

Feedback Form on CIS Guidance Document on Art 4(7) – Draft 2

Dear expert,

A **second draft version of CIS Guidance Document on Article 4(7)** was provided to you for feedback and consultation.

Please use this form for the provision of feedback and comments on the second draft version. For the further elaboration and treatment of your comments, it is important that all your requests for modification are duly justified and argued. Other ways of feedback will not be considered.

For logistical reasons allowing processing the feedback, please note that **only comments can be considered which were provided via this commenting form**. Please send this form only in word format.

Please also indicate in the feedback form **in case you are able to provide specific practical experiences and case studies** on particular elements as input for the further elaboration of the Guidance.

You are asked to send your comments via this form **latest by 7 July 2017** to Raimund.MAIR@ec.europa.eu and thomas.dworak@fresh-thoughts.eu.

Your comments will be taken into account for the elaboration of a third draft version of the Guidance, which is planned to be provided in Autumn 2017 and further discussed at the next meeting of the Ad-hoc Task Group (ATG) on the Article 4(7) Guidance.

Many thanks for your efforts.

Co-chairs of the ATG on Article 4.7

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Comments

[please add rows as appropriate]

Line nr. in draft 2 of the guidance	Comment/change request	Justification of the comment/change request
General comment on the second draft	<p>The Guidance Document must not be drawn up on a one-sided basis by representatives of environmental authorities and associations. Rather, representatives of the affected industrial sectors must also be involved in the drafting process so that they can also input their experience and know-how in coming to grips with the exemption situations regulated in article 4(7). Only in this way can the Guidance Document be drafted in a balanced way, and this is precisely what is set out in the terms of reference for the CIS Adhoc Task Group (ATG) Guidance on implementation of article 4(7) under the heading “working method”. The composition of ATG should meet this self-imposed requirement and we therefore wish that stakeholders from the affected industrial sectors will be included in ATG and their insights taken into consideration.</p>	<p>The primary expectation of a Guidance Document with such a title is that it will highlight ways in which the conditions for an exemption as specified in article 4(7) of the EU Water Framework Directive (WFD) can be met.</p> <p>This expectation obtains all the more since ECJ handed down a strict interpretation of the deterioration ban in its ruling of 1 July 2015 (C-461/13, known as the Weser dredging ruling) in relation to a surface water body (SWB) and decided additionally that a deterioration ban and an enhancement requirement are conditions for the authorisation of every individual project. In this regard, the strict interpretation is significant with a greater degree of relevance for water-related projects. As a result, these projects are highly dependent on the presence of the conditions for an exemption.</p> <p>The draft Guidance Document does not live up to this expectation. Instead, it gives the impression that it actually wants to restrict the applicability of article 4(7) EU WFD. Furthermore, the ECJ ruling of 4 May 2016 (C-346/14, known as the Schwarze Sulm ruling) points in the direction of Member States being granted wide discretion for the application of article 4(7) EU WFD.</p> <p>The draft Guidance Document also gives the impression of wanting to go beyond questions linked to implementation of EU WFD – in contrast to the original idea of the Common</p>

		<p>Implementation Strategy (CIS). Some of the ideas discussed go well beyond the rules governing article 4(7) EU WFD. The Guidance Document must not be drawn up on a one-sided basis by representatives of environmental authorities and associations. Rather, representatives of the affected industrial sectors must also be involved in the drafting process so that they can also input their experience and know-how in coming to grips with the exemption situations regulated in article 4(7). Only in this way can the Guidance Document be drafted in a balanced way, and this is precisely what is set out in the terms of reference for the CIS Adhoc Task Group (ATG) Guidance on implementation of article 4(7) under the heading “working method”. The composition of ATG should meet this self-imposed requirement and we therefore wish that stakeholders from the affected industrial sectors will be included in ATG and their insights taken into consideration.</p>
115 ff.	<p>The statement “This document aims at guiding experts and stakeholders in the implementation of the Directive 2000/60/EC establishing a framework for Community action in the field of water policy - the Water Framework Directive (WFD)” is misleading inasmuch as the document addresses the existence of exemption situations in accordance with article 4(7) WFD whereas an analysis of management objectives is not taken into consideration. However, the scope of and conditions for exemptions cannot be determined in a sensible way without a position being taken on the regulatory content of the management objectives.</p>	
178ff.	<p>It is wrongly postulated that the environmental objectives in isolation are the core of EU WFD. Rather, it is correct that the environmental objectives are subject to the express</p>	

	reservation of the exemption situations regulated in article 4(4) to (7), as specified in article 4(1). Hence, the exemptions form part of the environmental objectives	
238 ff. Chapter 2	<p>In the list of bullet points the following should be added:</p> <ul style="list-style-type: none"> • Industry policies such as [...] • Policies regarding the extraction of raw materials in Europe – i. e. The Raw Material Initiative. <p>Consequently under chapter 2 subsections for the industry and the raw material extraction should be introduced.</p> <p>With respect to energy supply, it is not only renewable energies that should be addressed in their own sub-chapter (cf. chapter 2.2), as these are not safely available in the sense of the EU Energy strategy defined in the preceding sentence. It should rather be explained that conventional energies and energy generation installations (power plants and domestic energy extraction) will also be needed as a back-up form of energy for the foreseeable future in order to guarantee a secure energy supply and thus that impacts for bodies of water are also unavoidable.</p>	<p>EU programmes with a focus on security of energy supply, industry, raw material extraction, agriculture and jobs are missing from the list of bullet points.</p> <p>With respect to energy supply, it is not only renewable energies that should be addressed in their own sub-chapter (cf. chapter 2.2), as these are not safely available in the sense of the EU Energy strategy defined in the preceding sentence.</p> <p>It should rather be explained that conventional energies and energy generation installations (power plants and domestic energy extraction) will also be needed as a back-up form of energy for the foreseeable future in order to guarantee a secure energy supply and thus that impacts for bodies of water are also unavoidable.</p>
430-432	Lines 430-432 should be deleted.	At the beginning of chapter 2.6. a new paragraph on COP Paris has been introduced. This is a political statement and has nothing to do with the Water Framework Directive. Therefore the new paragraph under lines 430-432 should be deleted.
563 - 567	The statement “it follows that if the conditions are not fulfilled and the article 4 (7) test fails, the project cannot be authorized under the WFD.” fails to acknowledge that under certain circumstances, it must also be possible to grant a derogation	The statement “It follows that if the conditions are not fulfilled and the article 4 (7) test fails, the project cannot be authorized under the WFD.” Is not acceptable. It disregards the fact that an exemption must also be possible under

	<p>on proportionality grounds in respect of the literal wording of Art. 4(7) if the management goal requirements and prohibitions are to be interpreted very narrowly.</p> <p>Clarification in this regard should be introduced into the Guidance Document.</p>	<p>certain circumstances for reasons of proportionality, beyond the narrow wording of article 4 (7) WFD. As a general rule, European Union law allows exemptions beyond the wording of the text of a directive. ECJ has confirmed this in its case law.</p> <p>Inter alia in its case law on conservation of natural habitats: In the case of the Finnish wolf in particular (Case C-342/05), the ECJ, following Advocate General Kokott, recognized the possibility of a derogations that goes beyond the wording of the Natural Habitats Directive. The advocate general opined that the court had already decided in respect of the law on nature conservation that exceptional grounds may justify detriment to legally protected interests in the natural world even if this would not be possible according to the text of the relevant directive provisions. She added that in practical terms, it is a question of applying the principle of proportionality, which is not restricted, with regard to the possible objectives of derogations, to the list of grounds set out in the directive (opinion delivered on 30 November 2006, Case C-342/05, juris, paragraph 52 ff.).</p>
581 ff.	Once again, the environmental objectives are presented in isolation as overriding principles without incorporation of the expressly reserved exemption provisions (see chapter 1.3).	
601/602 Chapter 3.1.	<p>Under line 601 the text should be modified as follows:</p> <p>“In contrast to surface water bodies, chemical status of groundwater bodies is not only defined by conductivity and concentrations of pollutants. Moreover, it has additionally to</p>	The statement relating to groundwater “Quantitative status is defined by the groundwater level regime and chemical status by conductivity and concentrations of pollutants” is incomplete. It disregards the fact that, when the chemical status of a ground water body is assessed – and hence when a chemical alteration is evaluated in connection with the

	<p>be taken in to account the extent to which increased pollutant content in the groundwater impacts on communicating bodies of surface water, on abstraction of drinking water or on terrestrial ecosystems dependent on the groundwater and leads to significant damage to these protected resources. ”</p>	<p>deterioration ban - the test is not merely about whether or not the relevant limit values are met (see line 972 – 981). This is different from the situation when the chemical status of a surface water body (SWB) is assessed. Rather, it is necessary to verify additionally the extent to which increased pollutant content in the groundwater impacts on communicating bodies of surface water, on abstraction of drinking water or on terrestrial ecosystems dependent on the groundwater and leads to significant damage to these protected resources (see WFD Annex 5, Chapter 2.3.2.). By contrast, the statement currently contained in the draft would mean an unacceptable equal treatment of SWB and GWB narrowed down exclusively to pollutant content, despite the clearly expressed wish of the European legislator that WFD should distinguish clearly between the level of protection for groundwater and for surface water (cf. Council common position 4/2006 of 23 January 2006 OJEU 2006, C 126E/1, page 14). An additional statement on the importance of the chemical status of GWB should be included in the text accordingly.</p>
643 ff.	<p>The restriction of “Modifications to the physical characteristics of surface water bodies” to “modifications to their hydro-morphological characteristics” is too narrow.</p> <p>It should be clarified in lines 643 seq. that if a chemical modification is a consequence of a physical modification of water body or of an alteration of the ground water level, this chemical modification – also in a corresponding waterbody – it can very well fall under a “modification to the physical characteristics” lead to the application of article 4 paragraph 7 first indent WFD.</p>	<p>The restriction of “Modifications to the physical characteristics of surface water bodies” to “modifications to their hydro-morphological characteristics” is too narrow.</p> <p>Such a restriction is in contradiction to the wording of the WFD. The English adjective “<i>physical</i>” can mean both morphological changes and changes relating to physical properties. Article 4(7) EU WFD refers to “<i>new modifications to the physical characteristics</i>”; annex V EU WFD talks about “<i>indicative physico-chemical quality elements</i>”. Restriction of the meaning to the “hydro-morphological quality elements” is neither appropriate nor acceptable.</p>

		<p>Further the exemption covers also modifications of the water quality as a consequence of physical modifications of a surface water body (and as a consequence of modifications of the groundwater level). Lines 645-647 say that the impacts may result directly from changes brought about by the modification (result) or from the modification (activity) or - - from changes in the water quality that have been caused by the modification or the modification's result. Also table 2 (under line 712) sets out in the heading "modifications to the physical characteristics of a body of surface water" for the supporting physical-chemical quality components "potential direct and/or indirect effects" and for the chemical status "potential indirect effects".</p> <p>Also, in the line "alteration to the level of bodies of groundwater" the table sets out potential indirect effects" for the supporting physical-chemical quality components as well as the chemical status of the surface water bodies and the chemical status of the groundwater bodies. Corresponding statements can be found in the text under the line 688/689 and 693/694.</p> <p>If a chemical modification is a consequence of a physical modification of water body or of an alteration of the ground water level, this chemical modification – also in a corresponding waterbody – it can very well lead to the application of article 4 paragraph 7 first indent WFD.</p> <p>This should be clarified.</p> <p>For the rest, the remarks beyond on the analogous application of article 4 para. 7 WFD (line 706-711) would also apply to the above mentioned cases.</p>
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<p>706 - 711. Chapter 3.2.</p>	<p>The paragraph “Note that Article 4(7) does not provide an exemption if deterioration caused [...] from high status to good status” should be deleted.</p> <p>Instead we propose a clarification:</p> <p>“Regarding the input of pollutants Article 4(7) provides an exemption for surface water bodies if deterioration from high status to good ecological status is caused by a new sustainable human development activity. Moreover Article 4 (7) may also provide an exemption on grounds of proportionality if deterioration caused by inputs of pollutants from point or diffuse sources drives a water body to status below good. This applies for the ecological and chemical status of surface water bodies and groundwater bodies as well.”</p>	<p>Since the issue under discussion here is a deterioration to a status below good, this sentence can relate only to article 4 (7) first indent EU WFD. Without any justification, it is postulated here that this exemption provision would not be applicable for any deterioration resulting from inputs of pollutants from point or diffuse sources.</p> <p>Such a narrow interpretation has to be rejected by reasons of proportionality. Also, it is not justified by any water management reasons. Therefore the exemption of article 4 para. 7 should – beyond its wording – also cover deterioration of the chemical status of groundwater and surface water bodies by input of pollutants from point and diffuse sources. Otherwise infringements of the deterioration ban through serious modifications to physical water properties (e.g. impoundments) could be permitted whereas infringements triggered by small inputs of pollutants from point or diffuse sources would be subjected to a blanket ban.</p> <p>This unjustified imbalance becomes all the more visible, that – according to line 684 ff and 692 ff, impacts on the chemical status are covered by Art. 4 (7) when caused by new physical modification of surface water bodies and alterations to the level of groundwater. A reasonable justification for such different treatment of activities with similar impacts is not obvious.</p> <p>It is therefore to be assumed that the European legislator would have foreseen an exemption provision also for deterioration of the chemical water properties by inputs from point and diffuse sources in the knowledge of the stringent application of the deterioration ban on chemical quality elements and/or substances flowing on from the ECJ ruling. This at least justifies analogous application of article 4(7) WFD if deterioration for the chemical status of groundwater</p>
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		and surface water bodies is caused by input from point and diffuse sources.
717 ff.	The clarification should be widened to include projects which cause a modification which lasts longer than 6 years but is nevertheless not permanent.	It is good to make a distinction between temporary (clarification that this is not a deterioration and that it is not necessary to invoke article 4(7)) and permanent modifications (article 4(7) necessary). However, the clarification should be widened to include projects which cause a modification which lasts longer than 6 years but is nevertheless not permanent. Here, too, article 4(7) is necessary.
Line 966 Chapter 3.3.2.	This chapter should be amended to make it clear that ECJ's findings in the Weser dredging ruling cannot be transposed directly on to groundwater bodies without further discussion.	<p>The ECJ ruling of 1 July 2015 (C-461/13, so-called Weser dredging ruling) which related to SWB is transposed directly on to GWB without any further discussion.</p> <p>This is inappropriate, at least in this form. ECJ's findings cannot be transposed to a deterioration in the chemical status of groundwater bodies with no questions asked. ECJ has still not established any definitive principles for determining a deterioration of the chemical status. Until this issue is clarified – by ECJ, for instance – it will continue to be the task of authorities and project promoters to find benchmarks for it. Behind this lies the issue that the probability of a GWB deterioration (only 2 status classes) is higher and hence the need for an exemption is also higher than with SWB (5 status classes).</p> <p>It should also be clarified that the courts have not yet decided the conditions under which a deterioration of the quantitative status of a GWB can be assumed. The Guidance Document should make an express reference to the differences in the evaluation of the ecological status of SWB on the one hand and the quantitative (and chemical) status of GWB as well as</p>

		to the associated questionability of transposing ECJ case law.
1028 - 1030	<p>The sentence “In this context, note that Article 4(7) does not provide an exemption if deterioration caused by inputs of pollutants from point or diffuse sources drives the water body to a status below good” should be deleted.</p> <p>We propose a clarification that exemptions for point and diffuse sources are also possible under certain circumstances: “Note that Article 4(7) may also provide an exemption on grounds of proportionality if deterioration of the groundwater chemical status is caused by inputs of pollutants from point or diffuse sources.”</p>	See rationale on our comment on 706 ff
1064 ff. Chapter 3.5.	By contrast with what is specified in article 6(3) FFH, no obligation to make a cumulative assessment can be inferred from article 4(7) EU WFD and this difference should be articulated here.	<p>This chapter is very difficult for project promoters to come to grips with. BDI is very critical of the announcement that further approaches may be added in the future on which, clearly, it is not possible for us to take a position here.</p> <p>However, by contrast with what is specified in article 6(3) FFH, no obligation to make a cumulative assessment can be inferred from article 4(7) EU WFD and this difference should be articulated here.</p>
1263 et seq. 3.7.2.	<p>This chapter should be deleted.</p> <p>At least it should be clarified that these are the personal ideas of the authors but not an interpretation of the provisions of WFD with practical relevance for water authorities.</p>	All in all, numerous instruments and requirements from European environmental impact assessment and nature protection legislation are transposed on to the thematic content of WFD in this chapter, even though there is no legal basis for this in WFD.

1402-1404 Figure 6	The graphic needs to be revised. The alteration of the groundwater level needs to be included.	The graphic was adapted. By doing this, the exemption regarding the “alteration of the groundwater level” has been partly forgotten. Therefore the graphic needs to be revised and the alteration of the groundwater level should be included.
1597 et seq. 4.4.	Also economic activities should be considered as possible overriding public interest. “Raw material security” is one example for “public interests” and should be included in the list.	This section of the Guidance Document relates to the interpretation of the condition set out in article 4(7)(c): <i>“the reasons for those modifications or alterations are of overriding public interest and/or the benefits to the environment or to society of achieving the objectives set out in paragraph 1 are outweighed by the benefits of the new modifications or alterations to human health, to the maintenance of human safety and to sustainable development, and”</i> . On the question of what constitutes an overriding public interest, the draft Guidance Document refers in the first line to the FFH directive as well as the corresponding ECJ case law. In taking the approach of the FFH directive as a basis, the draft Guidance Document comes to the conclusion that it would be appropriate to include in the concept of overriding public interest uses relating to the fundamental values of citizens (health, security, environment) and fundamental policies for state and society, and actions performed to meet specific obligations of public services. By contrast, uses which serve economic activities are not set out in the draft Guidance Document. This is unacceptable and should be fundamentally revisited.

1627 - 1647	This list should be deleted in its entirety.	This list is not very helpful here because it only mentions a few examples and omits other essential examples. This gives the user of this CIS document the impression that these examples are highlighted deliberately or are even the only valid examples.
1651 to 1655	Delete these lines	<p>It is stated here in a way that is at least misleading that a separate public consultation is necessary or appropriate for exemptions in accordance with article 4(7) or to determine the overriding public interest. However, there is specifically <u>no</u> statutory provision for public participation in the context of article 4(7) EU WFD. There is therefore a danger that the reader will be given a completely false idea of the legal situation.</p> <p>These passages should therefore be deleted.</p>