



Bund für Umwelt und Naturschutz Deutschland v Bundesrepublik Deutschland EU Case C 461/13

Court of Justice of the European Union clarifies obligation of “no deterioration” for water bodies under the Water Framework Directive

No Deterioration

The purpose of Directive 2000/60 (the “Water Framework Directive”) is to “establish a framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater which... prevents further deterioration and protects and enhances the status of aquatic ecosystems and, with regard to their water needs, terrestrial ecosystems and wetlands directly depending on the aquatic ecosystems. .”[emphasis added].

So, as well as the goal of achieving good ecological status, member states including the UK must ensure that there is no deterioration of surface waters including rivers and lakes. However, there is no definition in the Directive of “deterioration”

Status of a waterbody (high, good, moderate, poor and bad) is measured by its chemical and ecological elements and the Directive also explains that “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 (Art 2 (17)). In other words, if one element is classed as “moderate” – for instance, based on the level of phosphates of the lack of fish – even though other elements may be “good” - the overall status will be “moderate”; the “one-out, all out” system of classification.

Such obligations are, inevitably, subject to derogations/exemptions. For instance, Article 4(7) allows for a member state fails to “prevent deterioration in the status of a body of surface water or groundwater” where it is the result of “new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, or failure to prevent deterioration from high status to good status of a body of surface water is the result of new sustainable human development activities.

Dredging The Weser

In July 2011 the Waterways and Navigation Directorate for the North-West Region (Wasser- und Schifffahrtsdirektion Nordwest), a federal administrative authority, granted consent for three projects concerning the development of the river Weser to make it more navigable for large vessels, involving the dredging of the outer Weser from the sea to Bremerhaven, then from Bremerhaven upstream to Brake and finally from Brake upstream to Bremen.

The Waterways and Navigation Directorate for the North-West Region considered whether the projects were compatible with the objective laid down by the Directive of preventing deterioration of the status of the bodies of water.

It concluded that whilst deterioration was not expected to the coastal waters, the river higher up would be “adversely modified” by the development including increased salinity and siltation – each of which would lower the status of individual elements in the measurement of status class. Crucially, however, the Directorate reasoned that there would not be a change in the status class.

The Directorate also concluded that the conditions, laid down in Article 4(7) for a “derogation” from the objectives of the Directive, were met. Bund für Umwelt und Naturschutz Deutschland eV challenged the planning approval, arguing that there had been a failure to comply with provisions in the Directive. The German court therefore referred a number of questions to the Court of Justice of the European Union (CJEU) for a preliminary ruling.



The Questions To The Cjeu

The German court referred four questions to the CJEU which related to the interpretation of the Directive. The first question required the court to decide whether the “no deterioration” element of the Directive is “merely a statement of an objective for management planning”. The second asked, does the term “deterioration of status” in Article 4(10) cover only situations where there has been a drop in status class? The next related question asked whether if the answer to the deterioration question is, “no”, then under what circumstances does “deterioration of status” arise?” The last queried whether if a project jeopardises the attainment of Good Ecological Status, and no derogations are granted, should it be refused?

Not Simply The “Statement Of An Objective”

In answer to the first and fourth questions, the CJEU ruled that:

“Article 4(1)(a)(i) to (iii) of [the Directive] 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 directive” [emphasis added].

No Deterioration - Hard Line

The court discussed the alternative approaches of “status classes” and “status quo” theories, commenting that,

“the classes are thus merely an instrument which limits the discretion of the Member States when determining the quality elements which reflect the actual status of a specific body of water. It is in particular for that reason that Article 4(1)(a) (i) of Directive 2000/60 does not refer to Annex V thereto, as the concept of ‘deterioration of the status’ of a body of surface water is a concept of general scope”.

The judges continued,

“A different interpretation of that concept would, on the other hand, deter the Member States from preventing deterioration of the status of a body of surface water within a status class. Since classification of a body of surface water depends on the poorest value of the applicable parameters, all the other values could be reduced without that having legal consequences...

Furthermore, application of the status classes theory would result in a weakening of the protection of waters falling within the highest classes”.

They therefore concluded that:

“the concept of ‘deterioration of the status’ of a body of surface water . . . must be interpreted as meaning that there is deterioration as soon as the status of at least one of the quality elements. . . 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 [the Directive]”. [Emphasis added].

Comment

The finding that the requirements under the Directive are not simply managerial objectives without teeth is extremely significant for member states when considering the impact of projects or developments on water bodies. Where status is predicted to decline, unless a derogation applies, permission must be refused.

On the no deterioration obligation, the judgment gives clear reasoning that where individual elements used for assessing status decline, that will be a deterioration for the purposes of the Directive. If there is no lawful derogation or exemption relied on the member state will not be meeting the objectives, and will therefore be in breach of the Directive.

With the latest round of River Basin Management Plans now published in draft, it remains to be seen in how many rivers and lakes across the UK there has been a deterioration in “status quo” despite an apparent maintenance in status class. Campaigners and stakeholders may therefore be interested to see the full data for water bodies to understand the basis for the determination of status.

Justin Neal, Aaron & Partners LLP

First appeared in July edition of Environmental Law Monthly and reproduced here with the kind permission of the publisher.

To learn more about Aaron & Partners and how we could help your business, visit aaronandpartners.com or call us today

Offices

Chester

Tel: 01244 405555

Shrewsbury

Tel: 01743 443043

Manchester

Tel: 0844 800 8346