

Proposal for a Regulation of the European Parliament and of the Council on nature restoration

WFD Navigation Task Group¹ Position Paper, 20th February 2023

Context

The Water Framework Directive Navigation Task Group (WFD NAVI) is a thematic cluster of international organisations representing public and private sector, ports, harbours, waterways, leisure navigation, and dredging. The navigation sector, which is acknowledged in Directive 2000/60/EC (the Water Framework Directive) as an important sustainable human development activity, is a key player in contributing to clean and ecologically healthy water bodies.

WFD NAVI supports the principles of the EU Biodiversity Strategy and we fully accept the need to improve, re-establish and protect natural habitats and to ensure functioning, resilient ecosystems. We note, however, that while protecting biodiversity is a key objective, the European Green Deal reflects a much wider range of environmental ambition, including addressing the climate crisis. A synergistic approach is therefore required.

A priority of the Green Deal is to promote efficient, safe and environmentally friendly transport. The potential benefits of carbon neutral, resilient waterborne transport in enabling modal shift of freight and passengers away from road transport, are emphasised in policies such as the Sustainable and Smart Mobility Strategy. Furthermore, with regard to the adaptation of waterborne infrastructure, our sector plays an important role in delivering co-benefits to strengthen the resilience of both nature and navigation.

WFD NAVI recognises the ambitious targets set out in the new nature restoration proposal, but it is clear to us that, if all of the above-mentioned objectives are to be realised, the proposal must be balanced, proportionate and pragmatic in both its objectives and its implementation. It also needs to complement existing legislation such as the Birds and Habitats, Water Framework and Marine Strategy Framework Directives in order to create a consistent whole, rather than creating duplication and increasing the regulatory burden.

At a time when many Member State governments are taking steps to speed up planning and approval processes, particularly for activities that contribute to the meeting Green Deal objectives, some of the potential 'unintended consequences' of the proposed nature restoration law are of great concern to the WFD NAVI member organisations.

Relevant aspects of the proposal

Articles 4 and 5 of the nature restoration proposal introduce a requirement to improve and re-establish habitats, including freshwater, coastal/estuarine and marine habitats, that are not in 'good condition'. The original draft of the proposal anticipates that improvement and re-establishment

¹ The WFD Navigation Task Group – or WFD NAVI – comprises a 'thematic cluster' of European navigation-related organisations that provides the navigation sector's contribution to the Common Implementation Strategy supporting implementation of Directive 2000/60/EC. The Task Group, which is led by PIANC, the World Association for Waterborne Transport Infrastructure, includes the following professional bodies, trade associations and other stakeholders concerned with ports, commercial and leisure navigation and dredging: Central Dredging Association; European Barge Union - Inland Waterways Transport Platform; European Boating Association; European Boating Industry; European Dredging Association; European Federation of Inland Ports; European Sea Ports Organisation; ICOMIA; and Inland Navigation Europe. Central Commission for Navigation on the Rhine, the Danube Commission and the International Sava River Basin Commission are also invited to attend our meetings as observers. See <https://www.pianc.org/eu-water-framework-directive>

measures will be in place on at least 30% of the area of each habitat group by 2030; 60% by 2040; and 90% (improvement) or 100% (re-establishment) by 2050. In the meantime, the condition of such ecosystems must not deteriorate, either before or following restoration. These targets also apply outside of existing Natura 2000 sites.

According to Articles 4(8) and 5(8) of the proposal, non-fulfilment of the obligations to improve ecosystems and to prevent deterioration outside Natura 2000 sites can only be justified for reasons of force majeure; unavoidable climate-change induced habitat transformations; or a case-by-case determination of overriding public interest assuming no less-damaging alternative solutions are available. No further detail is provided on how this exemption will work in practice, or what will be the legal basis for the case-by-case assessment, but it seems possible that tests analogous to those under the Habitats Directive Article 6(4) may become necessary, even outside of Natura 2000 sites.

Under Article 7 of the nature restoration proposal, at least 25,000 km of longitudinally and laterally free-flowing rivers are to be established by 2030. To this end, an inventory of obstacles is to be drawn up and the removal of longitudinal and lateral structures that are no longer needed (obsolete) is to be made obligatory, while barriers that continue to have a use, including for navigation, are to be retained. It is not clear to us how this relates to the implementation of the Water Framework Directive. For example, whether the establishment of ecological continuity according to the WFD (e.g. via a fish pass in some situations) will still be sufficient.

We further note that Article 7 of the nature restoration proposal is to be achieved 'without prejudice' to Directive 2000/60/EC Articles 4(3) (the designation of heavily modified water bodies), 4(5) (the setting of less stringent objectives) and 4(7) (the exemption for new physical modifications). However, Articles 4 and 5 of that proposal do not currently make an equivalent provision, even though these Articles explicitly cover freshwater/coastal and marine habitats respectively. It is not clear to us why this distinction is made or why this inconsistency exists.

Potential implications

Achieving carbon neutrality and strengthening resilience, including to the effects of climate change, will require a great deal of investment in both maintenance activities and new development. Differences between existing project appraisal processes already mean the approval process for such activities can be lengthy and sometimes burdensome, particularly when protected habitats and species could be impacted.

Waterborne transport infrastructure, by its very nature, is typically located within or in the vicinity of freshwater, coastal/estuarine or marine habitats. Under the nature restoration proposal, there may be direct impacts on some in the sector as a result of the identification and implementation of habitat restoration/improvement or re-establishment initiatives. Furthermore, we are concerned that the requirement to avoid deterioration in the condition of other habitats could impose an additional burden on those proposing maintenance activities or new developments outside Natura 2000 sites. Such projects may be affected, among other things, by: a new or extended scope for environmental impact assessments; additional delays to the project approval process; and increased project costs. Unless such effects can be avoided or minimised, it will become more difficult for the waterborne transport sector to deliver its Green Deal obligations in a timely manner (if at all).

WFD NAVI requests for reassurance and clarification

WFD NAVI members therefore seek reassurance that proportionality principles will be embodied in the new nature restoration law, in particular in areas outside the Natura 2000 network. In this regard,

as mentioned above, consistency with the provisions of the WFD Articles 4(3), 4(5) and 4(7) will be important. In particular, WFD NAVI highlights the relevance of the criteria (tests) set out under WFD Article 4(7) that are used to determine whether an exemption can be applied to a new physical modification (etc.) potentially affecting the status of a water body. Specifically, these tests require either overriding public interest to be demonstrated and/or *evidence to be provided that the benefits to the environment and to society of achieving the [WFD] objectives are outweighed by the benefits of the new modifications or alterations, to human health, to the maintenance of human safety or to sustainable development.*

Taking into account the wider Green Deal objectives, WFD NAVI members believe that the latter test (*shown in italics*), often referred to the Article 4(7) balancing test, offers a more reasonable and pragmatic approach outside of protected areas, than the very strict 'imperative reasons of overriding public interest' test described in Article 6(4) of the Habitats Directive. Adoption of the WFD criteria would also help to avoid any need to introduce yet another project appraisal and testing regime.

We further note that the Marine Strategy Framework Directive follows a similar principle in requiring Member States to give due consideration to sustainable development and, in particular, *to the social and economic impacts* of the measures envisaged. WFD NAVI Task Group members would welcome the application of this principle within the nature restoration proposal, for example to the process of determining which areas are most suitable for restoration measures.

In addition to the above points, WFD NAVI also requests that greater clarity is provided with regard to the following questions:

- What evidence will be used to reliably establish the status of natural areas 70 years ago, given that it is often extremely difficult to find sufficient data, whether in the form of a baseline or on 'documented losses' in the meantime? It is our view that it is more relevant to properly define what represents 'good' condition for each habitat type, including in terms of functioning ecosystems, than to try to look back a very specific number of years, when habitats may or may not have been in 'good' condition, and when challenges such as climate change were neither omnipresent nor understood
- How and when will 'good condition' for habitat types or ecosystems that are not covered by the Habitats Directive be defined?
- How will the inter-relationships with other Directives (WFD, MSFD, EIA Directive) work in practice, especially where inconsistencies or potential redundancies are apparent?
- What is the potential role and status of 'artificial' natural areas in contributing to the delivery of the targets set out under the proposal?
- How is it proposed that stakeholders will be consulted or engaged when a proposal to restore, improve or re-establish a particular habitat area could adversely affect their legitimate interests in, or activities on, that site?
- Whether and how will socio-economic impacts be considered in the development and implementation of the proposal (see our suggestions above)?
- What is the exact status of the activities listed under Annex VII, where players in the waterborne sector are referred to?

Finally, members of the WFD NAVI Task Group stress the importance of ensuring that any new framework is designed and implemented, not only to be workable in a practical sense, but also to ensure a level playing field between Member States, including on how the impacts of climate change should be taken into account. This is vital, not only for waterborne transport, but also for many other socio-economic activities.