

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**

THE WFD: A SECOND-GENERATION FRAMEWORK DIRECTIVE

- 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**

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

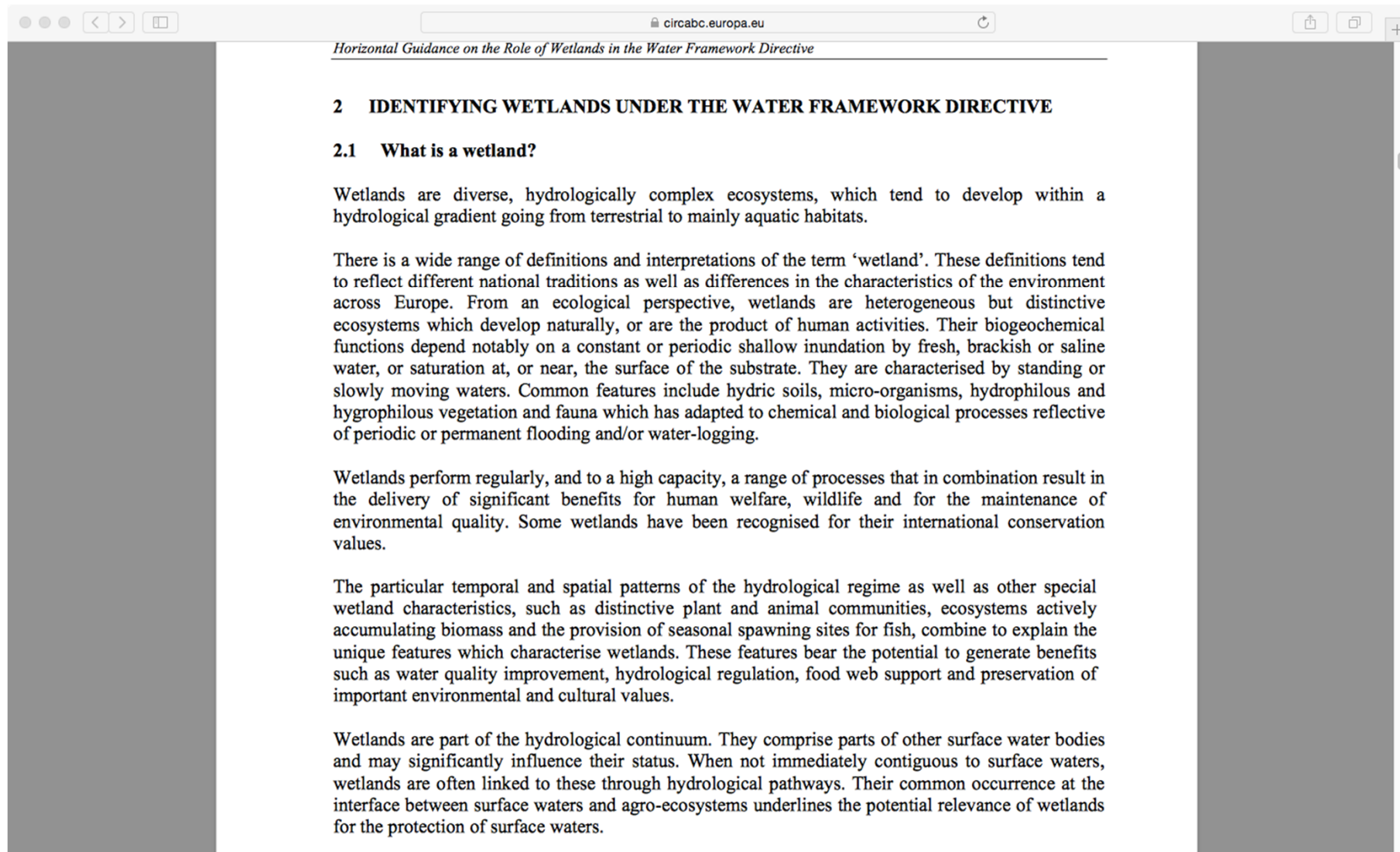
GUIDANCE DOCUMENTS

- 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
- http://ec.europa.eu/environment/water/water-framework/facts_figures/guidance_docs_en.htm


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



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)

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- 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 *national judges are aware of GDs*. 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?
- No use has been made of GDs.
 - 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 non-binding 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 WFD 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 N° 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
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