The Water Framework Directive

Advice note eighteen: The Water Framework Directive

Status of this Advice Note

This Advice Note has no statutory status and forms part of a suite of advice provided by the Planning Inspectorate.

This is a new Advice Note. It will be kept under review and updated when necessary.

This Advice Note makes reference to other Advice Notes, these can be found at: http://infrastructure.planninginspectorate.gov.uk/legislation-and-advice/advice-notes/

Summary of this Advice Note

The Water Framework Directive (WFD)\(^1\) was adopted and came into force in 2000 and represents a culmination in European Union (EU) water resource protection. It establishes a legislative framework for the protection of surface waters (including rivers, lakes, transitional waters\(^2\) and coastal waters) and groundwater throughout the EU. The WFD is transposed into law in England and Wales by The Water Environment (Water Framework Directive) (England and Wales) Regulations 2017 (the 2017 Regulations)\(^3\).

The 2017 Regulations place a general duty on the Secretary of State (SoS), the Welsh Ministers, the Environment Agency (EA), and Natural Resources Wales (NRW) to exercise their ‘relevant functions’ so as to secure compliance with the WFD (Regulation 3). Functions under the Planning Act 2008 (as amended) (PA2008) are not ‘relevant functions’ for this purpose.

However, the SoS, the Welsh Ministers, EA, NRW, and each public body have a specific duty to have regard to the relevant River Basin Management Plan (RBMP)\(^4\), and any supplementary plans made under it, in exercising their functions (Regulation 33)\(^5\); this would include functions under the PA2008.

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2. Article 2 of 2000/60/EC defines ‘Transitional waters’ which for the purposes of this Advice Note are referred to as estuarine waters.
4. Article 13.1 of the WFD requires EU Member States to produce river basin management plans for each river basin district within their territory.
5. ‘Having regard to’ river basin management plans includes taking account of and considering the environmental objectives and summary of measures contained within the plan when exercising any functions and the effects of those functions on the objectives and measures within the plan.
The SoS will need to consider the implications of the Proposed Development, firstly in relation to the specific duty to have regard to the RMBP and supplementary plans, and secondly, in more general terms in relation to the UK’s ability to comply with the WFD, including (if applicable) the derogation provisions of Article 4.7 (see section 4 of this Advice Note).

The Examining Authority (ExA) for a Nationally Significant Infrastructure Project (NSIP) will therefore need, by the close of the Examination, to be in a position to report to the SoS on the effects of the Proposed Development on the relevant RBMP (and the water bodies therein) as well as any supplementary plans. The ExA will also need to ensure that the SoS has sufficient information to determine whether or not the Proposed Development has implications for the UK’s obligations under the WFD (including necessary information in support of any derogation that may be sought under the provisions of Article 4.7 of the WFD).

In this Advice Note, the Inspectorate supports the preparation and submission of separate WFD assessment reports by Applicants, which clearly explain how the requirements of WFD have been met. These reports should be prepared in consultation with the EA and / or NRW and it is acknowledged that they are likely to inform any Environmental Statement (ES) and vice versa.

A number of National Policy Statements (NPS)⁶, for example EN-1 (overarching NPS for energy), expressly stipulate that the ES for an NSIP must contain information on impacts arising from the Proposed Development on water bodies or protected areas under the WFD (and daughter directives).

The purpose of this Advice Note is to alert Applicants to the requirements of the WFD and 2017 Regulations, as applicable to NSIPs under the PA2008. This Advice Note explains the information that the Inspectorate considers an Applicant must provide with their NSIP application in order to clearly demonstrate that the WFD and the 2017 Regulations have been appropriately considered.

This Advice Note seeks to provide:

- an introduction to the legal context and obligations placed on both the decision maker and the Applicant by the WFD and the 2017 Regulations;
- an explanation of the relationship between the WFD assessment, the Environmental Impact Assessment (EIA) and Habitats Regulations Assessment (HRA);
- advice regarding the relevant bodies that should be consulted by the Applicant during the process of preparing a Development Consent Order (DCO) application in respect of the WFD, and the suggested timing and level of that engagement;
- a clarification of the process and information to be provided with a DCO application with respect to WFD; and
- advice on the presentation of the information using optional screening and assessment matrices.

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⁶ EN-1 Energy NPS; EN-6 Nuclear; National Networks NPS; Ports NPS; Waste Water NPS; and Hazardous Waste NPS.
1. Introduction to the legal context

1.1 The WFD established a legislative framework for the protection of surface waters (including rivers, lakes, transitional (estuarine) waters and coastal waters) and groundwater throughout the EU.

1.2 The overall aims and objectives of the WFD are to:

- enhance the status and prevent further deterioration of surface water bodies, groundwater bodies and their ecosystems;
- ensure progressive reduction of groundwater pollution;
- reduce pollution of water, especially by Priority Substances and Certain Other Pollutants;
- contribute to mitigating the effects of floods and droughts;
- achieve at least good surface water status for all surface water bodies and good chemical status in groundwater bodies by 2015 (or good ecological potential in the case of artificial or heavily modified water bodies); and
- promote sustainable water use.

1.3 The WFD is transposed into English and Welsh law by the 2017 Regulations.

1.4 Many NSIPs have the potential to affect and also potentially contribute toward the achievement of the aims and objectives established by the WFD.

1.5 The WFD requires EU Member States to consider a single system of water resource management through characterisation, protection and enhancement of water resources considered within the context of a river basin district (RBD). Within England and Wales 11 RBDs have been identified, including three cross-border RBDs, one of which crosses the borders of England and Scotland. The 2017 Regulations require ‘the appropriate agency’ (the EA in England, and NRW in Wales) to prepare RBMPs for each RBD, for the approval of ‘the appropriate authority’ (the SoS in England, and the Welsh Ministers in Wales).

1.6 The RBMPs describe the current state of the water environment for each RBD, the pressures affecting the water environment, the objectives for protecting and improving it, and the programme of measures needed to achieve the statutory environmental objectives of the WFD. RBMPs are subject to a six year planning cycle and are to be routinely reviewed and updated to ensure compliance with the overall WFD objectives. RBMPs were first published in 2009, and were subsequently updated in 2015.

1.7 The 2017 Regulations also place a general duty on the SoS, the Welsh Ministers, the EA, and NRW to exercise their ‘relevant functions’ so as to secure compliance with the WFD (Regulation 3). Functions under the PA2008 are not ‘relevant functions’ for this purpose. However, the SoS, the Welsh Ministers, EA, NRW, and each public body have a specific duty to have regard to the relevant RBMP, and any supplementary plans made under it, in exercising their functions (Regulation 33); these functions include the determination of applications under the PA2008.

1.8 The SoS will need to consider the implications of the Proposed Development, firstly in relation to the specific duty to have regard to the RBMP and supplementary plans, and secondly, in more general terms in relation to the UK’s ability to comply with the WFD, including (if applicable) the derogation provisions of Article 4.7 (see section 4 of this Note).

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1.9 Some NPS’, such as EN-1 (overarching NPS for energy), expressly stipulate that the ES for an NSIP must contain information on impacts arising from the Proposed Development on water bodies or protected areas under the WFD (and daughter directives).

1.10 Regulation 5(2) (l) (iii) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 (as amended) (the APFP Regulations) requires each NSIP Applicant (where applicable) to provide with their application ‘a plan with accompanying information identifying … water bodies in a river basin management plan, together with an assessment of any effects on such … bodies likely to be caused by the proposed development.’ It is essential that any WFD assessment (see Section 4 below) is conducted thoroughly and is easily identified amongst the application documents, together with any relevant plans.

2. Relationship with Environmental Impact Assessment (EIA) and Habitat Regulations Assessment (HRA)

2.1 Most DCO applications are likely to require assessments in accordance with the WFD, the Habitats Directive9 and the EIA Directive10. With regard to EIA and HRA, Applicants should refer to advice contained in the Inspectorate's Advice Notes 711 and 1012, respectively. Although the WFD assessment, the HRA, and EIA are separate assessments, all are integral to the application and there is a direct relationship between them.

2.2 WFD, HRA and EIA influence decision-making in different ways:

- the WFD assessment – informs the SoS in relation to the duty to have regard to the RBMP and any supplementary plans (Regulation 33 of the 2017 Regulations);
- the EIA - informs the SoS as decision maker of likely significant effects (its findings must be taken ‘into consideration’) (Regulation 4(2) of the EIA Regulations13); whereas
- the HRA – the decision maker has to follow the stages prescribed by the Habitats Regulations14 (Regulation 61 of the Habitats Regulations) and can only make a DCO if authorisation is permissible in accordance with the Habitats Regulations.

2.3 Consideration of a Proposed Development’s implications on WFD is often included within the ES supporting the DCO application. This approach is not incorrect; however, it is important that Applicants recognise that WFD impacts are assessed in a different way from the EIA approach.

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12. Advice Note ten: Habitat Regulations Assessment relevant to nationally significant infrastructure projects.
14. The Conservation of Habitats and Species Regulations 2010 (as amended), SI 2010/490. (The Offshore Marine Conservation (Natural Habitats, &c) Regulations 2007 (as amended), SI 2007/1842 (Offshore Marine Regulations) will apply beyond UK territorial waters (12 nautical miles)).
2.4 Applicants will need to clearly identify in their documentation (either within the ES or as a standalone document(s)) the implications of the Proposed Development for the objectives of the WFD and relevant RBMPs. While it is most likely that the WFD assessments will utilise information gathered as part of the wider EIA, this must be transposed into an assessment in the context of WFD and ultimately it must be determined if the Proposed Development has the potential to impact upon WFD water bodies.

2.5 It may not be sufficient to use the conclusions of the EIA to determine if there would be a potential impact to WFD, a WFD assessment in its own right must be carried out if required (in consultation with the EA and/or NRW). To that end, it will be more appropriate to present the information in a separate WFD assessment report, particularly for more complex cases (see Section 4).

2.6 Although EIA is a separate process, Applicants are invited to use the formal EIA scoping procedures to submit information identifying the water bodies within relevant RBMPs likely to be impacted by the Proposed Development. EIA scoping often occurs early in the pre-application process and this will help alert the Inspectorate, the SoS, and relevant consultees (in particular the EA and/or NRW) to any potential implications the NSIP may have in respect of the WFD.

2.7 It is recommended that Applicants provide information on the methodology proposed to be used in their WFD assessment within their EIA Scoping Report.

2.8 Further advice on the WFD process and the information required is provided in section 4 of this Advice Note.

3. Relevant bodies to be consulted

Consultation with the Environment Agency and Natural Resources Wales

3.1 The EA and NRW have a duty to secure compliance with the WFD and are statutory consultation bodies for the purpose of the PA2008. Therefore, Applicants are advised to seek the views of the EA and/or NRW (as appropriate) early in the pre-application process and to continue this engagement through to (and during) the Examination stage. Matters to be discussed with the EA and/or NRW may include, but are not limited to, the following:

- the need or otherwise for a specific WFD assessment;
- the scope and methodology of any WFD assessment;
- the potential impact of the Proposed Development on water bodies within the relevant RBMP and compliance with the objectives of the WFD;
- any mitigation measures required to ensure compliance; and
- the information to be submitted as part of the DCO application to inform the tests of Article 4.7, if the WFD impact assessment concludes a derogation is necessary (see section 4 of this Advice Note). Applicants should be aware that if a derogation is likely to be required, the supporting information should be gathered from an early stage in the process, including the design options appraisal stage.

3.2 Applicants should ensure that sufficient information concerning compliance with the requirements of the WFD is submitted with an application. Applicants are therefore strongly advised to use the pre-application consultation process to obtain advice from the EA and/or NRW (as appropriate) to verify that all relevant water bodies have been considered, together with all potential effects on these water bodies, and whether the requirements of the WFD have been met, before an application is submitted. Evidence of the outcome of this consultation should be
recorded as part of the WFD assessment for completeness or appended to the relevant chapter of the ES if there is no separate WFD screening or assessment document. Further information on working and consulting with the EA and NRW during the NSIP process is provided in the Inspectorate’s Advice Note eleven (and its annexes).  

3.3 In cases where it has been agreed with the EA/NRW that a specific WFD assessment is not required, this should also be clearly reported and evidenced with the relevant consultation response being provided.

4. The WFD process and the information required

WFD Screening and the WFD Assessment

4.1 There is no specific or prescribed format or process to follow for WFD assessments (the EA have produced guidance in relation to estuarine and coastal waters in England which is discussed in the following paragraphs). The absence of a prescribed approach presents flexibility to Applicants and enables them to undertake a proportionate and flexible approach; however, it also adds a level of uncertainty and variation in the perceived levels of robustness between assessments. The Inspectorate has therefore produced this Advice Note to help clarify the information that should be provided with a DCO application with respect to WFD assessments.

4.2 Having regard to the EA’s “Water Framework Directive assessment: estuarine and coastal waters” guidance, Applicants may find it helpful to consider WFD impacts in a three-stage approach described below):

- **Stage 1 – WFD screening** – to determine if there are any activities associated with the Proposed Development that don’t require further consideration, for example activities which have been ongoing since before the current RBMP plan cycle and which have thus formed part of the baseline
- **Stage 2 – WFD scoping** – to identify risks of the Proposed Development’s activities to receptors based on the relevant water bodies and their water quality elements (including information on status, objectives, and the parameters for each water body)
- **Stage 3 – WFD impact assessment** – a detailed assessment of water bodies and their quality elements that are considered likely to be affected by the Proposed Development, identification of any areas of non-compliance; consideration of mitigation measures, enhancements, and contributions to the RBMP objectives. Where the potential for deterioration of water bodies is identified, and it is not possible to mitigate the impacts to a level where deterioration can be avoided, the project would need to be assessed in the context of Article 4.7 of the Directive (see Section 4 of this Advice Note for further advice on derogation). Where a derogation is necessary, Applicants will need to provide the necessary information to justify their case, bearing in mind that Applicants must always seek to avoid deterioration of the water environment. It is a matter for the SoS to consider whether derogation under Article 4.7 is justified in relation to a Proposed Development.

4.3 It should be noted that an assessment of a project’s compliance with the WFD could be made at any of the outlined stages above and Applicants may not need to proceed to all stages depending on the specific circumstances of a project.

15. Advice Note eleven: Working with public bodies in the infrastructure planning process (including Annex A – Cyfoeth Naturiol Cymru/Natural Resources Wales, and Annex D – Environment Agency)
17. Applicants should note that consideration of measures to avoid, mitigate and compensate impacts identified need not be limited to stage 3 and may also be considered at stages 1 and 2 as appropriate.
4.4 Mitigation relied upon to demonstrate compliance at any of the stages referred to above must be appropriately defined and sufficiently secured. Mitigation could be secured through DCO requirements/deemed marine licence conditions, or other legally binding methods.

4.5 The Inspectorate acknowledges that the EA’s “Water Framework Directive assessment: estuarine and coastal waters” guidance is specifically directed at projects affecting estuarine and coastal waters in England. However, the Inspectorate considers that the principles established in the guidance, particularly the staged approach to assessment, is equally applicable to other water bodies such as rivers, lakes and groundwater and projects in England and Wales. The application of these principles should be specifically discussed with EA/NRW (as appropriate) on a project specific basis (see section 3 of this Advice Note in relation to consultation with EA and NRW). Further information as to consultation with relevant bodies is provided in the following paragraphs.

4.6 The WFD screening stage and any subsequent WFD assessment should commence early in the pre-application process and should be conducted in consultation with the EA and/or NRW. In particular, Applicants should consider early discussions to inform their evidence gathering process (including any survey/monitoring and assessment work which may be required) in characterise the baseline conditions. In some instances, there may be a long lead-in time for the level of survey work that may be considered necessary prior to the submission of any DCO application.

4.7 A flow chart has been included as Figure 1 below to provide an overview of the recommended process to address the WFD during the pre-application process.
Stage 1

Does the proposed development have impact pathways to WFD water bodies?  
Yes  
No

Consult with EA/NRW – do they agree that there are not impact pathways to WFD water bodies?  
Yes  
No

Undertake WFD Screening and establish the Proposed Development's zone of influence

No WFD screening or assessment required. Submit evidence of consultation agreement with DCO application

Stage 2

WFD Scoping – agree the scope of the assessment with EA/NRW in respect of WFD water bodies screened in

Consult with EA/NRW as appropriate – can effects on all WFD water bodies be screened out?  
Yes  
No

Submit WFD Screening report and plan identifying WFD water bodies within the zone of influence (plus evidence of consultation agreement) with the DCO application

Stage 3

Identify risks from Proposed Development to relevant WFD water bodies. Consider mitigation. Consultation with EA/NRW

Undertake WFD Impact assessment – does the project comply with WFD? Do EA/NRW agree?  
Yes  
No

Consult with EA/NRW. Consider mitigation or changes to the proposed development. Compile case for Article 4.7 derogation. Can a case be made for the 4.7 derogation?  
Yes  
No

Further work needed to comply with WFD (risk of DCO refusal)

Prepare and submit WFD Impact assessment (reflective of the screening assessment), a plan identifying WFD water bodies and evidence of the consultation agreement with the DCO application

Prepare and submit WFD Impact assessment (reflective of the screening assessment) and Article 4.7 derogation case with DCO application, including plan identifying the WFD water bodies, and evidence of consultation agreement with the DCO application
Stage 1 – WFD Screening

4.8 The WFD water bodies should be clearly shown and labelled on a map / plan. The WFD screening stage should identify the extent to which the Proposed Development is likely to affect the water bodies (ie defining the Proposed Development’s zone of influence). The decision to exclude aspects from further consideration (screening out) at this stage should be clearly stated alongside reasoning for their exclusion. WFD screening should address and identify:

- the relevant RBMPs and water bodies;
- the zone(s) of influence based on aspects of the proposed development that could affect the identified water bodies; and
- any aspects of the Proposed Development that have been screened out and why.

4.9 Applicants should share the findings of their WFD screening with the EA and/or NRW and provide with the DCO application, written confirmation of their views (and identify the extent to which the conclusions are agreed). If written confirmation is not provided, it is likely to be requested during Examination.

4.10 WFD screening may determine that no further consideration of WFD matters is required, for example due to the absence of an impact pathway to the WFD water bodies, (i.e. where they do not fall within the project’s Zone of Influence). It is for the Applicant to provide sufficient evidence to demonstrate this. In such instances, evidence of the agreement with EA/NRW should be provided with the DCO application.

4.11 Decisions taken at the WFD screening stage should be considered and reviewed periodically. This will be particularly important as and when more detailed information regarding the Proposed Development becomes available.

Stage 2 – WFD Scoping

4.12 Once the screening stage has been completed, the Applicant should seek to define and agree, with EA/NRW, the scope of further assessment work that may be required as part of stage 3. This will include identifying risks from the Proposed Development’s activities to receptors based on the relevant water bodies and their water quality elements. Evidence of agreement as to the scope of works taken forward should be recorded through the reporting process and should be included as part of the DCO application documents.

4.13 WFD scoping should involve:

- undertaking an initial assessment to identify the risks from the Proposed Development to receptors (within the zone of influence) based on the relevant water bodies and their water quality elements; and
- identification of those water bodies where a more detailed impact assessment is required.

4.14 As per the outcomes of the screening stage, Applicants should share the findings of their WFD scoping with the EA and/or NRW and provide with the DCO application, written confirmation of their views (and identify the extent to which the conclusions are agreed). If written confirmation is not provided, it is likely to be requested during Examination.

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18. ‘Aspects’ are referred to interchangeably in this text and relate to the specific characteristics of the Proposed Development (including related activities during construction and operation) and the environmental topic areas relevant to the assessment of effects.
Stage 3 – WFD Impact Assessment

4.15 The WFD impact assessment is a detailed assessment of the water bodies and activities carried forward from the WFD screening stage. It should be set within the context of the appropriate RBMPs and should include:

- **Identification of water bodies** that are potentially affected (directly or indirectly) or could be at risk as a result of the Proposed Development;
- **The baseline characteristics** of the water bodies concerned;
- **A description of the Proposed Development** and the aspects of the development considered within the scope of the WFD assessment;
- **The methods used** to determine and quantify the scale of WFD impacts;
- **An assessment of the risk of deterioration**, as Article 4.7 may apply where is there is a risk the Proposed Development will prevent the achievement of good status or result in deterioration in status;
- **An explanation of any mitigation required** and how its delivery is secured; and
- **An explanation of any enhancements and/or positive contributions to the RBMP objectives** proposed and how their delivery would be secured.

Identification of Water Bodies

4.16 The Applicant’s WFD impact assessment submitted with their DCO application should clearly identify each water body that is likely to be affected by the proposed NSIP, as carried forward from the WFD screening exercise. This information should also be presented on a plan, in accordance with the APFP Regulations. Applicants should identify the water bodies that have been considered in a table, including the relevant baseline information relating to the water bodies stating whether the water body concerned is a river, lake, reservoir, stream, canal, transitional, coastal or groundwater body. Any designated artificial water bodies (AWB) or Heavily Modified Water Bodies (HMWB) should also be included in the table.

The baseline characteristics of the water bodies concerned

4.17 The WFD assessment should establish the baseline characteristics for each water body likely to be impacted by the Proposed Development. The assessment should clearly describe the current classification status for all elements (including hydromorphological status) for each affected water body.

4.18 The assessment should clearly explain the pressures already affecting the water body and its sensitivity to any change, as described in the RBMP.

Surface water bodies

4.19 The status of surface water bodies will be determined having regard to their Ecological and Chemical status. These are established having regard to the following elements:

- Ecological status
  - Biological quality;
  - General chemical and physicochemical quality;
  - Hydromorphological quality; and
  - Specific pollutants with UK Environmental Quality Standards (EQS).

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19. AWB and HMWB are defined at Article 2.8 and 2.9 of the WFD respectively. Conditions under which EU Member States may designate AWB or HMWB are provided in Article 4.3 of the WFD.
Chemical Status

- Priority substances and other EU level substances with EU EQS.

4.20 As EA guidance explains, the lowest classification of these is used to determine overall status of the water body. There are sub-elements to each of the ecological status criteria, for example biological quality is determined by consideration of phytoplankton, macroalgae, fish and invertebrates. The lowest classification principle applies equally in this context.

4.21 In addition, hydromorphological quality is only a ‘supporting element’ in determination of ecological status and is not taken into account in the overall status classification (unless it is required in differentiating between ‘high’ and ‘good’ overall status).

4.22 The lowest classification of the ecological status (including sub-elements) and chemical status is used to determine overall status of the water body. This is sometimes referred to as a “One out all out” principle.

4.23 For AWBs and HMWBs, a separate classification process applies because these water bodies cannot reach good ecological status given their socio-economic use for a particular purpose. The classification of AWBs and HMWBs ‘ecological potential’ is determined by:

- Identifying the impacts affecting the AWB / HMWB;
- Identifying the mitigation measures necessary to ensure the hydromorphological characteristics of a water body are consistent with ‘good’ or ‘maximum’ ecological potential; and
- Assessing whether those measures have been implemented in overall determination of ‘ecological potential.

Groundwater bodies

4.24 Groundwater status is established by having regard to both quantitative status and chemical status.

A description of the Proposed Development and the aspects of the development considered within the scope of the WFD assessment

4.25 A description of the Proposed Development, consistent with the draft DCO, should be included within the assessment or cross-referenced to the relevant description in the ES or other application documents. Certain aspects of the Proposed Development may not affect water bodies – these should be set out in the description and clearly identified as screened out of the assessment.

The methods used to determine and quantify the scale of WFD impacts

4.26 The WFD assessment should clearly set out the methodology used to identify WFD impacts arising from the Proposed Development.

4.27 The WFD assessment should quantify the scale of any impacts likely to occur both in terms of the geographical extent (ie which water bodies fall within the zone of influence) as well as the magnitude of change (ie any deterioration of an element within a status class and / or between status classes). The methods used to determine this should be clearly explained and justified. If the assessment has involved particular assumptions or professional judgement this should be clearly explained and reasoned as well as being supported by an appropriate evidence base. Ideally the information provided as part of any EIA scoping request will give an early indication of the likely methods to be used and will be helpful to inform the WFD methodology.
An assessment of the risk of deterioration

4.28 The WFD assessment should assess the risk of impact to the water bodies, having regard to its specific elements and objectives. The assessment should identify if there is a risk of deterioration of any WFD element as a result of the Proposed Development and any conclusion reached should be supported by a robust evidence base. A 2015 judgment in the EU Court of Justice\(^{22}\) found that the WFD precludes the authorisation of individual projects which may cause the deterioration of the status of a body of water, unless a derogation under Article 4.7 of the WFD is justified. Further, the judgement also ruled that activities which jeopardise the attainment of ‘good’ overall status are similarly precluded from authorisation. The Court advised that ‘deterioration of status’ is established as soon as the status of at least one of the quality elements falls by one class, even if the change does not result in a fall in classification of the water body as a whole\(^{23}\). Therefore, Applicants should clearly identify any predicted deterioration in status in any of the quality elements within water bodies.

An explanation of the mitigation required and how its delivery is secured

4.29 If specific mitigation is required in order to ensure no risk of deterioration of water bodies as a result of the project, this should be clearly identified in the WFD assessment. Any necessary mitigation should be explained in detail alongside a prediction of its likely efficacy and an assessment of any residual effect. It will also be necessary for the assessment to clearly explain the type of mechanisms to be put in place in order to secure the delivery of such mitigation, including reference to any DCO requirements/deemed marine licence conditions, or other legally binding methods and timescales for delivery.

An explanation of any enhancements and/or positive contributions to the RBMP objectives proposed and how their delivery would be secured

4.30 Applicants should also describe any enhancement measures or positive contributions that the project can provide in respect of the objectives in the relevant RBMP. These should be clearly distinguished from any necessary mitigation measures. Their method and timescales of delivery, as well as how they would be secured, should also be clearly explained.

Article 4.7 Derogations

4.31 Article 4.7 of the WFD allows derogation from the Directive; where its requirements are met, Member States can fail to achieve the objectives or cause a deterioration in status\(^{24}\). It is only available subject to stringent conditions\(^{25}\) and any reliance on Article 4.7 should be very much a last resort.

4.32 In addition, the development must not permanently exclude or compromise achievement of the WFD objectives in other bodies of water within the same RBD and must be consistent with the implementation of other EU environmental legislation (Article 4.8). In applying Article 4.7, steps must also be taken to ensure the new provisions guarantee at least the same level of protection as the existing EU legislation (Article 4.9).

4.33 The Article 4.7 tests require significant and often complex evidence to be made available and assessed. It is therefore critical that the potential requirement for Article 4.7 derogation is considered as early as possible.

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\(^{22}\) Bund für Umwelt und Naturschutz Deutschland eV v Bundesrepublik Deutschland [2015] EUECJ C-461/13.

\(^{23}\) This applies unless the water body is already in the lowest status class in which case any deterioration is considered to be deterioration in status under the WFD.

\(^{24}\) Article 4.7 of the WFD is only applicable to new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, or for deterioration from high to good status for surface water bodies related to new sustainable human development activities.

\(^{25}\) Set out in Article 4.7 of the WFD.
in the pre-application stage of the PA2008 process. Applicants should engage early with the EA/NRW as the “appropriate agencies” for WFD in England and Wales respectively. The appropriate agencies will be able to provide advice to Applicants on the information that is required to inform the Article 4.7 tests. The Inspectorate also strongly encourages Applicants to seek the comments of the appropriate agencies on draft documents where Article 4.7 tests are to be engaged during the pre-application process.

4.34 Further advice on the tests in Article 4.7 is provided below (the headings simplify the precise requirements of the Article). Applicants should be aware that all of the four tests must be satisfied. Where a derogation may be sought in relation to an NSIP, Applicants will need to provide the necessary information for the SoS (in exercising functions in Regulation 33 of the 2017 Regulations) to determine if an Application meets the tests and therefore whether a derogation may be justified under Article 4.7.

Test (a): All practicable steps are to be taken to mitigate the adverse impacts on the water body concerned

4.35 A case made in support of a derogation under Article 4.7, should explain all of the practicable steps taken to mitigate the adverse impacts arising from the Proposed Development on the status of the affected WFD water bodies. This will need to consider the whole lifecycle of the Proposed Development including construction, operation and decommissioning. The means of securing the proposed mitigation measures in the DCO should be clearly identified. Applicants are advised to consult with the EA / NRW as to whether the proposed mitigation measures can be effectively implemented.

Test (b): the reasons for modifications or alterations are specifically set out and explained in the RBMP

4.36 The SoS (as the competent authority in respect of a DCO application) must be satisfied, under WFD Article 4.7(b), that any alterations or modification to water bodies that necessitate derogation would be capable of being reported in the relevant RBMP (whose objectives are required to be reviewed every 6 years under WFD Article 13.7).

Test (c)(1): There is an overriding public interest in the Proposed Development and/or Test (c)(2): its benefits outweigh the benefits of the WFD objectives

4.37 Applicants will need to provide evidence as to why they consider that the Proposed Development is justified by:

- Overriding public interest and/or
- That the benefits of the project to human health, human safety or sustainable development outweigh the benefits of achieving the WFD objectives.

4.38 It may be that a Proposed Development satisfies both (c)(1) and (c)(2) tests, in which case, Applicants should consider providing information to support both cases, however, only one part of the test would need to be satisfied.

26. Regulation 2 of the WFD Regulations.
Test (d): The benefits of the project cannot be achieved by a significantly better environmental option

4.39 To satisfy this condition, Applicants have to demonstrate that the beneficial objectives of the modifications or alterations to the water body made by the Proposed Development cannot be achieved by other means which are a significantly better environmental option, are technically feasible, and do not lead to disproportionate cost. This could include consideration of alternative locations, different scales, designs of development, or alternative processes for example.

4.40 The Scottish Environment Protection Agency (SEPA) has provided guidance (SEPA, 2013) stating that an option may be a significantly better environmental option if:

- the benefit it delivers is at least equivalent to the benefit that would be delivered by the proposal;
- its environmental cost is significantly less than the environmental cost of the proposal (SEPA would assess the environmental cost of a proposal by identifying the significance of its adverse impacts using the method set out in WAT-SG-67: Assessing the Significance of Impacts - Social, Economic, Environmental); and
- it is economically viable and hence a realistic option.

4.41 Applicants for NSIPs should contact the EA and/or NRW to obtain any other available guidance or advice it may be able to provide in this context for projects in England and Wales respectively.

5. Presentation of Information

5.1 Regulation 5 of the APFP Regulations requires Applicants (where applicable) to provide an assessment of the effects on water bodies likely to be affected/impacted by the Proposed Development. As described above, typically this will result in the WFD screening and impact assessment (as necessary) being provided as separate assessments, or appended to the ES. Applicants are also required to provide a plan showing the relevant water bodies within a RBMP to which their development proposal relates.

5.2 To support the process the Inspectorate has prepared WFD overview matrices [see Appendix 1] which are intended to assist Applicants in providing information that is likely to be required in the examination of their applications. The WFD Matrices are available for download in Microsoft Word format.

5.3 Completed draft Matrices can be provided along with other relevant information as part of a request for an EIA scoping opinion in order to address the requirements identified above.

5.4 The matrices are only intended to provide an ‘at a glance’ overview and could be useful to Applicants and the Inspectorate, particularly during the acceptance process under the PA2008. They are not intended to replace or negate the need for the full information contained in the Applicant’s WFD screening/assessment report, but should contain appropriate cross-referencing to relevant parts of that report.

5.5 The matrices allow Applicants to document their approach to WFD on the basis of the screening stage and the WFD compliance assessment conclusion stage as follows:

- Identify each RBMP that could be affected by the Proposed Development and each water body within the relevant RBMP likely to be affected. The screening matrices should also indicate for each water body if it has

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been carried forward to a detailed WFD assessment; and

- In respect of each water body assessed by the Applicant, the matrices will provide a summary position of the assessment and a useful point of reference during the acceptance review stage and during the examination. It should also provide an ‘at a glance’ summary of water bodies. In particular, where deterioration in the status/class of an element is predicted or where achievement of WFD objectives for the identified water bodies may be impeded by the Proposed Development. WFD water bodies and elements carried forward to consideration of Article 4.7 derogation should be clearly identified in the matrices.

6. Other Resources

6.1 The European Commission has produced a series of guidance documents and technical reports under the Common Implementation Strategy (CIS) to assist stakeholders to implement the WFD

6.2 These guidance documents are intended to provide an overall methodological approach, and although they need to be tailored to the specific circumstances of each EU Member State, Applicants are advised to take into account such guidance when undertaking their assessment of WFD.

6.3 The UK WFD Technical Advisory Group (UKTAG) is a partnership of UK government agencies set up by the UK WFD policy group, created to provide coordinated advice on scientific and technical aspects of the WFD.

6.4 UKTAG considers available scientific and technical information (as well as commissioning research into specific areas) in developing recommendations for WFD practice in the UK, and these are made available as part of their online resources, to which Applicants are encouraged to refer for specific technical guidance. The different UK government administrations then consider whether to adopt the UKTAG’s recommendations (which can vary by administration).


Further information

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