Improving the Quality of Applicability Assessments under Art 4(7) of WFD

The Environmental Impact Assessment as a Role Model for the Assessments of Impacts on Water Bodies

Legal analysis
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Abbreviations used:

ApA – Applicability Assessment
EIA – Environmental Impact Assessment
ENGO – Environmental Non-Governmental Organisation
MS – Member States
RBMP - River Basin Management Plan
SEA – Strategic Environmental Assessment
WFD – Water Framework Directive
1 Introduction

Water Framework Directive (2000/60/EC, hereinafter WFD) requires that the MS achieve certain environmental objectives for surface and ground waters. Importantly, this includes the prevention of the deterioration of the status of water bodies. Moreover, the MS have to ensure that that natural surface water bodies adhere to good ecological and chemical status and groundwater bodies to good quantitative and chemical status. The latter objective had to be achieved by 2015 in principle. The WFD Art 4(7) sets out a derogation from the objectives. The provision allows deterioration of the high status of a water body to good status for new sustainable human development activities and failure to achieve the required status or ecological potential or deterioration of the status resulting from new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater.

This exemption is applicable only if all the following criteria are met:

a) all practicable mitigation measures are taken;

b) the reasons for modifications/alterations are specifically set out, explained and periodically reviewed in the river basin management plan (hereinafter RBMP);

c) the reasons for modifications/alterations are of overriding public interest;

d) the beneficial objectives served by modifications/alterations cannot for reasons of technical feasibility or disproportionate cost be achieved by other means, which are a significantly better environmental option.

Moreover, general requirements set out in paragraphs 8 and 9 of Art 4 apply. Importantly, the MS have to ensure that the granting an exemption does not permanently exclude or compromise the achievement of the objectives of the WFD in other water bodies within the same river basin district and is consistent with the implementation of other Community environmental legislation.

Application of the exemption requires assessment of the impacts of modifications, alterations or new sustainable human development activities. Such an assessment, which is known as “applicability assessment” (hereinafter ApA), is one of a group of ex ante assessments of environmental impacts required under the EU law. Other assessments include, for instance, the environmental impact assessment (hereinafter EIA) under the EIA Directive, the appropriate assessments under the Habitats Directive and the strategic environmental impact assessments under the SEA Directive. The most advanced procedural rules for any ex ante environmental assessments required under EU law are provided in the EIA Directive. Therefore, the present paper focuses on the relevance of EIA requirements to the ApA. It should be noted, however, that WFD Art 4(7) is not limited to private and public projects in the meaning of the EIA Directive. It is applicable to any action that may have the detrimental effects of the status of water bodies including, for instance, plans/programmes in the meaning of the strategic environmental impact assessment directive.

There is limited case-law and comparative analysis in applying the WFD Art 4(7). One of the hurdles for the correct and uniform application of the provision is the lack of explicit procedural rules for the assessment. This not a concern in the cases where a project is subject both to the EIA and the ApA. In such cases the assessments should be combined - as pointed out in the
recent CIS Guidance Document No. 36 – and the procedural requirements of the EIA would apply. In the cases where the EIA is not required, the WFD leaves a margin of discretion to the MS for determining the procedural requirements but the discretion is limited. Firstly, a number of procedural requirements are inherent in any environmental decision-making due to the general principles of environmental or administrative law. The principles are enshrined in EU Treaties and in the Charter of Fundamental Rights of the EU. Secondly, the case-law of the CJEU suggests that decisions under Art 4(7) of the WFD may be subject to Art 6 of the Aarhus Convention. This article of the Convention sets out requirements for public participation in authorizing projects which may have significant environmental impacts. **The aim of this paper is to identify the requirements that are inherent to the applicability assessment, refer to the requirements that derive from the Aarhus Convention and discuss the elements of the EIA that could be used in the applicability assessment or should not be used.** For this purpose, the EIA procedural requirements are used as a role model: its key features are analysed and their relevance for the ApA is explained.
2 Summary

Assessment of impacts of development projects that may have an effect on the status of water bodies (so-called applicability assessment or ApA) is necessarily part of any decision to apply the derogation set out in Art 4(7) of the Water Framework Directive. The Directive does not, however, set out the procedural requirements for the assessment and the decision to derogate. The most advanced procedural rules for any ex ante environmental assessments required under EU law are provided in the EIA Directive. The paper identifies the requirements of the environmental impact assessment (or EIA) that are inherent in the applicability assessment, derive from Article 6 of the Aarhus Convention or which could be useful (or not useful) for the applicability assessment. The summary of our findings is presented in the following table.

<table>
<thead>
<tr>
<th>Requirements for the EIA</th>
<th>Requirements for the ApA</th>
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<tbody>
<tr>
<td><strong>Objectives</strong></td>
<td></td>
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<tr>
<td>To identify all significant environmental effects - e.g. effects on climate change - and their mitigation measures.</td>
<td>To identify adverse effects on the status or ecological potential of a specific water body and to provide information on preconditions for applying the derogation.</td>
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<tr>
<td><strong>Screening</strong></td>
<td></td>
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<tr>
<td>Assessment is based on the precautionary principle</td>
<td>Inherent</td>
</tr>
<tr>
<td>Cumulative impacts must be taken into account</td>
<td>Inherent</td>
</tr>
<tr>
<td>The potential use of thresholds or criteria</td>
<td>Could be used if the thresholds or criteria are specific to location</td>
</tr>
<tr>
<td>List of information to be provided by developer on the project</td>
<td>Could be used</td>
</tr>
<tr>
<td>Written statement of reasons, which is made publicly available</td>
<td>Inherent, partly deriving from the Aarhus Convention</td>
</tr>
<tr>
<td><strong>Consulting</strong></td>
<td></td>
</tr>
<tr>
<td>Consulting with the public concerned</td>
<td>Essentially the same requirements because Article 6 of the Aarhus Convention applies</td>
</tr>
<tr>
<td>Consulting with the environmental authorities and regional and local authorities</td>
<td>Inherent</td>
</tr>
<tr>
<td>Expertise</td>
<td></td>
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</tr>
<tr>
<td>Sufficient expertise of consultants drafting the report</td>
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<tr>
<td>Sufficient expertise of authorities reviewing the report</td>
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<tr>
<td>Conflict of interest</td>
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<tr>
<td>Conflict of interests should be avoided by separation of functions</td>
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<tr>
<td>Discretion</td>
<td></td>
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<tr>
<td>Assessment results should be duly considered.</td>
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<tr>
<td>Prevention, mitigation, compensation and monitoring measures</td>
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<tr>
<td>Incorporation of prevention, mitigation and compensation measures to the authorization</td>
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<tr>
<td>Implementation of prevention, mitigation and compensation measures</td>
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<tr>
<td>Monitoring of actual significant impacts must be ensured</td>
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</table>
3 Elements of the EIA Directive relevant for the WFD article 4(7)

The ApA is part of any decision to apply derogations set out in Art 4(7). The WFD art 4(7) does not explicitly set out procedural requirements for the ApA. However, some of the requirements which are set out in the context of the EIA are also implicitly applicable for the ApA due to the general principles of environmental or administrative law. The principles are enshrined in EU Treaties and in the Charter of Fundamental Rights of the EU (hereinafter the Charter). According to Article 51(1) the Charter is applicable to the actions of the MS when they are implementing the EU law, such as providing exemptions deriving from Art 4(7) of the WFD. The EIA Directive also can be used as a model to highlight the procedural requirements that would (or would not) be useful in achieving the aim of the WFD. The requirements are discussed roughly in the order the procedure, i.e. starting with the screening decision and ending with monitoring measures. The requirements provided for the EIA are further divided into three categories: 1) requirements that are necessary for implementation of Article 6 of the Aarhus Convention (as interpreted by Aarhus Convention Compliance Committee); 2) requirements that are implicit in the WFD art 4(7) because it would not possible to ensure the effectiveness of the WFD without applying them; 3) requirements that are not currently part of the WFD art 4(7) but could be applied (or should not be applied) to the ApA to improve its quality.

As the final note it should be pointed out that the goal of the ApA is more specific than the goal of the EIA. The objective of the EIA is to ensure that all significant environmental effects of a project are identified with the aim of avoiding, preventing reducing or, if possible, offsetting all significant negative effects. The issues that are within the scope of the EIA are defined in Art 3 of the Directive and include direct and indirect significant effects on the following factors: (a) human beings, fauna and flora population and human health; (b) biodiversity; (c) land, soil, water, air and climate and landscape; (d) material assets, cultural heritage and the landscape; (e) the interaction between the factors referred to in points (a) to (d). In contrast, the goal of the ApA is to identify the adverse effects on the status or ecological potential of a specific water body and to help determine whether the preconditions for applying the derogation can be met, e.g. what are the practicable steps to mitigate adverse impact and whether the beneficial objectives of modifications can be achieved by alternative means.

3.1 Screening

The first stage of the ApA is screening\(^1\). The step is implicitly provided for in Article 4(7) because otherwise it would not possible to decide whether the exemptions are relevant. At the screening step it has to be determined whether the project has effects on the status or ecological potential of a water body.

The screening decision is necessarily made in a situation of imperfect information, before any substantial studies of the baseline conditions and impacts. Therefore, the screening decisions of the ApA, like the similar decisions under other types of ex-ante environmental assessments, have to be based on the precautionary principle similarly with the EIA. Scientific uncertainty

\(^1\) CIS Guidance Document No. 36, p 39.
about the effects of a project cannot be the reason to exclude a project from the assessment. Taking into account of cumulative impacts in the screening phase, as required by the Annex III of the EIA Directive is also relevant for the ApA. In our view, the requirements are inherent in the ApA and should be set out explicitly in the transposing national laws.

According to Art 4 of the EIA Directive, EIA is obligatory for the projects listed in Annex I to the EIA Directive. In case of Annex II projects, Member States may decide the need for EIA either case-by-case or set thresholds/criteria. On several occasions the CJEU has stressed that the discretion of the MS is limited: setting thresholds/criteria should not lead to a situation where a project which may have significant environmental impacts is exempt from the EIA.

Setting out threshold/criteria ensures legal certainty and more clarity for stakeholders. It also lessens the burden on administrative authorities by making it easier to decide whether a project should be subject to an assessment. The criteria could relate to size, location or specific effects of the projects. Typically, the thresholds/criteria under the EIA relate to the project size.

In our view, the project size is not, as a rule, suitable for defining the threshold for the ApA because water bodies and their features vary significantly. Depending on the size, type and current status of a water body a project of a certain size may or may not have a negative impact. However, the size-related thresholds could be set for specific river basins or for specific water bodies. The thresholds/criteria could be set out in national laws or in RBMPs. To conclude, setting the threshold/criteria is an optional requirement under the EIA Directive. The ApA could also benefit for threshold/criteria that are location specific.

Authorities need uniform and sufficient amount of information to make good quality screening decisions, including information on the project. The MS should set out a list of information to be provided by the project developer, following the example of Annex IIa of the EIA Directive, to improve the quality of the screening decisions. Establishing such lists would also make the procedure more transparent and predictable to the developers.

Art 4(5) of the EIA Directive requires the competent authority to provide written statement of reasons for the decision to initiate or not initiate the assessment and make it publicly available. In our view, the requirements derive from good administrative practice and procedural rights of the members of the public and are therefore also inherent to the ApA. Any decision made by a public authority needs to be reasoned to ensure that it serves public interest and does not constitute an abuse of power. Considering the importance of WFD Art 4(7) exemptions for achieving the aims of the Directive, the reasons need to be stated in writing to ensure that they could be verified. In principle, the information also has to be available to the public to fulfil the requirements of the Aarhus Convention on environmental information. Moreover, the information has to be made available for the purposes of participation and access to justice, at least to the public concerned, especially to environmental non-governmental organizations (ENGOs).

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2 Ibid, p 37.
3 Ibid p 35.
4 See the CJEU ruling in case C-244/12 and the case-law cited.
Article 41 (2) (c) of the Charter requires the administration to provide reasons for its decisions to ensure right to good administration. Also, decisions on specific projects under Art 4(7) are within the scope of Article 6 of the Aarhus Convention, which requires, inter alia, early and effective public participation and giving the public access for examination all information relevant to the decision-making as soon as the information becomes available. Decisions to allow a project without proper ApA may be subject to review on the basis of Article 9(2) or at least on the basis of Art 9(3) of the Convention. Both provisions foresee access at least to the ENGOs. Art 9(2) stipulates, inter alia, that any ENGOs are presumed to have sufficient interests or rights capable of being impaired for access to justice purposes. The Compliance Committee has come to the conclusion that at least some environmental organisations should have standing on the basis of Art 9(3)\(^5\).

The CJEU has held that the MS must interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings. The interpretation must be in accordance with the objectives of Article 9(3) of the Convention and the objective of effective judicial protection of the rights conferred by EU law, so as to enable an ENGO to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law\(^6\). Likewise, the CJEU has stated that Art 9(3) of the Convention cannot allow the Parties to impose criteria so strict that it would be effectively impossible for ENGOs to contest the actions or omissions that are the subject of that provision. Art 9(3) of Aarhus Convention, read in conjunction with Article 47 of the Charter, must be interpreted meaning that a duly constituted environmental organisation operating in accordance with the requirements of national law must be able to contest before a court a decision granting a permit for a project that may be contrary to the obligation to prevent the deterioration of the status of bodies of water as set out in Article 4 of WFD\(^7\).

It should be noted that it is up to the MS to decide the exact procedural arrangements. For instance, the national law may foresee separate procedures for screening, assessment and authorization or it may consider these as steps in a single procedure. It is also within the discretion of the MS when the screening decision may be challenged, e.g. immediately after it is made or together with the decision to authorize a project. However, according to Article 9 of the Aarhus Convention it must be ultimately possible to challenge the authorities on the grounds that they wrongfully did not carry out the ApA.

### 3.2 Public consultation

Holding consultations with the public is an important requirement of the EIA Directive. In principle, the requirements derive from Article 6 of the Convention\(^8\) that applies to authorizing projects which may have significant environmental impacts. The article applies to projects listed in Annex I to the Convention. However, Art 6(1)(b) sets out that a Party shall apply the provisions of Article 6, in accordance with its national law, also to decisions on activities not listed in Annex

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6. C-240/09 Lesosohradské zoskupenie VLK, paragraph 51.

7. C-664/15 Protect, paragraphs 48 and 58.

I, which may have a significant effect on the environment. To this end, a Party has to determine whether such a proposed activity is subject to the provisions. The text of the Convention seems to leave wide margin of discretion to Parties whether to apply the Article to activities other than those listed in Annex I.

However, in C-243/15 *Lesoochranárske zoskupenie VLK* the CJEU held that the applicability of the Article is governed by the national law only as regards the manner in which the public participation specified by Art 6 is carried out. The mere fact that the national authorities decided to initiate an authorization procedure for the project pursuant to Art 6(3) of the Habitats Directive, means that the project falls under the scope of Art 6 of the Convention.\(^9\)

The Court’s position appears to be based on the more detailed view of the Advocate General Kokott. The Advocate General held that if proposed activities are likely to have significant effects on the environment the Parties must apply Article 6 of the Convention. Consequently, any appropriate assessment under the Habitats Directive falls, in principle, under Article 6(1) of the Aarhus Convention. The Convention contains no definition of what ‘significant environmental effects’ are. In principle, the MS have some discretion in this regard but the discretion is limited as regards the Habitats Directive because the Directive specifies the requirements governing the significance of environmental effects in the field of European nature conservation. It must be assumed that adverse effects on the conservation objectives connected with European protection areas have to be regarded, in principle, as ‘significant’ for the purposes of Article 6(1)(b) of the Convention.\(^10\)

In C-664/15 the CJEU stated that Article 6 of the Convention applies to such decisions under the WFD, which may result in significant effects on environment, particularly with regards to the status of the water forming the subject of the permit procedure.\(^11\) The ruling was based on the assumption that there were no such effects in the case. The court did not make it clear, which negative effects regulated by the WFD would qualify as ‘significant environmental effects’ in the meaning of the Convention. In our view it can be argued by analogy with Article 6(3) of the Habitats Directive that adverse effects on the status or ecological potential of a water body in the meaning of Art 4(7) of WFD qualify as ‘significant environmental effects’ in the meaning of Article 6 of the Aarhus Convention. Therefore, the requirements of Article 6 of the Convention are, as a rule, relevant for the ApA.

Public consultations are necessary for transparency and accountability in general but also for gathering information and enabling the members of the public to defend their legally protected interests, e.g. property right, or, in the case of ENGOs, public environmental interests. Art 4(7) of the WFD does not explicitly foresee public consultations. However, Art 14 requires the MS to encourage active involvement of all interested parties in the implementation of the Directive, in particular in the production, review and updating of the RBMPs. The Article also sets out some public consultation requirements with regard to RBMPs. The CJEU has stated that the general requirement to ‘encourage active involvement’ is aspirational and the binding nature of the

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10. The opinion of the Advocate General Kokott in case C-243/15 *Lesoochranárske zoskupenie VLK*, paragraphs 77-78.
provision is limited.\textsuperscript{12} The Advocate General Sharpston is also of opinion that the provision is abstract and does not create participatory rights in itself.\textsuperscript{13} Nonetheless, granting participatory rights at least to the ENGOs would clearly contribute to attaining the objectives of the WFD.\textsuperscript{14} The CJEU has emphasized that participation of ENGOs is important because only such organisations are orientated towards the public interest.\textsuperscript{15}

It should be noted that Article 41 (2)(a) of the Charter sets out the right of every person to be heard, before any individual measure which would affect him or her adversely is taken. Moreover, in our view it has to be presumed, in general, that the adverse effects on the status or ecological potential of a water body in the meaning of Art 4(7) of WFD qualify as ‘significant environmental effects’ in the meaning of Article 6 of the Aarhus Convention. Therefore, the requirements of Article 6 of the Convention are, as a rule, relevant for the ApA. Note that the CJEU has not clarified whether the significance of the effects has to be presumed under Art 4(7) of WFD, although the court has stated that public participation must be provided if participation in permit proceedings is a prerequisite for challenging the permit.\textsuperscript{16}

Consultations with public authorities are also necessary. This is especially true in the cases where the decision-maker is a not in in charge of RBMPS. For example, an authority in charge of public safety must consult with environmental authorities regarding the environmental impacts of flood protection works. Consultations with authorities that have specific environmental responsibilities is partly necessary to safeguard that the decision-maker has access to environmental expertise. The matter is discussed in next section. However, consultations with authorities, especially with authorities with general local and regional competence, is somewhat similar to public consultations. The application of Art 4(7) exemption requires proper balancing of interest, which is not possible without knowing the relevant local and regional public and private interests. It follows from the general principles of administrative law that the ApA requires consulting with public authorities to gather the relevant information to ensure proper exercise of discretion.

### 3.3 Expertise

The value of any \textit{ex-ante} assessment depends on the quality of the assessment, which in turn depends on the expertise available. The EIA Directive Art 5(3) stipulates that the EIA report has to be prepared by competent experts and that the competent authority must have the competence or access to sufficient expertise to examine the EIA report. In our view the requirements are also inherent to the ApA. It would not possible to achieve the aims of the WFD if the exemptions are authorized on the basis of misleading or incomplete information or without the ability to fully comprehend the information.

Two scenarios as regards competence of experts and expertise should be distinguished on the basis of who carries out the ApA.

\begin{itemize}
  \item \textsuperscript{12} C-644/15 Protect, paragraph 74.
  \item \textsuperscript{13} The opinion of the Advocate General Sharpston in C-644/15 Protect, paragraphs 64 and 103.
  \item \textsuperscript{14} Ibid, paragraphs 104-106.
  \item \textsuperscript{15} C-644/15 Protect, paragraph 79.
  \item \textsuperscript{16} In C-664/15 Protect paragraph 68.
\end{itemize}
It should be noted that in any case the competent authority needs to exercise at least supervisory powers over the assessment as they are liable for proper implementation of the Directive even in those cases where some assessment functions are delegated to developers or experts hired by them.

### 3.4 Conflict of Interests

The conflict of interest may arise if the authority in charge of the ApA is the same body charged with developing and implementing the project being assessed, e.g. the same authority in charge of water management (including the ApA and permits) is also tasked with developing and implementing civil engineering works for flood protection. In such cases, it has to be ensured, in spirit of Art 9a of the EIA Directive that there is a separation between conflicting functions when performing duties.

The separation has to be genuine: the tasks have to be divided between organisationally independent units carrying out different functions, each with sufficient resources. In our view the requirement is inherent in the ApA because the general principles of administrative law require impartiality of the decision maker. Article 41 (1) of the Charter explicitly stipulates that every person has the right to have his or her affairs handled impartially and fairly.

### 3.5 Assessment and the Extent of Discretion

A key question regarding effectiveness of environmental assessments is whether and to what extent they have to be taken into account in decision-making. There are significant differences between the assessments under EU law. The results of the EIA are basically for information as Art 8 of the EIA Directive only requires that the results be taken “duly into account”. In contrast, Art 6(3) of the Habitats Directive essentially forbids granting a permit if the assessment shows that the integrity of the site may deteriorate.

It is apparent from the structure of the Art 4 of the WFD that the results of the ApA are binding on the competent authorities similarly with Art 6(3) of the Habitats Directive. If the assessment concludes that the new development project does not enable achievement of environmental
objectives, the activity can only be permitted by way of derogation provided in Art 4(7) when he conditions in (a)-(d) are met.

In order to avoid confusion as to the legal implications of the assessment results the effect of the results on the extent of discretion should be clearly stated in the laws of the MS.

3.6 Prevention, Mitigation, Compensation and Monitoring Measures

According to Art 8a(1) (b) of the EIA Directive the decision to grant development consent has to incorporate information on any environmental conditions attached to the decision, a description of any features of the project and/or measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects on the environment as well as, where appropriate, monitoring measures. According to Art 8a(4) of the EIA Directive the MS have to ensure that the features of the project and/or measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects on the environment are implemented by the developer, and have to determine the procedures regarding the monitoring of significant adverse effects on the environment. The type of parameters to be monitored and the duration of the monitoring has to be proportionate to the nature, location and size of the project and the significance of its effects on the environment.

In our view, applying the exemption of Art 4(7) of the WFD inherently requires incorporating information on the prevention, mitigation and compensation measures to the decision to derogate and making certain that the measures are implemented. The conclusions of the ApA are not directly binding. If the decision does not provide the information on the required measures, at the minimum by reference to the ApA conclusions, then there would be no obligation for the project developer to take the measures. Also, it would not be feasible to achieve the aims of the Directive without actually implementing the measures. Note also that Art 4(7)(a) of the WFD explicitly requires taking all practicable steps to mitigate the adverse impacts as a prerequisite for the derogation. In our view, the practicable steps necessarily include incorporating the information on the measures and implementing the measures in the final (permitting) decision.

Additional monitoring requirements may not always be needed because the WFD already provides for monitoring and assessment of the status of water bodies. Nonetheless, the decision to derogate should make cross-reference to the relevant monitoring requirements. Moreover, if the ApA demonstrates the need for more specific monitoring, the monitoring measures have to be incorporated to the decision and actually implemented. The guideline for the monitoring measures set out in the EIA Directive could also be used for the purposes of Art 4(7) of the WFD, i.e. the requirement to tailor the monitoring to the nature, size, location and effects of the project.

According to the polluter pays principle, the developer has to bear the cost of prevention, mitigation, compensation and monitoring measures.
Contact information:

name: Siim Vahtrus
organization: J&E
tel/fax: +372 55 683 880
e-mail: chairman@justiceandenvironment.org
web: www.justiceandenvironment.org

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