strategic Environmental Assessment Environmental Report for the Draft River Basin Management Plan For Ireland (2018-2021)*, p.87

<sup>9</sup> Van Rijswick & Keessen, “*The EU Approach for Integrated Water Resource Management*” in *Routledge Handbook of Water Law and Policy*, 2017, p.58

As van Rijswijk & Keessen note,<sup>10</sup> since the promulgation of the WFD, Member States had different opinions on:

- (1) whether the environmental objectives of Article 4 should be regarded as obligatory for results or best practices;
- (2) whether “no deterioration” refers to all deterioration, or only applies when a water body shifts to a lower status class.

In its judgment, the Court of Justice dealt clearly with the issues related to the meaning of “non-deterioration”. The referring court had asked whether the concept of “deterioration of the status” of a body of surface water in Article 4(1)(a)(i) must be interpreted as covering only detrimental changes which result in classification of that body of water in a lower class in accordance with Annex V to the directive (the status classes theory). If the answer was in the negative, that is to say, if that concept covers any detrimental change to the body of water at issue (the status quo theory), the referring court wished to ascertain the criteria for concluding that there is a deterioration of the status of a body of surface water.<sup>11</sup>

As the Court noted, the concept of “deterioration of the status” of a body of surface water is not defined in the WFD. In the absence of such a definition in EU law, the meaning and scope of that concept must be determined by taking into account both the terms in which the provision of EU law concerned is couched and its context. The Court held:

*“The wording of Article 4(1)(a)(i) of Directive 2000/60 supports an interpretation according to which the concept of ‘deterioration of the status’ of a body of surface water also covers deterioration which does not result in classification of that body of water in a lower class. That provision expressly states that deterioration of the status of all bodies of surface water should be prevented. According to the definition in Article 2(17) of the directive, surface water status is the general expression of the status of a body of surface water, determined by the poorer of its ecological status and its chemical status. Thus, Article 4(1)(a)(i) of Directive 2000/60 imposes in a general manner the obligation to prevent deterioration of the status of bodies of surface water and does not mention any change of class; only Article 4(1)(a)(ii) and (iii) of the directive refers to Annex V thereto, in respect of the obligation to enhance the status of bodies of surface water.”<sup>12</sup>*

As regards the criteria for concluding that there is a deterioration of the status of a body of water, the Court concluded that it is clear from the scheme of Article 4, and in particular Article 4(6) and (7), that a deterioration of the status of a body of water, even if transitory, is authorised only subject to strict conditions. It follows that the threshold beyond which breach of the obligation to prevent deterioration of the status of a body of water is found must be low.

---

<sup>10</sup> *Ibid.*

<sup>11</sup> Judgment of the Court (Grand Chamber), 1 July 2015, para.52

<sup>12</sup> *Ibid.*, para.55

Thus, an interpretation that only “serious impairment” constitutes a deterioration of the status of a body of water, cannot be inferred from the wording of Article 4(1)(a)(i) of Directive 2000/60.

The Court of Justice held that the view should be taken that there is “deterioration of the status” of a body of surface water, within the meaning of Article 4(1)(a)(i) of Directive 2000/60, as soon as the status of at least one of the quality elements, within the meaning of Annex V, falls by one class, even if that fall does not result in a fall in classification of the body of surface water as a whole. However, if the quality element concerned, within the meaning of that annex, is already in the lowest class, any deterioration of that element constitutes a ‘deterioration of the status’ of a body of surface water, within the meaning of Article 4(1)(a)(i).

The Court concluded:

*“In the light of all the foregoing considerations, the answer to the second and third questions submitted is that the concept of ‘deterioration of the status’ of a body of surface water in Article 4(1)(a)(i) of Directive 2000/60 must be interpreted as meaning that there is deterioration as soon as the status of at least one of the quality elements, within the meaning of Annex V to the directive, falls by one class, even if that fall does not result in a fall in classification of the body of surface water as a whole. However, if the quality element concerned, within the meaning of that annex, is already in the lowest class, any deterioration of that element constitutes a ‘deterioration of the status’ of a body of surface water, within the meaning of Article 4(1)(a)(i).”*

Thus, as has been observed,<sup>13</sup> both (i) the prohibition of deterioration of the quality of a water body, and (ii) the obligation to ensure a good water status are binding requirements and not simply goals for management plans. Furthermore, these standards are to be applied strictly and do not allow flexibility or derogations, other than those mentioned in the WFD itself

All bodies of surface water, groundwater and protected areas are included in the environmental objectives of the WFD, as stated in Article 4. Pursuant to Article 4(1)(a)(i) and 4(1)(b)(i) respectively, Ireland was obliged to implement the measures necessary to prevent the deterioration of the status of all bodies of surface and groundwater. Under Article 4(1)(a)(ii), the aim is to achieve “good surface water status” by 22 December 2015, in accordance with Annex V. Similarly, pursuant to Article 4(1)(b)(ii), Member States were obliged to achieve “good groundwater status” within 15 years, subject to Annex V. Finally, Article 4(1)(c) required Member States to achieve certain objectives in respect of protected areas by 2015.

A “water status” assessment approach was implemented in Ireland as part of the Water Framework Directive implementation by local authorities, which incorporates chemical and biological monitoring into a status grade for each water body. Water Framework Directive water status is classified according to a scale of “high”, “good”, “moderate”, “poor” and “bad”.

---

<sup>13</sup> Van Rijswijk & Keessen, *op. cit.*, p.58

A key finding of the “Water Quality in Ireland 2010-2012” Report (EPA, 2015) was that 53% of rivers, 43% of lakes, 45% of transitional waters, 93% of coastal waters and 99% of groundwater were satisfactory at “good” or “high” status. The 2015 report noted that while there has been some modest improvement in the quality of Ireland’s waters over the period between 2010 and 2012, there was a significant challenge to meet the requirements of the Water Framework Directive, with some targets set in the first cycle of the river basin management planning not met by 2015, such as the 13.6% target improvement in surface water ecological status.

By the time of the “Water Quality in Ireland 2010-2015” Report (EPA, 2017), it was noted that that some water bodies have deteriorated which, the EPA concedes, highlights that not enough has been done to prevent deterioration of water quality. However, it would appear from the relevant figure contained in the EPA’s report<sup>14</sup> that the analysis of deterioration has been based on deterioration such as to cause an overall change in Water Framework Directive status class – an approach which has been definitively rejected by the Court of Justice.

The current status of river, lake, transitional and coastal surface water bodies is summarised in the table below:

**Water Framework Directive Ecological Status (Surface Waters)<sup>15</sup>**

| Status   | River  | Lake | Transitional | Coastal |
|----------|--------|------|--------------|---------|
| High     | 10%    | 11%  | 13%          | 23%     |
| Good     | 45%    | 35%  | 19%          | 53%     |
| Moderate | 27%    | 33%  | 49%          | 19%     |
| Poor     | 18%    | 12%  | 15%          | 5%      |
| Bad      | 0.003% | 8%   | 5%           | 0%      |

**Enforceability of Article 4(1)**

Insofar as Article 4(1)(a)(i) mandates Ireland to avoid deterioration in the status of all bodies of surface water, that sub-article contains a legally binding target for water management and must be implemented accordingly. However, other provisions of Article 4(1)(a), i.e., those that relate to the achievement of good ecological and chemical status for surface waters and to the realisation of good ecological potential and good chemical status for artificial or heavily

<sup>14</sup> *Water Quality in Ireland 2010–2015* (2017), page 5, Table 1

<sup>15</sup> Source: EPS Status Tables 2013–2015. It should be noted that Water Quality Status is for Surface Water bodies that are monitored as part of the Water Framework Monitoring Programme, regardless of jurisdiction and as such takes into account some of Northern Ireland. Unassigned water bodies have been excluded; percentages are based on monitored water bodies only.

modified water bodies, are imprecise. This leads to problems of enforceability. For example, the expression “with the aim of” may indicate that Ireland would be subject only to an obligation to use all reasonable means to achieve the specified objectives, rather than the “absolute” requirement to realise them.<sup>16</sup> Thus, whilst Ireland must take all necessary measures to prevent any further deterioration of given surface water areas, Ireland may not be legally censured for failing to actually bring about “good status”. The only obligation in respect of “good status” may be to use all reasonable or possible means to achieve it. Notwithstanding this apparent lack of legal enforceability in respect of some of the environmental objectives recited in Article 4(1)(a), Ireland will still have to comply, as a minimum, with Articles 4(9) and 11(3)(a), on quality requirements and protection measures in existing legislation.

There was doubt, as a result of the lack of precision in drafting certain of the provisions of Article 4(1), whether all aspects of that article are enforceable as against the Member States. A concern existed as to whether Member States were required, for example, to take measures to prevent further deterioration of surface waters, but may not be required to actually achieve the “good status” which is the central objective of this sub-article.

However, any uncertainty has now been removed by the CJEU judgment in the *Weser* case, wherein it was held that, the wording *which provides that “Member States shall implement the necessary measures to prevent deterioration of the status of all bodies of surface water”, attests to the binding force of that provision. It was held that the words “shall implement” involve an obligation on the Member States to act to that effect.*<sup>17</sup>

The issue was put beyond doubt by the Court’s judgment:

*“The environmental objectives that the Member States are required to achieve are specified in Article 4(1) of Directive 2000/60.*

*That provision imposes two objectives that are separate, although intrinsically linked. First, in accordance with Article 4(1)(a)(i) of Directive 2000/60, the Member States are to implement the necessary measures to prevent deterioration of the status of all bodies of surface water (obligation to prevent deterioration). Second, pursuant to Article 4(1)(a)(ii) and (iii), the Member States are to protect, enhance and restore all bodies of surface water with the aim of achieving good status by the end of 2015 at the latest (obligation to enhance).*

*The origin of those two objectives is apparent from the drafting history of Directive 2000/60. So far as concerns in particular the obligation to prevent deterioration of the status of surface waters, the provisions at issue, in their initial version, could be interpreted as allowing bodies of water classified above ‘good status’ to deteriorate to that class once Directive 2000/60 was adopted. It is for that reason that the European Parliament proposed an amendment enabling a distinction to be drawn between the*

---

<sup>16</sup> Grimeaud, *op. cit.*

<sup>17</sup> Judgment of the Court, *op. cit.*, para.31

*obligation to achieve ‘good status’ and that of preventing any deterioration by the insertion in Article 4(1) of the directive of a new indent laying down the latter obligation separately.*

*Both the obligation to enhance and the obligation to prevent deterioration of the status of bodies of water are designed to attain the qualitative objectives pursued by the EU legislature, namely the preservation or restoration of good status, good ecological potential and good chemical status of surface waters.*

*In order to ensure that the Member States attain the environmental objectives referred to above, Directive 2000/60 lays down a series of provisions, in particular Articles 3, 5, 8, 11 and 13 and Annex V, establishing, as the Advocate General has noted in points 43 to 52 of his Opinion, a complex process involving a number of extensively regulated stages, for the purpose of enabling the Member States to implement the necessary measures, on the basis of the specific features and the characteristics of the bodies of water identified in their territories.*

*These matters confirm the interpretation that Article 4(1)(a) of Directive 2000/60 does not simply set out, in programmatic terms, mere management-planning objectives, but has binding effects, once the ecological status of the body of water concerned has been determined, at each stage of the procedure prescribed by that directive.”<sup>18</sup>*

Article 4(1)(b)(i) provides that Ireland *shall* prevent or limit pollutant inputs and *shall* prevent the deterioration of the status of all groundwater bodies, subject to some exceptions. This “non-deterioration” requirement is likely to amount to a standstill obligation. This would mean that Ireland must ensure that, whatever the current status of a given groundwater body, no further deterioration occurs. Moreover, Article 11(3)(j) stipulates that any direct pollutant discharges into groundwater must generally be prohibited.

Questions of the legal enforceability of environmental objectives also arise in respect of groundwater. The question is whether Article 4(1)(b) imposes on Member States any obligation in addition to the “baseline obligations” in Articles 4(9) and 11(3)(a) to comply with related free-standing measures and minimum water quality under the Groundwater Directive (80/68/EEC). The provisions on the achievement of good groundwater quality lack clarity, and therefore legal enforceability.

Article 4(1)(b)(ii) contains the terms “shall” and “with the aim of”. This contrasts with Article 4(1)(b)(i) which only uses the term “shall” in relation to Ireland’s obligations. The expression “with the aim of” may indicate that Ireland would be obliged only to use all reasonable means to achieve good groundwater status, as opposed to an unqualified obligation to actually attain that objective. Consequently, Ireland may have to comply with Articles 4(9) and 11(3)(a), prevent or limit any further deterioration of groundwaters per Article 4(1)(b)(i), and take appropriate measures to reverse any significant and sustained upward trends of pollutant concentrations per Article 4(1)(b)(ii).

---

<sup>18</sup> Judgment of the Court, paras. 38 to 43

Whilst there is some doubt, as a result of the lack of precision in drafting certain of the provisions of Article 4(1)(b), whether all aspects of that article are enforceable against Ireland, in the light of the *Weser* case, it seems that Ireland is required to take measures to prevent further deterioration of groundwaters, to reverse upward trends in pollutant discharges and to prohibit direct pollutant discharges into groundwater. Moreover, as with surface water, there is an enforceable requirement to actually attain the objective of “good groundwater status”.

Along with surface and groundwater, Article 4(1) deals specifically with protected areas, which are to be distinguished from other water bodies, and by virtue of their vulnerable nature, are to be made subject to more stringent protection measures. Article 4(1)(c) expressly requires that standards and environmental objectives in relation to protected areas *shall* be achieved by 22 December 2015. This wording contrasts with the expression “with the aim of” elsewhere in Article 4(1). Therefore, for protected areas, Ireland has an absolute obligation to achieve good status and to implement relevant quality standards.

### **Derogation from the Environmental Objectives**

Article 4(7), provides, *inter alia*, that failure to prevent the deterioration of a surface or groundwater body may be justified where the failure derives from “new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater”. It should be noted that only new modifications or alterations may serve as justifying reasons, and that the discharge of contaminants remains prohibited.

Even if deterioration in water status results specifically from one of the justifying factors, further conditions, as laid out in Article 4 (7), have to be fulfilled for a derogation to apply:

- all practicable steps must be taken to mitigate the adverse impacts on the status of the water body;
- reasons for the modifications or alterations must be explained in the relevant river basin management plan;
- modification or deterioration in quality must be for reasons which are of “overriding public interest” or the benefits of achieving the objectives under Article 4(1) must be outweighed by the benefits of the modifications or alterations in terms of human health, safety and sustainable development;
- benefits resulting from modifications to the physical characteristics of a surface water body or alterations affecting the high water quality status of such a water body must not be capable of being achieved by other means which are technically feasible and not disproportionately costly, and which are a significantly better environmental option.

It has been recently opined that Article 4(7) of the WFD is not directly applicable. In Case C-529/15 *Folk v. Unabhängiger Verwaltungssenat für die Steiermark*, Advocate General Bobek stated:

*“Leaving aside the rather elusive assessment of what is clear and precise, that*

*provision is certainly not unconditional. Its application is subordinated to a number of further implementing steps, a series of qualitative verifications, in which the Member States arguably enjoy considerable discretion.*<sup>19</sup>

Moreover, in the *Weser* case, the CJEU stated that, by way of example, that the derogation regime provided for in Article 4(7) “constitutes a matter which confirms the interpretation that prevention of deterioration of the status of the bodies of water is binding in nature.”<sup>20</sup>

The practical effect of this finding is also laid out in the Court’s judgment in the *Weser* case:

- Article 4(1)(a)(i) to (iii) of the WFD must be interpreted as meaning that the Member States are required — unless a derogation is granted — to refuse authorisation for an individual project where it may cause a deterioration of the status of a body of surface water or where it jeopardises the attainment of good surface water status or of good ecological potential and good surface water chemical status by the date laid down by the WFD.<sup>21</sup>

Thus, it appears that the obligations under the Article 4 of the WFD will feature more prominently in land use and environmental permitting applications than heretofore. However, it should be noted that, in *Folk*, the Advocate General opined that the mere existence of an authorisation does not necessarily entail that all the criteria of Article 4(7) of the WFD have been fulfilled.<sup>22</sup>

### **Artificial and Heavily Modified Water Bodies**

Article 4(1)(a)(ii) specifies that “artificial and heavily modified water bodies” are to be considered separately from other surface water bodies. Article 2 defines an “artificial water body” as a body of surface water that has been created by human activity. “Heavily modified water bodies” are defined in Article 2 as surface water bodies whose character is changed substantially owing to physical alterations caused by human activity and which have been designated as such by Member States in accordance with Annex II.

Regarding environmental objectives, Article 4(1)(a)(iii) stipulates that Member States will protect and enhance such water areas “with the aim of” achieving “good ecological potential” and “good surface water chemical status” by 22 December 2015.

Article 4(3)(a) provides that Member States may designate a surface water body as artificial or heavily modified when the changes to be made to the hydromorphological features of that body to achieve “good ecological status” would “significantly” and adversely affect, *inter alia*, beneficial objectives such as the wider environment, navigation or recreation, water regulation, flood prevention or other “equally important sustainable human development activities”. It would appear, therefore, that Ireland will thus be called upon to conduct a

---

<sup>19</sup> Case C-529/15 *Folk v. Unabhängiger Verwaltungssenat für die Steiermark*, Opinion of Advocate General Bobek, 10 January 2017, para.56

<sup>20</sup> *Ibid.*, para.44

<sup>21</sup> *Ibid.*, para.51

<sup>22</sup> Case C-529/15, para.40

cost/benefit analysis, which will mean calculating the costs of modifying the hydromorphological features of a given surface water body and an assessment of the resulting environmental benefits.<sup>23</sup> The Directive does not, however, provide any specifications of what is to be taken into account in such a calculation.

Consequently, it seems as though Ireland enjoys some latitude in designating “heavily modified surface water bodies” in particular. For example, it is left to Ireland to set the appropriate criteria to define terms such as “reasonable”, “significant” and “disproportionate”. However, Article 4(8) imposes limits on Ireland’s discretion. Firstly, relying on Article 4(3)(a) must not permanently exclude or compromise the achievement of the directive’s environmental objectives for other water bodies in the same RBD (now the entire state). Secondly, Article 4(8) provides that the application of Article 4(3) must be consistent with the implementation of other EU environmental legislation.

### **Extended deadlines for achieving “good status”**

Member States may be able to postpone the 15 year deadline for achieving “good status” for a given surface groundwater body by up to 12 years in certain circumstances. However, in order to have availed of such an extension, Ireland must comply with the four pre-conditions set out in Article 4(4). These are that:

- no further deterioration can occur in the status of the affected body;
- the reasons for the inability to achieve the necessary improvements in the status of bodies of water by 2015 must be for technical reasons, disproportionate expense, or natural conditions;
- extension of the deadline and the reasons for it must be specifically set out in the management plan,
- summary of measures required and expected timetable to be set out in the management plan.

Extensions of the 2015 deadlines are only available in certain defined circumstances. Moreover, the maximum limit on time extensions is 2021, except in cases of adverse natural conditions. Finally, Article 4(4) also places obligations on Ireland not to allow any further deterioration in the status of the water bodies concerned.

### **Recovery of Water Service Costs**

Policies on water pricing derive from the “polluter pays” principle. Article 9(1) of the WFD requires Member States to take account of the principle of recovery of the costs of water services, including environmental and resource costs. These latter are in addition to water industry costs. However, this provision does not define environmental and resource costs. Indeed, Ireland is provided with discretionary power to determine cost recovery.

---

<sup>23</sup> Grimeaud, *op. cit.*

Article 9 has been the most litigated substantive provision of the WFD and there have been a number of judgments delivered by the Court of Justice which have established the following principles:

- Directive 2000/60 is a framework directive adopted on the basis of Article 175(1) EC (now Article 192 TFEU), which establishes common principles and an overall framework for action in relation to water protection and the common principles and overall framework for action which it lays down are to be developed subsequently by the Member States, which are to adopt a series of individual measures in accordance with the timescales laid down in the directive;
- however, the WFD does not seek to achieve complete harmonisation of the rules of the Member States concerning water (see, *inter alia*, judgments of 30 November 2006, C-32/05 *Commission v. Luxembourg* and C-525/12 *Commission v. Germany*);
- as is apparent from Recital (19), the WFD aims at maintaining and improving the aquatic environment in the European Union, and this purpose is primarily concerned with the quality of the waters concerned;
- control of quantity is an ancillary element in securing good water quality and therefore measures on quantity, serving the objective of ensuring good quality, should also be established;
- Article 9 provides that the Member States are to take account of the principle of recovery of the costs of water services, including environmental and resource costs, having regard to the economic analysis conducted in accordance with Annex III, and in accordance, in particular, with the polluter-pays principle;
- Member States must ensure, *inter alia*, that water-pricing policies provide adequate incentives for users to use water resources efficiently and thereby contribute to the environmental objectives of Directive 2000/60;
- the methods enabling the objective set of ensuring that water-pricing policies provide adequate incentives for users to use water resources efficiently are thus left to the discretion of the Member States. In that context, it cannot be disputed that the setting of the price of water services according to the volume of water actually consumed constitutes one of the methods providing incentives for users to use water resources efficiently;
- nonetheless, in order to comply with the obligation to recover the costs of the services connected with water use, laid down in EU law, the Member States may adopt other water-pricing methods which enable recovery of, *inter alia*, the costs borne by water distribution services in making it available to users in sufficient quantity and of sufficient quality, irrespective of their actual consumption of that water.

It was held most recently, in Case C-686/15, *Vodopskrba i odvodnja d.o.o. v. Željka Klafurić* that, provided that they fulfil the obligation to recover the costs of services connected with water use, including the environmental and resource costs, Member States may choose between various pricing methods best suited to their own situation as part of the discretion left to them under the WFD, which does not require them to use any specific pricing method. In that regard, the Court of Justice held that it does not follow either from Article 9 of the WFD that the EU legislature intended to preclude the Member States adopting a water-pricing policy which is based on a price for water charged to users including a variable component

connected with the volume of water actually consumed and a fixed component not connected therewith.

In Case C-525/12, *Commission v. Germany*, the Court of Justice held that whilst the various activities listed in Article 2(38) of Directive 2000/60, such as abstraction or impoundment, may have an impact on the state of bodies of water, it cannot be inferred that the absence of pricing for such activities will necessarily jeopardise the attainment of those objectives. In that regard, Article 9(4) of Directive 2000/60 provides that the Member States may, subject to certain conditions, opt not to proceed with the recovery of costs for a given water-use activity, where this does not compromise the purposes and the achievement of the objectives of that directive.

Finally, there appears to be nothing to oblige Ireland to impose full cost recovery on, for example, agricultural activities. Any water use would be required to pay only an “adequate contribution” with the level at which such contribution is set being a policy matter. Indeed, Article 9(4) provides scope to exempt a water use activity from the application of Article 9(1) and (2) altogether, as long as this does not jeopardise the environmental objectives of the WFD. Such an exemption can only be awarded after a careful assessment of its impact.

### **Combined Approach for Point and Diffuse Sources**

Pursuant to Article 10(1), Ireland must ensure that all discharges into surface waters are controlled. Further, since 22 December 2012, Ireland has been obliged to ensure the establishment or implementation of emission controls based on best available technology (BAT), relevant emission limit values, and in the case of diffuse impacts, controls including best environmental practices (BEP) as set out in defined EU environmental legislation (such as Directives 91/271/EEC and 96/61/EC). Moreover, where a quality objective or quality standard requires stricter conditions than under Article 10(2), then more stringent emission controls shall be set.

When Ireland implements EQSs in respect of diffuse sources of pollution in order to achieve “good surface water status”, emission controls or limit values will also have to be set. EQSs define the minimum quality requirements of water to limit the cumulative impacts of emissions (i.e. from diffuse sources), while ELVs focus on the maximum permissible quantities of pollutants that may be discharged from a particular (i.e. point) source.

### **River Basin Management Plans (RBMPs)**

Pursuant to Article 13(1), Ireland shall ensure that a river basin management plan is produced for each RBD lying entirely within its territory. In relation to international RBDs (IBRD) (i.e., those river basin districts that straddle the border with Northern Ireland), Article 13(2) provides that Ireland and Northern Ireland shall ensure co-ordination, “with the aim of” producing a single international river basin management plan. In drawing up RBMPs, Ireland must include the information detailed in Annex VII. In addition, RBMPs may be supplemented

by the production of more detailed programmes and management plans for sub-basin, sector, issue or water type, to deal with particular aspects of water management.

Thus, the obligations placed on Ireland were to publish the first cycle of RBMPs by 22 December 2009, and review and update those plans by 22 December 2015, and every 6 years thereafter. In preparing RBMPs, Ireland must include the information listed in Annex VII.

However, the second cycle (2016-2021) is two years behind – indeed, only Greece and Ireland of all EU Member States have failed to adopt the second RBMPs – with the third cycle intended to cover the period 2022-2027, by which time the objective is “to achieve good ecological status in all waters”.

As referred to above, the area of influence of the draft RBMP 2018-2021 covers all or part of the three proposed RBDs in Ireland: the national RBD, the North Western International RBD and the Neagh-Bann International RBD. The draft RBMP does not directly apply to the remaining RBD wholly within Northern Ireland, but it is acknowledged that there is potential for impacts on water bodies within the district and as such transboundary impacts are considered in the assessment.

### **Public Participation & Access to Justice**

Article 14 of the WFD obliges the Member States to inform and consult the public when defining goals, making plans and adopting measures. However, when Directives take a programmatic approach, like the WFD, the public can only enforce their right that the Member States establish plans and programmes of measures: C-237/07 *Janecek v. Freistaat Bayern*. Members of the public cannot enforce compliance with specific measures in a plan or programme and depend on national law for access to the courts. The European Court of Justice has held that Member States have to interpret their laws in the light of the Aarhus Convention (C-240/09 *Lesoochránárske zoskupeni*). Indeed, this issue was recently addressed by the Supreme Court in this jurisdiction in *Conway v. Ireland* [2017] IESC 53:

*“...the fact that the EU is itself a subscriber to the Convention and that the EU has adopted measures designed to implement the Convention in its laws means that, at least in that indirect way, the Aarhus Convention has some application in Ireland.*

*However, it is important to emphasise that, in so saying, it needs to be recognised that it is insufficient in Ireland simply to mount a claim based on an alleged breach of the Aarhus Convention. It is necessary to demonstrate that a relevant provision of the Aarhus Convention is material either because it has the potential to be directly effective itself as a matter of European Union law, because the Convention may be relevant in interpreting measures of the European institutions designed to give effect to its provisions or because it is said that, in some other way, Union law requires the application of the Convention in Ireland. A simple claim based on an allegation of a breach of the Aarhus Convention must necessarily fail as a matter of Irish law. A claim*

*that a relevant provision of the Aarhus Convention may be applicable or influence the proper interpretation or application in Ireland of EU measures as a matter of European law is a different matter which needs to be considered on its merits.”*

## Transposition

The Directive was to be transposed into national law by 22 December, 2003. In addition, a large number of other deadlines are provided. Altogether about forty deadlines are specified in the Directive. These deadlines define the milestones to implementation and are summarised in the table below.

| Year | Milestone  |
|------|--|
| 2000 | Directive enters into force  |
| 2003 | Transposition into national law  |
| 2004 | Identification, location and boundaries of River Basin Districts   |
|      | Identification of Competent Authorities  |
|      | Characterisation of River Basins   |
|      | Identification of pressures and impacts  |
|      | Economic analysis of water use   |
|      | Identification of location and boundaries of water bodies  |
|      | Definition of reference conditions for <i>good</i> ecological status of water bodies.                                    |
| 2006 | Register of Protected Areas.   |
|      | Register of sites for use in an inter-calibration network to test definition of <i>high, good, moderate</i> status       |
|      | Monitoring programmes operational  |
| 2008 | Production of timetable and work programme of the River Basin Management Plans, including consultation measures.         |
|      | Draft River Basin Management Plans to be made public   |
| 2009 | Production of River Basin Management Plans and Programme of Measures.  |
| 2012 | Implementation of the Programme of Measures  |
| 2015 | <i>Good</i> water status to be achieved for all surface waters, artificial and heavily modified waters, and groundwaters |
|      | First management cycle ends & Second RBMP published  |
| 2021 | Second management cycle ends   |
| 2027 | Third management cycle ends. Deadline for meeting objectives   |

## Irish Legislative Framework

### Introduction

As was noted in 1990,<sup>24</sup> until (the then entitled) European Community environmental directives were implemented, Irish water pollution control law concentrated on providing mechanisms for pollution control but was silent on the precise objectives or standards to be attained. The EEC/EC/EU water directives enacted since 1975 have prescribed various explicit qualitative and quantitative criteria which must be observed when decision-making on water pollution control is undertaken. The Water Framework Directive, at least to some extent, builds on this approach, by requiring, firstly, that environmental objectives set in the Directive are implemented into Irish law and, secondly, by prescribing both qualitative and quantitative standards which are required to attain those objectives. It is necessary, therefore, for Ireland to implement both the various objectives and standards into national law, so as to give enforceability to those provisions before the Irish courts.

The substantive Irish primary legislation on water quality is:

- Local Government (Water Pollution) Acts, 1977 to 2007
- Environmental Protection Agency Act, 1992 to 2011
- Waste Management Acts, 1996 to 2011

Some of the main Irish secondary legislation relating to water includes:

- European Communities (Water Policy) Regulations, 2003 (S.I. No. 722 of 2003), as amended
- European Communities Environmental Objectives (Surface Waters) Regulations, 2009 (S.I. No. 272 of 2009)
- European Communities Environmental Objectives (Groundwater) Regulations, 2010 (S.I. No. 9 of 2010)
- European Communities (Good Agricultural Practice for Protection of Waters) Regulations, 2010 (S.I. No. 610 of 2010)
- European Communities (Technical Specifications for the Chemical Analysis and Monitoring of Water Status) Regulations, 2011 (S.I. No. 489 of 2011)
- European Communities (Drinking Water) Regulations 2014 (S.I. 122 of 2014)

The Water Policy Regulations (S.I. No. 722 of 2003), Surface Waters Regulations (S.I. No. 272 of 2009) and Groundwater Regulations (S.I. No. 9 of 2010) govern the shape of the WFD characterisation, monitoring and status assessment programmes in terms of assigning responsibilities for the monitoring of different water categories, determining the quality elements and undertaking the characterisation and classification assessments.

---

<sup>24</sup> Scannell, *“Impact of EC Water Pollution Directives in Ireland”*, Environmental Protection and the Impact of European Community Law, Publication No. 12, Irish Centre for European Law (1990)

The Surface Waters Regulations instituted a wide-ranging set of environmental standards for Irish surface waters. The Groundwater Regulations establish environmental objectives to be achieved in groundwater bodies and include groundwater quality standards and threshold values for the classification of groundwater and the protection of groundwater against pollution and deterioration in groundwater quality.

### **Legal framework for WFD implementation<sup>25</sup>**

The European Communities Environmental Objectives (Surface Water) Regulations, 2009 (S.I. No. 272 of 2009) and the European Communities Environmental Objectives (Groundwater) Regulations, 2010 (S.I. 9 of 2010) establish the legal framework needed to implement the environmental objectives of the Water Framework Directive. They lay down the criteria and environmental quality standards for classifying water status and impose an obligation on public authorities to take the necessary steps to achieve the objectives set out in river basin management plans. Both sets of regulations inter alia require licensing authorities to examine, and where necessary, review discharge licences where reviews are needed to achieve of the water quality objectives set out in river basin management plans., Both sets of Regulations were amended in 2016<sup>26</sup> to transpose the provisions of the updated Directive 2013/39/EU on Priority Substances and Directive 2014/80/EU which amends Annex II to Directive 2006/118/EC on the protection of groundwater against pollution and deterioration.

### **Legal framework for UWWTD implementation<sup>27</sup>**

The Waste Water Discharge (Authorisation) Regulations 2007 (S.I. No. 684 of 2007) give effect to the requirements of the Urban Waste Water Treatment Directive (Directive 91/271/EEC) and the Water Framework Directive (2000/60/EC) in Ireland. The Urban Waste Water Treatment Directive lays down the requirements for the collection, treatment and discharge of urban waste water and specifies the quality standards which must be met - based on agglomeration size - before treated waste water is released into the environment.

The EPA is responsible for licensing and regulating urban waste water discharges. The authorisation process provides that the EPA must address the requirements of the Urban Waste Water Treatment Directive when granting a licence. Where necessary, the EPA must also specify a requirement for more stringent treatment on the basis of the 'combined approach' set out in Article 10 of the Water Framework Directive, if needed to address particular water quality needs such as protected area requirements (including bathing waters, shellfish growing waters or nutrient sensitive areas), or otherwise addressing water quality standards based on requirements or priorities established in river basin management plans.

## **Interface between Water Framework Directive and Pollution**

---

<sup>25</sup> See Generally, Housing, Planning, Community And Local Government, *Public Consultation on the River Basin Management Plan For Ireland (2018-2021)*, February 2017, p.28

<sup>26</sup> See, for example, S.I. No. 366 of 2016

<sup>27</sup> *Public Consultation on the River Basin Management Plan For Ireland (2018-2021)*, op. cit., p.28

It should be recalled that it was in response to the increasing threat of pollution and the increasing demand from the public for cleaner rivers, lakes and beaches, that the EU has developed the Water Framework Directive. As set out in some detail above, the Water Framework Directive establishes a legal framework to protect and restore clean water across Europe and ensure its long-term, sustainable use. The WFD establishes an admittedly innovative approach for water management based on river basins, the natural geographical and hydrological units, and it sets specific deadlines for Member States to protect aquatic ecosystems.<sup>28</sup>

Articles 4, 10, 11 and 16 and Annexes V, VIII, IX and X of the directive address chemical pollution. Moreover, Directive 2008/105/EC establishes Environmental Quality Standards for the 33 first priority substances.

By targeting priority substances, the Water Framework Directive focuses on individual pollutants or groups of pollutants that present significant risk to or via the aquatic environment. The substances are identified through rigorous risk assessments, which involve examining scientific evidence of the hazardous properties of the substances, their contamination of European waters, and other factors such as volumes used.

Among the 33 chemicals categorised as priority substances, 13 are designated as priority hazardous substances due to their persistence, bioaccumulation and toxicity. The European Commission reviews this list every four years, to allow for the inclusion of additional substances of concern. The Water Framework Directive seeks to progressively reduce emissions, discharges and losses of priority substances to waters. Priority hazardous substances are to be phased out completely over time.

Two types of environmental quality standards are set for priority substances: annual average concentrations and maximum allowable concentrations. The former protects against long-term chronic pollution problems, and the latter short-term acute pollution. Member States are responsible for monitoring the concentrations of priority substances in surface waters as part of their monitoring programmes.

The Water Framework Directive also calls for control measures for a number of other pollutants, such as organophosphorus compounds, metals, and materials in suspension. Member States must address these substances in their river basin management plans. The process of developing such plans involves the identification of point and diffuse pollution sources and the design of appropriate control measures, including measures to address pollution from industrial, transport and other accidents.

Again, as set out in some detail above, the WFD sets environmental objectives, and these take account of the full range of pressures upon the aquatic environment, including pollution, with the emphasis being on ecological quality.

---

<sup>28</sup> See generally, European Commission, Water Notes on the Implementation of the Water Framework Directive, *Water Note 8, Pollution: Reducing dangerous chemicals in Europe's waters* (2008)

Specifically in relation to groundwater, the WFD requires the reversal of any significant and sustained upward trends in pollution and prevention or limitation of input of pollutants to groundwater.

In its Fourth Implementation Report,<sup>29</sup> under the heading “Tackling Pollution”, the European Commission concluded as follows:

*“Member States need to strengthen their basic measures to tackle diffuse pollution caused by agriculture. Despite the fact that there is still a long way to go to achieving ‘good status’ and that the pre-WFD measures are not sufficient in many river basin districts, many Member States rely only on voluntary measures. While these can effectively close a fraction of the remaining gap, significant improvement can only be achieved through the compulsory basic measures.*

*Member States should tackle the sources of pollution by fully implementing WFD measures and water-related legislation, especially the Nitrates Directive, Industrial Emissions Directive and Urban Waste Water Treatment Directive. This is much preferable to using end-of-pipe treatment, for instance to ensure the high quality of drinking water while avoiding high treatment costs and protecting the environment.*

*Member States are encouraged to continue extending the establishment of safeguard zones to protect areas used for the abstraction of drinking water, in particular as regards surface waters. Moreover, they need to ensure that their measures target the sources and chemicals that cause water bodies to fail to achieve ‘good status’.”*

It is to be anticipated that the effect of the Court of Justice’s judgment in the *Weser* case, which was delivered after the Fourth Implementation Report will have curative effects on the many Member States who rely only on voluntary measures. The clear decision that Article 4(1) ecological objectives are legally binding will, it is anticipated, bring about a culture shock in the implementation of the provisions of the WFD, with a consequent effect on pollution from both point and diffuse sources.

---

<sup>29</sup> European Commission, “The Water Framework Directive (WFD) and the Floods Directive (FD): Actions towards the ‘good status’ of EU water and to reduce flood risks” (March 2015)

## Conclusion

The Water Framework Directive 2000/60/EC (WFD) is widely accepted as the most substantial and ambitious piece of EU environmental legislation to date. However, as has been noted,<sup>30</sup> over fifteen years since it was adopted, and with many problems and delays in its implementation, the WFD has not delivered its main objectives of non-deterioration of water status and the achievement of good status for all EU waters.

Indeed, the recently published EPA report, *Water Quality in Ireland 2010–2015* (2017), establishes that there were 1% and 2.6% declines respectively in “high” or “good” ecological status/potential of monitored river and lake water bodies over the period 2010–2015.

Against this backdrop, the conclusion reached by one important group of commentators is disheartening:

- unless current implementation efforts are reviewed or revised, enabling the paradigm shift required to ensure a more sustainable and holistic approach to water management, the fading aspirations of the initial great expectations that came with the Directive could disappear for good.<sup>31</sup>

However, if implementation of the policies and objectives of the WFD is enhanced and improved at EU and Irish level, including a genuine drive to achieve the ecological objectives of Article 4, then unlike Coleridge’s *Ancient Mariner*, by 2027, we in Ireland should not be surrounded by any water that we cannot drink.

---

<sup>30</sup> Voulvoulis, Arpon & Giakoumis, “The EU Water Framework Directive: From great expectations to problems with implementation” (January, 2017)

<sup>31</sup> *Ibid.*