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Title: Clarification on the application of WFD Article 4(4) time extensions in the 2021 RBMPs and practical considerations regarding the 2027 deadline

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Explanatory note:

At the informal Water Directors Meeting of 28-29 November 2016 in Bratislava it was agreed¹ to establish an Ad-hoc Strategic Group (ASG) with the aim to set a strategic view and to initiate a process of clarification on the use of exemptions in the 2021 River Basin Management Plan (RBMP) on the basis of the current legal framework. Furthermore, clarification should be provided on the type of evidence that will be needed to support extending the time available to achieve good status on grounds of disproportionate costs and technical feasibility, including potential policy options. It should also be taken into account how to deal with uncertainties related to pressures, targets and measures. In addition, the CIS Working Groups (WGs) ECOSTAT, Chemicals and Groundwater were mandated by the Water Directors to work on further clarification of the concept of natural conditions in relation to WFD Articles 4(4) and 4(5).

The scope of this paper is focusing on the use of Article 4(4) time extensions in the 2021 RBMPs on grounds of 'technical feasibility', 'disproportionate costs' and 'natural conditions' while addressing some practical considerations with respect to the 2027 deadline. The scope is therefore addressing the main issue identified by the Ad-hoc Strategic Group (ASG) based on the mandate of the Water Directors.

Case studies provided by Member States and further clarifications on 'natural conditions' are addressed in more detail in a separate draft document, elaborated by the co-chairs of the WGs ECOSTAT, Chemicals and Groundwater.

As appropriate, any remaining points from the mandate of the Water Directors may be taken further in the future.

Disclaimer:

This technical document has been developed through a collaborative framework (the Common Implementation Strategy (CIS)) involving the Member States, EFTA countries, and other stakeholders including the European Commission. The document is a working draft and does not necessarily represent the official, formal position of any of the partners.

To the extent that the European Commission's services provided input to this technical document, such input does not necessarily reflect the views of the European Commission.

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¹ <https://circabc.europa.eu/w/browse/01e99eb3-26a2-4a3c-b028-9de120b21fa5>

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1 Context and objectives

The Water Directors discussed in 2016 a number of issues and lessons learned that emerged during the preparation of the second River Basin Management Plans (RBMPs) according to the EU Water Framework Directive (WFD). During these discussions, the WFD 2027 deadline was identified as needing early attention, specifically in relation to the application of WFD Article 4(4) provisions in the third RBMPs, which are due in 2021. The **WFD continues to apply after 2027**. The obligations to update the RBMPs and the Programmes of Measures do not have a sunset clause. Member States are therefore required to continue updating these planning documents every 6 years after 2027. Under the existing legal framework, **time extensions according to Article 4(4) can be applied until 2027**, but not beyond, except in cases where the natural conditions are such that the objectives cannot be achieved within this period.

CIS Guidance Document No. 20 on the Exemptions from the Environmental Objectives² already provides directions on this issue. **However, different understandings continued to exist among MS/MS and the EU Commission with regard to the modalities and reporting requirements for applying Article 4(4) time extensions** in the 2021 RBMPs. This led to a **concern by Member States** that they could feel obliged, in the 2021 RBMPs, to increase the recourse to Article 4(5) exemptions which allow **setting less stringent objectives** for specific water bodies subject to certain conditions. This could lead to an overall lowering of the ambitions for WFD implementation³.

In this context, the **Water Directors⁴ and Council⁵ reiterated** their support to the WFD objectives and their commitment to find a legally sound way that makes it possible to **continue an ambitious implementation** up to 2027 and beyond. A thorough understanding of the WFD provisions is therefore important for the 2021 RBMPs, which will be elaborated taking into account the results of the 2018 implementation report. The forthcoming evaluation of the WFD (in 2019) will provide an opportunity to assess its effectiveness, efficiency, coherence, relevance and EU added value.

The Ad-hoc Strategic Group tasked with delivering the way forward has produced the present paper, complementing CIS Guidance Document No. 20 and which, addressing the primary concern above, focuses on clarifying the use of **Article 4(4) time extensions in the 2021 RBMPs** on grounds of 'technical feasibility', 'disproportionate costs' and 'natural conditions'⁶ while addressing some practical considerations with respect to the 2027 deadline. It was noted that varying practices in applying Article 4(4) have been reflected in the previous Plans. However, since all foresee the possibility to spread measures until 2027 subject to the conditions of Article 4(4), the difference appears to be in the understanding in terms of reporting.

2 Article 4(4) time extensions and application in the 2021 RBMPs

The WFD requires Member States to protect, enhance and restore water bodies with the aim of achieving good status or potential⁷ by 2015 (Article 4(1)). Article 4(4) allows for an extension of the

² https://circabc.europa.eu/sd/a/2a3ec00a-d0e6-405f-bf66-60e212555db1/Guidance_documentN%C2%B020_Mars09.pdf

³ Conclusions informal meeting of Water Directors of the European Union and EFTA Countries Brussels, 6th October 2016; Article 4(5) may only be used under the strict conditions therein.

⁴ <https://circabc.europa.eu/sd/a/ea75fb1b-83fd-4eae-8658-78cf5db1ebc8/Final%20synthesis%20Bratislava%20WD.docx>

⁵ Council conclusions on Sustainable Water Management, adopted by the Council at its 3491st meeting held on 17 October 2016.

⁶ Note that case studies and further clarification on 'natural conditions' are compiled in a separate document.

⁷ For heavily modified and artificial water bodies, Article 4.1 point (a) indent (iii) sets out "specific objectives" for these specific water bodies. In Article 4.3, criteria for the designation of artificial or heavily modified water bodies are described.

deadline for the **phased achievement of the WFD objectives beyond 2015**, in case Member States determine that all necessary improvements cannot reasonably be achieved by 2015 for at least one of the following reasons (Article 4(4)(a)):

- (i) the scale of improvements required can only be achieved in phases exceeding the timescale, for reasons of **technical feasibility**;
- (ii) completing the improvements within the timescale would be **disproportionately expensive**;
- (iii) **natural conditions** do not allow timely improvement in the status of the body of water.

Article 4(4)(b) requires that the extension of the deadline, and the reasons for it, are specifically set out and explained in the RBMP. Furthermore, Article 4(4)(c) specifies that the **extension of the deadline** shall be **limited to a maximum of two further updates of the RBMPs** except in cases where the natural conditions are such that the objectives cannot be achieved within this period. The **extension of the deadline** is therefore **limited to two further updates** of the RBMPs for reasons of **technical feasibility and/or disproportionate costs**. **No time limitation** is specified for the extension of the deadline on grounds of **natural conditions**⁸.

Article 4(4)(d) requires to include in the RBMPs a summary of the measures envisaged as necessary to bring the bodies of water progressively to the required status (necessitating a prior need for an effective "gap analysis" – discussed at section 3.2 below – and a review of existing permits and activities that exert significant pressure on water bodies⁹) when Article 4(4) time extensions are applied.

Article 4(4)(d) also stipulates that a **review** of the implementation of these measures, the reasons for any significant delay in making these measures operational, the expected timetable for their implementation and a summary of any additional measures shall be included in updates of the RBMPs.

2.1 Taking measures to achieve good status or potential

Generally, the WFD foresees different **cases in terms of the implementation of measures for achieving the WFD objectives** and in the context of Article 4(4). Either,

- a) All measures necessary to achieve good status or potential are taken in the first implementation cycle until 2015, or
- b) Member States need more time than one cycle to take the necessary measures to achieve the objectives, either because implementation costs need to be spread over several planning cycles (disproportionate costs) or the complexity of the measures are such that more time is needed to implement them (technical feasibility). This additional time to take all the necessary measures to achieve the objectives is limited in the Directive to two further updates of the plans, i.e. up to 2027.

⁸ For the priority substances newly introduced by Directive 2013/39/EU, amending Directive 2008/105/EC, good status should be reached by 2027. The extension of time limits provided for by article 4(4) is limited to two further updates of the RBMPs, hence up to 2033 for existing substances with stricter revised standards and up to 2039 for new priority substances, except in the case of natural conditions (see Article 3(1a) of Directive 2008/105/EC as amended). Since the existing standards were to be met by 2015, the meeting of those existing standards by the original extended deadlines of 2021 or 2027 should not be delayed where measures can be taken, i.e. the allowance of an additional six years should be considered to apply only for closing the gap between the existing and the stricter standard.

⁹ Next to a review and adjustment of the monitoring programmes as appropriate - see WFD Article 11(5)

In both cases **natural conditions may dictate the date** by when the environmental objectives will effectively be met, i.e. it may take longer than 2015, 2021 or 2027 respectively if natural conditions are such that recovery of the ecosystem requires more time. This is taken into account in the WFD by the possibility for extensions due to natural conditions in Article 4(4), which has no time limit (see section below for further clarifications in relation to the concept of natural conditions under Article 4(4)).

2.2 Article 4(4) time extensions on grounds of 'technical feasibility' and/or 'disproportionate costs' in the 2021 RBMPs

Application of Article 4(4) on grounds of 'technical feasibility' and/or 'disproportionate costs' is limited to **"two further updates of the RBMPs"**. Considering the WFD implementation timeline and 6-years WFD planning cycle, the following applies for the application of this provision:

- December 2009: Deadline for publication of the RBMPs
- December 2015: Deadline for the publication of the 1st update of the RBMPs
- **December 2021: Deadline for the publication of the 2nd update of the RBMPs**

There is nothing that prevents Member States from applying Article 4(4) time extensions in the 2021 RBMPs on grounds of 'technical feasibility' and/or 'disproportionate costs' for the achievement of good status or potential by 2027. 2021 constitutes the deadline for the 2nd update of the RBMPs, and is the final possibility for the application of time extensions (except for reasons of natural conditions).

Water bodies which are not in good status or potential at the time of the publication of the RBMP in 2015 or 2021 can be subject to the application and justification of a **time extension** because this **refers to the objective set in Article 4(1) which sets the objective to achieve good status or potential by 2015**. It follows that any water body which is not in good status or potential by 2015 or 2021 can be subject to a justified Article 4(4) time extension. A decision on application has to be taken by Member States at the latest by the time of the finalisation of the RBMPs based on the conditions set out in Article 4(4), taking into account relevant information like monitoring data and further technical and/or economic data.

2.3 Article 4(4) time extensions on grounds of 'natural conditions'

WFD Article 4(4) allows for the extension of the deadline to achieve the environmental objectives of good status or potential if "*natural conditions do not allow timely improvement in the status of the body of water*". This provision assumes that the **measures have been taken (by 2027 at the latest)** but the characteristics of the water body are such that the **recovery to good status or potential is expected to take a longer time period**.

Contrary to the other two reasons to extend the deadline in Article 4(4) ('disproportionate costs' and 'technical feasibility'), **there is no time limit in the WFD for reasons of 'natural conditions'**. This recognises that, after sometimes decades of unsustainable practices, some water bodies may take long periods of time to recover after the necessary corrective measures have been taken. For instance, the existing pollution or deterioration of the ecosystem from past activities may make it difficult to achieve the objective by 2027 in the affected water body even when the measures initially considered as adequate were implemented.

Case studies provided by Member States and further clarification on practices with regard to the application of Article 4(4) on grounds of 'natural conditions' are compiled in a separate document.

3 Maintaining ambition, uncertainties and transparency needs

As described above the WFD allows for the application of Article 4(4) time extensions in the 2021 RBMPs on grounds of 'technical feasibility' and/or 'disproportionate costs' for the phased achievement of good status/potential by 2027, or later on grounds of 'natural conditions'. The measures required to achieve good status/potential have to be included in the 2021 RBMP.

The relevant **provisions of the WFD¹⁰ require Member States to review the objectives, the exemptions and the measures** as part of the preparation of the updated RBMPs in 2027 and beyond. This provides an opportunity for Member States to revise their decisions in light of new evidence and information, including for instance also advanced solutions for mitigation.

Different **factors might cause uncertainties** with regard to the timely achievement of the objectives, despite **the ambition of a Member State being to achieve good status/potential** for a respective water body. It is important in terms of a transparent and open communication to stakeholders and the general public to gain clarity and take stock of these factors in order to allow for an informed exchange and debate.

3.1 Uncertainties and issues hampering progress

Member States face different levels of uncertainty at various stages of the planning cycle. These can also include the effectiveness of measures and the possibility of achieving objectives by the end of the planning cycle. Therefore, the **identification of measures needed to achieve good status or potential can be a challenging exercise**, in particular in the context of multiple pressures and high intensity of uses. Based on the precautionary principle, Member States should take decisions on the basis of the best information available at any given moment. Full certainty is not possible and should not act as a barrier to delay taking action.

There are a number of things which can be done, and should be done, to **reduce uncertainties** or to deal with them in the decision-making process¹¹. This is also important since it is recognised that it can be challenging to convince decision makers investing in measures that are uncertain as regards their contribution to meeting the objectives. The iterative nature of the planning cycle allows Member States to plan the necessary actions to improve the understanding of the effectiveness of measures and assess the extent of the expected improvements in status of water bodies. The review clauses in the WFD¹² mean that past decisions must be reviewed should additional information demonstrate that estimates were not realistic.

In this context, the 2021 RBMPs may contain exemptions for water bodies and quality elements not meeting WFD objectives. Based on a concrete gap analysis outlining the scale of necessary actions, the 2021 RBMPs would then contain measures to improve water body status or to prevent deterioration towards meeting the objectives by 2027, unless it is already known that more time is

¹⁰ See WFD Article 11(5), 11(8), 13(7) and Annex VII B.

¹¹ CIS Guidance Document No. 20, Chapter "3.2.3 Management of uncertainties"

¹² See footnote 10.

needed due to natural conditions. For the 2027 RBMPs, the gap analysis needs to be updated and decisions on exemptions need to be reviewed in accordance with the Directive.

Although it is expected that, as planning cycles advance, the uncertainties will be reduced as Member States will have gathered increasing evidence as well as experience, including also the tools for the implementation of measures,, still a **certain level of uncertainty is expected to remain**. This could include the sources of pressures and how multiple pressures interact, the assessment of status and the effectiveness of measures, also in the context of internationally shared basins. Uncertainties might also remain with regard to the impact of climate change, demographic and economic developments and their effects on pressures and the disproportionality of costs of measures. These uncertainties and factors are of relevance for decision making and may hamper progress. They also relate to the analysis for applying time extensions, and can have substantial impact on estimates related to cost and benefit or technical feasibility.

3.2 Need for transparency and gap analysis

There is a **continued need for transparency with stakeholders and the general public in the 2021 RBMPs** on the expected improvements which can be achieved by 2027 and beyond in terms of the level of ambition by a Member State, progress achieved and remaining challenges. The public consultation requirements under the WFD¹³ for the elaboration of the 2021 RBMPs provide an opportunity for Member States and help to ensure this transparency. Furthermore, the RBMPs themselves and accompanying documents, including a gap analysis for showing the current understanding of the scale of action that is necessary to achieve the WFD objectives should be used to explain the reasons for the decisions taken and to provide the underlying evidence.

Based on the existing WISE schema elements, it should be explored if an appropriate schema or necessary adaptation for reporting to the Commission is needed, without jeopardising the coherence and continuity of the schemas used for previous reporting cycles.

4 Conclusions and outlook

- Member States aim to maintain the level of ambition of the WFD in the 2021 RBMPs and beyond 2027, thus avoiding the lowering of objectives and widespread use of Article 4(5) exemptions.
- It was noted that varying practices in applying Article 4(4) have been reflected in the previous plans to achieve good status/potential, though all allow for measures to be spread until 2027.
- The WFD, as it stands, allows for the application of Article 4(4) time extensions in the 2021 RBMPs on grounds of 'technical feasibility' and/or 'disproportionate costs' with the objective of a phased achievement of good status or potential by 2027, or afterwards where 'natural conditions' prevent achievement by 2027.
- A 'gap analysis' showing what measures are needed to achieve good status or potential is essential, considering also uncertainties. The 2021 RBMPs may contain exemptions for water bodies and quality elements not meeting the WFD objectives and measures to improve water body status or to prevent deterioration towards meeting the objectives by 2027, or afterwards

¹³ WFD Article 14

on grounds of 'natural conditions'. For the 2027 RBMPs, the gap analysis needs to be updated and decisions on exemptions need to be reviewed.

- There is a continued need for transparency with stakeholders and the general public. The public consultation process under the WFD provides an opportunity to ensure this transparency. For reporting to the Commission, it should be explored if an appropriate schema or necessary adaptation is needed based on the existing WISE schema elements.
- The forthcoming evaluation of the WFD (in 2019) will provide an opportunity to assess its effectiveness, efficiency, coherence, relevance and EU added value (including on issues such as timelines, costs and priorities) and provide reflection for the way forward.