

LEGAL APPLICATION OF WFD ENVIRONMENTAL OBJECTIVES

in environmental permitting in
Sweden, Finland and Denmark



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Today's Presentation

- ▶ Background
- ▶ Sweden
- ▶ Finland
- ▶ Denmark
- ▶ Bonus: Åland Islands
- ▶ Concluding Remarks

Background

- ▶ Discussions on the normativity of the environmental objective of the Water Framework Directive (Swe, Fin, Dk, Ål)
- ▶ Clarifications by the EU Court of Justice
 - ▶ The Weser Judgment C-461/13
 - ▶ The Schwarze Sulm Judgment C-346/14
- ▶ Several investigations and proposals on the need to change legislation implementing WFD
 - ▶ Permitting legislation; legal effect of environmental objectives
 - ▶ WFD Article 4(7) not possible to apply in all countries
 - ▶ Case law

Sweden

- ▶ WFD implemented as separate legislation on river basin management planning
 - ▶ The Swedish Water Quality and Management Decree (2004:660) and the national system of environmental quality standards EQS in 2nd and 5th chapter of the Environmental Code (1998:808)
- ▶ Formal notice against Sweden, infringement procedure 2007/2239 (2016) and the political energy agreement 2016
- ▶ Case law *Before* the Weser Judgment
 - ▶ Unclear legal effect of EQSs; limit values (binding) and goal values (non-binding objectives),
 - ▶ **But uncertainty of the legal status of the EQSs** (MMD M 1427-07 2011 Eldforsen 2011; MÖD M 10108-11 Laxån 2012; MÖD M 8255-14 Långforsen I 2015)
- ▶ Case law *After* the Weser Judgment
 - ▶ Ecological status interpreted as binding in line with Weser
 - ▶ **Case law reasoning changed, but outcome appears to be the same** (MÖD M 9616-14 Norviks port II 2015; MÖD M 6574-15 Näckån 2016; Joint cases MÖD M 2649-16 Lasele and M 2650-16 Långbjörn 2017)

Finland

- ▶ WFD implemented by Water and Marine Management Planning Act (1299/2004)
 - ▶ Environmental objectives and water management plans
- ▶ Water Act (587/2011) concerning physical and structural impact on waters and Environmental Protection Act (527/2014) on pollution control
 - ▶ Water management plans to be “taken into account”
- ▶ Problems?
 - ▶ Environmental objectives not binding, not connected to permit revisions
- ▶ Case law *after* Weser: **binding environmental objectives but granted permits**
 - ▶ KHO 29.10.2018 t. 4935 on pulp mill; KHO 14.2.2018 t. 608 peat extraction; KHO 2017:87 new hydropower plant; KHO 13.4.2017 t. 1711 on water abstraction; KHO 26.4.2018 t. 1948-1953 on fish farming

Finland

VALTIONEUVOSTON
SELVITYS- JA TUTKIMUSTOIMINTA

Antti Belinskij, Jukka Aroviita, Jussi Kauppila, Sara Kymenvaara, Laura Leino, Milla Mäenpää, Elina Raitanen, Niko Soininen

Vesienhoidon ympäristötavoitteista poikkeaminen – perusteet ja menettely

Vesienhoidon ympäristötavoitteiden toteuttaminen: ympäristöllisten lupien muutettavuutta koskevan lainsäädännön kehittäminen ja sen valtiosääntöoikeudelliset perusteet

Denmark

- ▶ 2013 Act on River Basin Management Planning (Lov nr. 1606 af 26/12/2013)
- ▶ Statutory Order on Programmes of Measures (Bekendtgørelse nr. 1521/2017)
 - ▶ 8 § Authorities must prevent deterioration and ensure that the attainment of the environmental objectives is not hindered
 - ▶ Nb. Wording *after* Weser judgment
- ▶ Decisions by the Appeals Board have referred to the Weser judgment
 - ▶ E.g. MAD2015.462
- ▶ The Statutory Order distinguishes between two situations:
 - ▶ where the affected body of water *meets* the established environmental objective and the other
 - ▶ where the body of water does *not meet* the objective
- ▶ Special procedure for the emissions of nitrogen or phosphorus

Bonus: Åland Islands

- ▶ The Water Act (Vattenlag 1996:61 för landskapet Åland)
 - ▶ WFD disconnected from permitting
 - ▶ ”Stop provision” blocks new activities with nutrient emissions
- ▶ Investigation on a new Water Act (Utredning av en ny vattenlag för landskapet Åland 2016, Kymenvaara & Eklund)
- ▶ Case law *after* Weser judgment
 - ▶ ÅFD 52/2016 dnr 2014/44 on fish farming
- ▶ Draft government bill of 19 March 2019
 - ▶ New Act likely to enter into force in 2020

Concluding remarks

- ▶ Varying impact of Weser judgment
- ▶ Different ways of integrating WFD with permitting across the Nordic countries
 - ▶ Wording of legislations, instruments used, nationally conditions and systems
- ▶ Danish (and Swedish as of 1 January 2019) clearest on legal effect of WFD in permitting
- ▶ Operator's obligation to be aware of activity's impacts
 - ▶ Data on classification and monitoring is a common challenge
 - ▶ Size of water bodies
- ▶ Validity of permits

Thank you!



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- ▶ Further reading:
 - Sara Kymenvaara et al., *Variations on the same theme: Environmental objectives of the Water Framework Directive in environmental permitting in the Nordic countries*, Review of European, Comparative, International Environmental Law (RECIEL 1/2019)