# **GUIDANCE DOCUMENTS UNDER THE WFD: LEGAL STATUS AND EFFECTS**

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#### AGENDA

- 1. Guidance documents under the Water Framework Directive
- 2. The debate on soft law
- 3. The results of the survey

- 1. Procedurally precise, substantively vague: norms define only key terms
- 2. Member States obliged to generate information and report it to the Commission
- 3. The specification of obligations and the management of information flow entrusted to administrative networks
- 4. The networks prepare guidance documents in order to clarify the provisions of the Directive

| FEATURES                                                               | WFD                                                                                                              |
|------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------|
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| The specification of obligations and the management of information flow entrusted to administrative networks | Common Implementation Strategy, i.e<br>representatives from national<br>authorities and from<br>the Commission as well as of experts<br>and stakeholders |  |
| The networks prepare guidance documents in order to clarify the provisions of the Directive                  | Main aim of CIS is to develop technican<br>and scientific guidelines in order to help<br>MS with implementation of the WFD                               |  |

# GUIDANCE DOCUMENTS

- Drafted by the CIS
- Currently 34 Guidance Documents
- Some more "substantive" (e.g. analysis of pressures and impacts on water), other more "procedural" (e.g. monitoring and public participation)
- May contain technical specifications, clarifications and recommendations on implementation of the WFD
- <u>http://ec.europa.eu/environment/water/water-</u> <u>framework/facts\_figures/guidance\_docs\_en.htm</u>

# **EXAMPLE: WETLAND GUIDANCE DOCUMENT**

- The protection, restoration and enhancement of the water needs of wetlands are mentioned as part of the scope of the WFD (Article 1(a))
- WFD contains no definition of "wetland"
- Guidance Document No 12 on the Role of Wetlands in the Water Framework Directive

# **EXAMPLE: WETLAND GUIDANCE DOCUMENT**

| l circabc.europa.eu ♂                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | 1 |
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| Horizontal Guidance on the Role of Wetlands in the Water Framework Directive                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |   |
| 2 IDENTIFYING WETLANDS UNDER THE WATER FRAMEWORK DIRECTIVE                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |   |
| 2.1 What is a wetland?                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | 1 |
| Wetlands are diverse, hydrologically complex ecosystems, which tend to develop within a hydrological gradient going from terrestrial to mainly aquatic habitats.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |   |
| There is a wide range of definitions and interpretations of the term 'wetland'. These definitions tend<br>to reflect different national traditions as well as differences in the characteristics of the environment<br>across Europe. From an ecological perspective, wetlands are heterogeneous but distinctive<br>ecosystems which develop naturally, or are the product of human activities. Their biogeochemical<br>functions depend notably on a constant or periodic shallow inundation by fresh, brackish or saline<br>water, or saturation at, or near, the surface of the substrate. They are characterised by standing or<br>slowly moving waters. Common features include hydric soils, micro-organisms, hydrophilous and<br>hygrophilous vegetation and fauna which has adapted to chemical and biological processes reflective<br>of periodic or permanent flooding and/or water-logging. |   |
| Wetlands perform regularly, and to a high capacity, a range of processes that in combination result in<br>the delivery of significant benefits for human welfare, wildlife and for the maintenance of<br>environmental quality. Some wetlands have been recognised for their international conservation<br>values.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |   |
| The particular temporal and spatial patterns of the hydrological regime as well as other special wetland characteristics, such as distinctive plant and animal communities, ecosystems actively accumulating biomass and the provision of seasonal spawning sites for fish, combine to explain the unique features which characterise wetlands. These features bear the potential to generate benefits such as water quality improvement, hydrological regulation, food web support and preservation of important environmental and cultural values.                                                                                                                                                                                                                                                                                                                                                   |   |
| Wetlands are part of the hydrological continuum. They comprise parts of other surface water bodies<br>and may significantly influence their status. When not immediately contiguous to surface waters,<br>wetlands are often linked to these through hydrological pathways. Their common occurrence at the<br>interface between surface waters and agro-ecosystems underlines the potential relevance of wetlands<br>for the protection of surface waters.                                                                                                                                                                                                                                                                                                                                                                                                                                             |   |

#### THE PROS AND CONS OF GUIDANCE DOCUMENTS

- Help MS to implement law
- Flexibility as MS diversity can be taken into account
- Increased information flow both MS-MS and MS-COM
- Reduce the need to initiate infringement proceedings
- Guidance for authorities /judges (application stage)

- Effects cannot be clearly determined
- Publicity and accessibility questionable
- Commission can by-pass democratic control
- Use by EU courts can broaden democratic deficit

# **THE SURVEY**

- 10 responses
  - Sweden (2)
  - Italy
  - Luxembourg
  - Lithuania
  - Spain
  - Germany (3)
  - Finland
- All "generalist" courts apart from Sweden

#### **GUIDANCE DOCUMENTS: AWARENESS**

- Are you aware that there are technical guidance documents that explain the terms of the WFD?
  Do you know where you can find them?
- The majority of answers indicated that <u>national</u> <u>judges are aware of GDs</u>. They know where they can be found even in the case they have never used them.

#### **GUIDANCE DOCUMENTS:** USE BY COURTS

- Have you used them when deciding WFD cases? If not, why not?
- <u>No use has been made of GDs.</u>
  - The main reason for this seems to be an absence of WFD-related cases.
  - "[t]he cases could be solved according to the national law (being in line with the WFD)"
  - "they are difficult to use in specific cases. They are too abstract"

#### **GUIDANCE DOCUMENTS: USE BY PARTIES**

- Have they been relied on by the parties (e.g., national administration, applicants, environmental organisations etc)?
- Parties to court proceedings have not invoked guidance documents
  - One respondent noted, however, that parties have relied on national Guidance Documents

#### **GUIDANCE DOCUMENTS:** LEGAL EFFECTS

- In your view, do guidance documents have legal effects?
  - 2 = no
  - 5 = cautiously positive: these answers emphasise the nonbinding nature of GDs but note that they may be helpful in interpreting the law, filling in gaps, or unifying practice
  - 3 = yes but on different grounds
    - " […] because Directive 2000/60 refers to these documents "
    - "The documents can at least guide a proper use of the discretion that is conferred to the public authority"
    - " […] legal effects in our legal system through the jurisprudence of courts"

#### **GUIDANCE DOCUMENTS:** VALID SOURCE OF LAW

- Does your legal system recognise guidance documents as a valid source of law?
- 2 = no
- 8 = yes
  - In most legal systems, they are among what can be called as "permissible" legal sources
  - It seems that some legal systems require that the implementing national law expressly refers to GDs
  - In other legal systems judicial recognition makes them "hard" law
  - One respondent emphasised their bindingness for public authorities who "are more or less bound by those documents they normally use (cf. 'self-binding effect of circulars')"

### **CASE SCENARIO**

The national authority in your country has granted a permit to divert a river. The environmental organisation *Our Waters* challenges the granting of the permit on the grounds that the river diversion threatens the environmental objectives of the WFD. The organisation says that the WFD technical guidance document No. 41 contains information about the ecological status of the rivers in your region. This data shows that the rivers in your region are at risk of failing the WDE environmental objectives. The organisation

argues that you must ensure that you have an adequate informational basis for decision-making and hence you should use the WFD guidance document when you evaluate the risk of ecological damage due to the river diversion project.

Please briefly explain how you would decide this hypothetical case, mentioning especially how you would deal with the above mentioned guidance document.

#### **GUIDANCE DOCUMENTS:** LEGAL EFFECTS?

- Only one of the criteria of assessment, but some effects consistently recognised
  - "the technical guidance document would not be the only source of information"
  - "the concept of deterioration [...] must be considered in the light of national provisions [...] and other technical information available, including technical guidance documents"
  - "[...] keeping in mind that the guidance documents are not legally binding and that the tribunal has to examine in concreto the ecological impact of the project"
  - "technical guidance Nº 41 would be the most adequate informational basis for decision-making"

#### **GUIDANCE DOCUMENTS:** LEGAL EFFECTS?

- One of the criteria of assessment, but some effects consistently recognised
- What if there was a contradiction?
  - E.g. expert evidence provided by the administration (or requested ex officio by the court) seems to contradict the Guidance Document

# CONCLUSIONS

- Guidance documents are integral part of WFD
- Legal status and effects are not clear
- Diverse approaches as to their binding value
- Uncertainty amongst national courts and administrations?
- Issues with democracy and rule of law?
- Threat for uniform application of EU law?

# Thank you for your attention!

#### COMMENTS, QUESTIONS, REMARKS AND SUGGESTIONS ARE WELCOME AT M.ELIANTONIO@MAASTRICHTUNIVERSITY.NL

