

Overview of the Water Law of the Federal Republic of Germany

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Federal Law

Legislative Competence

It was only with the re-organization of legislative competences in the course of the 2006 federalism reform which abolished framework legislation and transferred its matters to article 74 of the Basic Law (Grundgesetz) that the federal government obtained the possibility for comprehensive management of water resources (cf. article 74 No. 32 Basic Law).¹ However, the *Länder* (German states) can set out proper regulations that differ from the federal provisions if the variant rules do not pertain to materials or facilities associated to water management (article 72 (3) No. 5 Basic Law).

The principle legal sources of German water law are as follows:

Water Management Act (Wasserhaushaltsgesetz, WHG) [Federal Law Gazette 2009 No. 51, pp. 2585 et seq.]

The new law pertaining to the management of water resources (Water Management Act, in the following: WHG), came into effect on March 1, 2010. It revises federal water law following the expansion of legislative competences in the course of the federalism reform.²

The reform of the WHG had the following main purposes:

- the substitution of the previous framework legislation by a comprehensive legislation
- the transfer of former *Länder* law pertaining to certain areas of water management to federal law
- the implementation of binding EU provisions through uniform federal legislation
- systematization and standardization in order to improve the comprehensibility and practicability of the complicated water law.³

According to its para. 2 (1), the WHG pertains to all surface waters, coastal waters and groundwater. It contains fundamental provisions on the management of water resources (specifically, their quantity and quality).⁴ Para. 1 WHG explains the law's purpose and states that the sustainable management of waters is meant to protect these as part of the ecosystem, as man's livelihood, as a habitat for flora and fauna, and as a commodity.

¹ Cf. *Becker*, Das neue Umweltrecht 2010, Munich 2010, pp. 9, 28.

² Brochure of the Federal Environment Agency on water resources in Germany, Berlin 2010, p. 35.

³ Cf. the official grounds [travaux préparatoires], BT-Drs. 16/12275, March 17, 2009, p. 40.

⁴ Brochure of the Federal Environment Agency on water resources in Germany, Berlin 2010, p. 35.

The water management generally lies in the hands of the State and its competent water authorities.⁵ In order to guarantee the preemptive protection of water resources, their use is, save for less important instances, subject to an administrative permission from the competent water authority.⁶ Para. 9 WHG enumerates the different uses that fall under the ambit of the law.

The WHG sets out management objectives for all waters (i.e. surface waters, coastal waters and groundwater). These objectives comply with the provisions of the EU Water Framework Directive and shall be met by 2015. Surface waters shall, for example, be in a good chemical and ecological state by 2015.⁷

Para. 23 WHG empowers the Federal Government to enact statutory instruments on water management, an empowerment that enables it not only to specify legal parameters, but also to implement the legal acts of the European Union both uniformly and quickly on the federal level.

Moreover, the third chapter of the WHG includes numerous specific regulations concerning water management. The provisions pertaining to facilities' handling of substances harmful to water (para. 62 et seq. WHG), the construction and operation of sewage works (para. 54 et seq. WHG), the appointment of a commissioner for the protection of waters (para. 64 et seq. WHG), the development of watercourses (para. 67 et seq. WHG), the protection from floods (para. 72 et seq. WHG), and the designation of water protection areas (para. 51 WHG) are worthy of special mention.

Waste Water Charges Act (Abwasserabgabengesetz, AbwAG) [Federal Law Gazette 2005 I, p. 114; amended version in the Federal Law Gazette 2009 I, p. 2585]

The Waste Water Charges Act (in the following: AbwAG) prescribes a charge for the discharge of waste water into waters. The charge depends upon the quantity and the harmfulness of certain discharged substances (cf. the annex to para. 3 AbwAG) and is meant to create an economic incentive to refrain from waste water discharge as far as possible.⁸ It is paid to the *Länder* and its revenue is earmarked for measures aiming to keep the waters clean.⁹

The AbwAG takes into account the EU Water Framework Directive according to which the recovery of the costs of water services includes environmental and resource costs.¹⁰

Waste Water Ordinance (Abwasserverordnung) [Federal Law Gazette 2004 I, p. 2625; amended version in Federal Law Gazette 2009 I, p. 2585]

Federally applicable minimal standards for the introduction of waste water into waters and thus for the production, prevention and treatment of waste water exist since

⁵ Cf. *Breuer*, *Öffentliches und privates Wirtschaftsrecht*, 3rd ed., Munich 2004, p. 127.

⁶ Para. 8 WHG.

⁷ Para. 27 (1) No. 2 WHG.

⁸ Brochure of the Federal Environment Agency on water resources in Germany, Berlin 2010, p. 37.

⁹ Para. 1 and 13 WHG.

¹⁰ Cf. article 9 (1) Water Framework Directive.

1976¹¹ and can be found today in para. 57 WHG. The best available technology constitutes the basis for these minimal standards. The Waste Water Ordinance specifies these standards for both the direct and the indirect discharge of waste water.¹²

Numerous annexes to the Ordinance specify the standards according to the particular industrial branch. The instrument also implements EU law pertaining to waste water-related technical requirements [e.g. Directive on the Protection of Waters (2006/11/EC)].

The Ordinance on Groundwater of November 9, 2010 (Grundwasserverordnung) [Federal Law Gazette I, p. 1513]

The new Ordinance on the Protection of Groundwater (Groundwater Ordinance) entered into force on November 16, 2010, replacing the previous Groundwater Ordinance of March 18, 1997¹³ and completing the implementation of the Groundwater Daughter Directive 2006/188/EC in national law. The Ordinance includes requirements for the determination, description and supervision of groundwater bodies, stipulating that the state of these bodies must be ascertained and described by December 22, 2013 and every six years after that date.¹⁴ Furthermore, it sets criteria for the appraisal, ascertainment, categorization and supervision of the groundwater's both quantitative and chemical state. The supervision and categorization of the groundwater's state is particularly important for controlling whether the groundwater management objectives set out in para. 47 of the WHG can be met.¹⁵ If the competent authority realizes in the course of its supervision that there is a risk of not attaining the management objectives set out in para. 47 of said law, it must categorize the groundwater body as endangered according to para. 3 (1) of the Groundwater Ordinance. In such a case, the competent authority must ascertain long-term and increasing tendencies of concentration of harmful substances in the concerned groundwater bodies in accordance with the Ordinance and must introduce the measures necessary to reverse these tendencies.¹⁶

Ordinance on Surface Waters of July 20, 2011 (Oberflächengewässerverordnung) [Federal Gazette I, p. 1429]

The Ordinance on Surface Waters entered into force on July 26, 2011. According to its para. 1, it aims at protecting the surface waters and enabling the economic analysis of their uses. The Ordinance replaces the federal states' ordinances and thus contributes to a federally uniform level of protection for surface waters. However, its primary objective is to implement European legal requirements regarding the protection of surface waters. Examples for such requirements are the Directive on Environmental Quality Standards¹⁷, the Directive on Technical Specifications for Chemical Analysis and Monitoring of Water Status¹⁸, and the Annexes II, III and V of the Wa-

¹¹ Brochure of the Federal Environment Agency on water resources in Germany, Berlin 2010, p. 84.

¹² Brochure of the Federal Environment Agency on water resources in Germany, Berlin 2010, p. 84.

¹³ Groundwater Ordinance [Federal Gazette 1997 I, p. 542].

¹⁴ Cf. para. 2 (1) and Annex I, Nr. 1 of the Groundwater Ordinance.

¹⁵ Cf. *Schütte/Winkler*, Aktuelle Entwicklungen im Bundesumweltrecht Berichtszeitraum 21.10.201-7.12.2010, ZUR 2011, pp. 98, 100.

¹⁶ Cf. para. 10 of the Groundwater Ordinance.

¹⁷ Directive 2008/105/EC.

¹⁸ Directive 2009/90/EC.

ter Framework Directive¹⁹. The Surface Waters Ordinance sets standards for the characteristics of surface waters and requires the competent authorities to either ascertain and evaluate pollution levels or check and update existing evaluations carried out in accordance with the Länders' regulations.²⁰ For this, the Ordinance sets out precise criteria for an evaluation of the chemical and ecological status as well as the ecological potential that is in keeping with the type of surface water concerned.²¹ Furthermore, the regulation includes standards for the categorization, typification and delimitation of surface water bodies as well as for the economic analysis of their uses.²²

Ordinance on Long-Distance Pipelines (Rohrfernleitungsverordnung) [Federal Law Gazette 2002 I, pp. 3777, 3809; amended version in Federal Law Gazette 2009 I, p. 2585]

The Ordinance on Long-Distance Pipelines sets out standards with the aim of protecting man and environment from harmful exposure to substances conveyed through pipelines.

Long-distance pipelines are facilities that, e.g. in light of the Act on Environmental Impact Assessment, necessitate a planning approval or a planning permission.²³

Federal Soil Protection Act (Bundes-Bodenschutzgesetz) [Federal Law Gazette 1998 I, p. 502; amended version in Federal Law Gazette 2004 I, p. 3214]

The Federal Soil Protection Act sets out that the authorities can oblige the polluter and his universal successor, the landed proprietor, the former owner, a person who gave up the property as well as the person liable in terms of commercial law to rehabilitate the groundwater contaminated by harmful soil alteration or residual waste.²⁴ Water law determines the rehabilitation standards.²⁵

Laundry and Cleaning Act (Wasch- und Reinigungsmittelgesetz) [Federal Law Gazette 2007 I, p. 600]

The Act on the Environmental Compatibility of Laundry and Cleaning Detergents (Laundry and Cleaning Act) provides rules on the production, labeling, and sale of laundry and cleaning detergents. Furthermore, it sets out standards for their environmental compatibility. If a product does not satisfy these standards, e.g. because it contains substances harmful to water, its marketing can be prohibited or limited.²⁶ The law applies alongside Regulation (EC) No. 64/2004 on Detergents [OJ L 104, p. 1, 31 March 2004, last amended by OJ L 164, p. 3, 25 June 2009].

¹⁹ Directive 2000/60/EC. For more information on the European legal requirements, cf. the section on "Relevant European Law", pp. 7 et seq.

²⁰ Cf. para. 4 (1) of the Surface Waters Ordinance.

²¹ Cf. para. 5 and Annexes 3 and 4; para. 6 and Annex 7 of the Surface Waters Ordinance.

²² Cf. para. 3 (1) and Annex 1 as well as para. 12 of the Surface Waters Ordinance.

²³ Cf. para. 2 (2) of the Ordinance on Long-Distance Pipelines.

²⁴ Para. 4 (3) Federal Soil Protection Act.

²⁵ Para. 4 (4) Federal Soil Protection Act.

²⁶ Cf. para. 6 Laundry and Cleaning Act.

Infection Protection Act (Infektionsschutzgesetz, IfSG) [Federal Law Gazette 2000 I, p. 1045; amended version in Federal Law Gazette 2009 I, p. 2091]

The Act on the Prevention and Abatement of Infectious Human Diseases (Infection Protection Act) includes provisions on the quality of water for human use, swimming and bathing pools as well as on the safe removal of waste water.²⁷

The essential requirement for the quality of drinking water is that its consumption or use is not harmful to human health, especially through pathogenic agents.

The hygienic standards for urban waste water removal are that the authorities responsible for waste water removal, usually the municipalities or municipalities associations,²⁸ have to remove waste water in a manner not harmful to human health due to pathogenic agents.²⁹

Ordinance on Drinking Water (Trinkwasserverordnung) [Federal Law Gazette 2001 I, p. 959; amended version in Federal Law Gazette 2006 I, pp. 2407, 2455]

The Ordinance on Drinking Water implements the EC Drinking Water Directive. It sets out specific requirements for the quality of water for human use (drinking water), comestibles-producing industries, as well as for the quality of drinking water conditioning.³⁰

The ordinance particularly includes rules on the quality of drinking water and the duties of an operator of water supply facilities as well as on the supervision of operators through sanitary authorities with respect to hygiene.³¹ Furthermore, the Ordinance sets out limits for deleterious substances and pathogenic agents and determines the frequency and extent of water tests.³² These limits comply with the EC Drinking Water Directive.

Ordinance on Fertilizing (Düngeverordnung) [Federal Law Gazette 1996 I, p. 118; amended version in Federal Law Gazette 2006 I, p. 20]

The aim of the Ordinance on Fertilizing, passed on the basis of the former Fertilizer Act [Federal Law Gazette 1977 I, p. 2134], is to improve the protection of waters from contamination, especially with nitrate, through agricultural sources. At the same time, the Ordinance implements the EC Nitrate Directive. The former Fertilizer Act was replaced by the Act on Fertilizing [Federal Law Gazette 2009 I, p. 254] at the beginning of 2009.

²⁷ See para. 37 et seq. IfSG.

²⁸ Pursuant to para. 56 WHG, it is up to *Länder* law to specifically assign the responsibility for waste removal. According to this *Länder* water law, the responsibility generally resides with municipalities or municipalities associations (cf., for instance, para. 45b of the Water Law of Baden-Württemberg; article 34 of the Bavarian Water Law).

²⁹ Para. 41 IfSG.

³⁰ Cf. Parts 2 and 3 of the Ordinance on Drinking Water.

³¹ Cf. para. 4 et seq., 13 et seq., and 18 of the Ordinance on Drinking Water.

³² Cf. para. 5 et seq. and 14 of the Ordinance on Drinking Water.

Länder Law

The *Länder* regulations remain important even after the reorganization of legislative competences because they implement and complete federal regulations. This holds especially true for those areas in which the federal government has seen no need for federal regulation. The *Länder* can still fill out these areas with own provisions.³³ All *Länder* will have to adapt their respective water laws to the federal water law WHG.³⁴

***Länder* water laws**

A definitive verdict on the question to what extent the *Länder* will also make use of the permission to enact variant laws granted in article 73 (3) Basic Law and will exchange or complete federal provisions with own regulations is not yet possible, given that the WHG only came into effect on March 1st, 2010.

The provisions of several *Länder* levy a charge for the abstraction of water from a water body (see, for instance, para. 17a of the Water Law of Baden-Württemberg, para. 16 of the Water Law of Mecklenburg-Vorpommern, para. 1 of Saarland's Groundwater Abstraction Charge Act). The charge falls upon the agent extracting the water,³⁵ i.e. the public utility company in the case of public water supply,³⁶ which will pass the expenses on to the consumer. The abstraction charge revenue is often appropriated for water protection measures.³⁷ In some cases, *Länder* law expressly prescribes this earmark (see, for instance, para. 8 of Saarland's Groundwater Abstraction Charge Act).

Municipal Statutes

Municipalities can also enact binding regulations within the limits of their sovereignty to pass municipal statutes. For example, they determine the waste water charges and the obligation to connect to the municipal water supply and waste water removal system.³⁸

³³ *Egner/Fuchs*, Naturschutz- und Wasserrecht 2009 – Schnelleinstieg für Praktiker, Munich 2009, p. 339.

³⁴ *Ibid.*

³⁵ Cf. para. 3 (1) and 1 (1) of Saarland's Groundwater Abstraction Charge Act.

³⁶ Cf. *Breuer*, Öffentliches und privates Wasserrecht, 3rd ed., Munich 2005, p. 669.

³⁷ Brochure of the Federal Environment Agency on water resources in Germany, Berlin 2010, p. 39.

³⁸ See, for instance, the Statute on Public Waste-water Removal of the City of Heidelberg of December 18, 1980. <http://www.heidelberg.de/servlet/PB/menu/1105553/index.html> (accessed on November 11, 2010).

Relevant European Law (Water Policy)

Due to the transnational character of environmental protection, the EU is increasingly active in this area. The protection and management of waters is especially noteworthy in this respect. This is why guidelines set out in European law have a great influence on national water law and the water management of Member States. Large parts of German water law are influenced by or implement European provisions. These provisions shall be briefly described in the following overview.

(1) Primary Law

Title XX “Environment”, articles 191-193 of the Treaty on the Functioning of the European Union (OJ C 115, p. 49 of 9 May, 2008).

(2) Secondary Law (excerpt)

Numerous secondary law provisions influence the national water law of the Member States directly or indirectly. European water policy predominantly sets out guidelines for the Member States in the form of directives. A directive is generally directed at the Member States and aims at aligning the Member States’ national regulations. It is binding as to the result to be achieved, but leaves the choice of form and methods to the national authorities. The following will only reflect the most important directives.

Water Framework Directive³⁹

Directive 2000/60/EC of the European Parliament and the council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 327, p. 1, 22 December 2010.

Modifying Provisions:

Decision No. 2455/2001/EC of the European Parliament and of the Council of 20 November 2001 establishing the list of priority substances in the field of water policy and amending Directive 2000/60/EC (Text with EEA relevance), OJ L 331, p. 1, 15 December 2001.

Directive 2008/32/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2000/60/EC establishing a framework for Community action in the field of water policy, as regards the implementing powers conferred on the Commission, OJ L 81, p. 60, 20 March 2008.

Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide and amending Council Directive 85/337/EEC, European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC and Regulation (EC) No 1013/2006 (Text with EEA relevance), OJ L 140, p. 114, 5 June 2009.

³⁹ For more information see *Bohne* (ed.), *Ansätze zur Kodifikation des Umweltrechts in der Europäischen Union: Die Wasserrahmenrichtlinie und ihre Umsetzung in nationales Recht*, Berlin 2004.

One of the most important provisions in the area of water policy is the European Water Framework Directive, in which the European Union (EU) lays down a common regulation framework for the protection and the use of water.

The Water Framework Directive came into effect in 2000. Its fundamental idea is that surface waters (flowing waters, lakes, coastal waters, groundwater) can be used or modified, but only to an extent that does not greatly impair their ecological functions. Furthermore, one assumes that only a transnational and coordinated approach within the river basins makes effective surface water management possible.⁴⁰

The directive's main objective is to achieve a good quality of all waters within the European Union until 2015. Its focal points are the protection of waters, the prevention of their deterioration, the advancement of sustainable water use, the protection and enhancement of the status of aquatic ecosystems and wetlands directly depending on the aquatic ecosystems, and the mitigation of the effects of floods and droughts.⁴¹ That is why the directive determines environmental objectives for all European surface waters and the groundwater.⁴² It specifies the requirements for a good ecological quality of waters in detail for the different types of surface waters.

Another central element of the directive is the obligation of the EU Member States to conduct an extensive analysis of the river basins and to draw up, with involvement of the public, river basin management plans and programmes of measures in order to achieve these objectives until 2015.⁴³

Further directives of the European Union complete and specify the Water Framework Directive.

Directive on the Protection of Waters

Directive 2006/11/EC of the European Parliament and of the Council of 15 February 2006 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community, OJ L 64, p. 52, 4 March 2006.

The Directive on the Protection of Waters applies to inland surface water, territorial waters, and the internal coastal waters of the EU Member States.⁴⁴ Its main objective is to eliminate the pollution of waters by substances in List I (so-called "black List") and to reduce the pollution by substances in List II (so-called "grey List").⁴⁵ Annex I specifies the substances harmful to waters. They are regrouped according to their toxicity, longevity, and bioaccumulation.

⁴⁰ Cf. article 3 Water Framework Directive.

⁴¹ Article 1 Water Framework Directive.

⁴² Article 4 Water Framework Directive.

⁴³ Cf. articles 5 et seq. Water Framework Directive.

⁴⁴ Article 1 of the Directive on the Protection of Waters.

⁴⁵ Article 3 of the Directive on the Protection of Waters.

Directive on Environmental Quality Standards

Directive 2008/105/EC of the European Parliament and of the Council of 16 December 2008 on environmental quality standards in the field of water policy, amending and subsequently repealing Council Directives 82/176/EEC, 83/513/EEC, 84/156/EEC, 84/491/EEC, 86/280/EEC and amending Directive 2000/60/EC, OJ L 348, p. 84, 24 December 2008.

The directive refers to article 4 of the Water Framework Directive and the objectives named therein. It determines environmental quality standards for priority substances and certain other pollutants (as provided for in article 16 of the Water Framework Directive) that pose a considerable risk for the environment and human health. Its objective is to achieve a good surface water chemical status.⁴⁶ That is why it determines concentration limits, which means that the amount of said substances found in water may not exceed certain threshold values (either a mean value or the permitted maximum concentration of a substance). The EU Member States are obligated to control the observance of these provisions. Moreover, they must establish an inventory of emissions, discharges, and losses of all substances that fall under the directive.⁴⁷

Groundwater Daughter Directive

Directive 2006/118/EC of the European Parliament and of the Council of 12 December 2006 on the protection of groundwater against pollution and deterioration, OJ L 372, p. 19, 27 December 2006.

The Groundwater Daughter Directive has to be seen in connection with article 17 (1) and (2) Water Framework Directive. It sets out specific measures for the prevention, abatement and control of groundwater pollution.⁴⁸ Groundwater is a main source for drinking water supply in the European Union. The directive aims at protecting the groundwater as a valuable and sensitive natural resource as well as protecting ecosystems dependent on groundwater from deterioration or chemical pollution. The EU Member States' obligations include, among others, an assessment of the chemical status of the groundwater and the identification, through the establishment of monitoring programs, of significant and sustained upward trends in the concentration of certain pollutants, groups of pollutants or indicators of pollutants judged harmful and found in bodies or groups of bodies of groundwater. Pursuant to this, they also include the definition of starting points for reversing that trend and the establishment of measures to prevent or limit the input of pollutants into groundwater.⁴⁹

Urban Waste Water Directive

Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment, OJ L 135, p. 40, 30 May 1991.

⁴⁶ Article 1 of the Directive on Environmental Quality Standards.

⁴⁷ Article 5 of the Directive on Environmental Quality Standards.

⁴⁸ Article 1 Groundwater Daughter Directive.

⁴⁹ Cf. articles 3 et seq. Groundwater Daughter Directive.

Modifying provisions:

Commission Directive 98/15/EC of 27 February 1998 amending Council Directive 91/271/EEC with respect to certain requirements established in Annex I thereof, OJ L 67, p. 29, 7 March 1998.

Urban waste-waters contribute a major part to the eutrophication of aquatic ecosystems. The Urban Waste Water Directive includes the collection, treatment, and discharge of urban waste water and the treatment and discharge of waste water from certain industrial sectors. Its objective is to protect the environment from the adverse effects of the abovementioned waste water discharges.⁵⁰ It sets out numerous standards for the treatment of waste water by EU Member States, whose duties include the construction of collecting systems for urban waste water,⁵¹ biological secondary treatment,⁵² more stringent treatment in sensitive areas previously identified as such,⁵³ or the supervision or permission of discharges.⁵⁴

Nitrate Directive

Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources, OJ L 375, p. 1, 31 December 1991.

Modifying provisions:

Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 adapting to Council Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in instruments subject to the procedure referred to in Article 251 of the EC Treaty, OJ L 284, p. 1, 31 October 2003.

Regulation (EC) No 1137/2008 of the European Parliament and of the Council of 22 October 2008 adapting a number of instruments subject to the procedure laid down in Article 251 of the Treaty to Council Decision 1999/468/EC, with regard to the regulatory procedure with scrutiny — Adaptation to the regulatory procedure with scrutiny — Part One, OJ L 311, p.1, 21 November 2008.

Intensive agricultural production methods in many EU Member States increase the nitrate content in waters. The Nitrate Directive aims at reducing water pollution caused by nitrate from agricultural sources and at preventing further such pollution.⁵⁵ In order to achieve this objective, the Directive obliges the EU Member States to a number of measures. These include, among others, the identification of waters that are or could be affected by pollution and the designation of vulnerable zones previously identified as such,⁵⁶ the establishment of codes of good agricultural practice, or the establishment of action programs.⁵⁷

⁵⁰ Article 1 Urban Waste Water Directive.

⁵¹ Article 3 Urban Waste Water Directive.

⁵² Cf. article 2, para. 8: “secondary treatment” combined with article 4 Urban Waste Water Directive.

⁵³ Article 5, para. 2 Urban Waste Water Directive.

⁵⁴ Cf. articles 5, 6, and 14 Urban Waste Water Directive.

⁵⁵ Article 1 Nitrate Directive.

⁵⁶ Article 3 Nitrate Directive.

⁵⁷ Article 4 Nitrate Directive.

Bathing Water Directive

Directive 2006/7/EC of the European Parliament and of the Council of 15 February 2006 concerning the management of bathing water quality and repealing Directive 76/160/EEC, OJ L 64, p. 37, 4 March 2006.

The Bathing Water Directive constitutes a further addition to the Water Framework Directive. It applies to all surface waters used as “bathing waters” or as bathing areas. Its objective is to preserve, protect, and improve the quality of the environment and to improve human health. It lays down provisions for the monitoring and classification of bathing water quality, its management, and the provision of information to the public on bathing water quality.⁵⁸

Drinking Water Directive

Council Directive 98/83/EC of 3 November 1998 on the quality of water intended for human consumption, OJ L 330, p. 32, 5 December 1998.

The Directive sets out the fundamental quality standards for drinking water, given the importance of drinking water for human use. Its main objective is to protect human health. It aims at ensuring that drinking water is wholesome and clean.⁵⁹ That is why it defines health and cleanliness parameters (biological, chemical, and radioactivity parameters) for drinking water in the EU Member States. The Member States shall ensure that drinking water is not potentially dangerous to human health because of micro-organisms, parasites, or other substances.⁶⁰ In order to achieve this, they must control and monitor the water quality regularly.⁶¹ Moreover, the drinking water in the EU Member States must fulfill certain minimum requirements. It is up to the Member States themselves to define the respective parametric values. These values may, however, not be less stringent than those set out in Annex I of the Directive,⁶² albeit derogations are permissible in certain cases.⁶³ In the case of a potential danger to human health, the supply or use of drinking water must be prohibited or limited accordingly, even if all parametric values are met.

Flood Directive

Directive 2007/60/EC of the European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks, OJ L 288, p. 27, 6 November 2007.

Floods have increasingly led to problems in many European countries in the last years. The extensive use of rivers, as well as increased human settlement have elevated the natural flood risk. The Flood Directive aims to reduce the adverse consequences of floods.⁶⁴ It wishes to manage flood risks. The duties of the Member States

⁵⁸ Cf. article 1 Bathing Water Directive.

⁵⁹ Article 1 Drinking Water Directive.

⁶⁰ Article 4 Drinking Water Directive.

⁶¹ Article 7 Drinking Water Directive.

⁶² Article 5 Drinking Water Directive.

⁶³ Cf. article 9 Drinking Water Directive.

⁶⁴ Article 1 Flood Directive.

include, among others, the assessment of flood risks,⁶⁵ the preparation of flood hazard and flood risk maps at the level of river basin districts⁶⁶ as well as, with involvement of the public, the establishment of flood risk management plans.⁶⁷

International Cooperation

Germany is a member of several international river basin commissions. This function is realized on the basis of binding international conventions. Within the framework of international commissions, the extensive and transboundary management of water-courses and lakes is carried out for entire river basins and lakes.

European law, especially the Water Framework Directive, also plays an important role here too. The river basin commissions coordinate and participate in the implementation of the Water Framework Directive within their respective river basins.

Germany actively participates in the following commissions:

Rhine River / International Commission for the Protection of the Rhine

(<http://www.ikrs.org>)

Convention on the Protection of the Rhine (signed 12 April 1999, entered into force 1 January 2003) [2000], OJ L 289, p. 31.

Further relevant provisions:

Convention on the Protection of the Rhine against Pollution by Chlorides (signed 3 December 1976, entered into force 5 July 1985), 1404 UNTS 59.

Additional Protocol to the Convention on the Protection of the Rhine against Pollution by Chlorides (concluded 25 September 1991, entered into force 1 November 1994), 1840 UNTS 372.

The Rhine River is, in economical terms, one of the most important rivers in Europe. Its uses are diverse. The cooperation for the protection of the Rhine goes back to the 1950's. After a first and informal cooperation between the Rhine riparian States, the International Commission for the Protection of the Rhine (ICPR) was established in 1963. The European Union acceded to the ICPR very early (1976). The ICPR was one of the first commissions created for the protection of a river. Its activities later often served as a role model for other river commissions. France, Germany, Luxembourg, the Netherlands, Switzerland, and the European Commissions are members.

Organization of the ICPR:

The Rhine Minister Conference is the political decision-making body of the ICPR. In their meetings, the ministers responsible for water protection negotiate the States' obligations and determine the functions and objectives of the ICPR. These meetings occur on an irregular basis. The ICPR itself is staffed with ministerial officials from the Member States. The chairmanship changes every three years. The annual plenary ses-

⁶⁵ Articles 4 and 5 Flood Directive.

⁶⁶ Article 6 Flood Directive.

⁶⁷ Articles 7 et seq. Flood Directive.

sion passes the ICPR's decisions. These are passed unanimously, although abstention does not prevent a favorable vote. The decision obliges the Member States to implement its guidelines on their territory. The strategy group prepares the plenary sessions. Working and expert groups assist the strategy group in specific questions involving the areas quality of water and emissions, floods, ecology and economy. A small secretariat based in Koblenz, Germany, supports the ICPR.⁶⁸

The ICPR can be considered an example for the successful cooperation between riparian States for the protection of a river. Thanks to successful action plans – especially the Rhine Action Plan (1987), the Action Plan Floods (1998), the Salmon 2000 Programme and the Rhine 2020 Programme which replaces the first Rhine Action Plan from 1987 – and management measures since the end of the 1980's, an improvement of the Rhine's status, which had to be called very bad in the 1970's, could be achieved. The return of the salmons is seen as a symbol of the successful cooperation between the Rhine riparian States. The successful cooperation was then given a legal foundation in 1999, the Convention for the Protection of the Rhine. Today, the focus of the international cooperation for the protection of the Rhine is not exclusively on the protection of the Rhine anymore, but on its sustainable use and extensive management in balance with aspects of environmental protection.⁶⁹

The Chloride Convention of 1976 combined with the Additional Protocol of 1991 must find special mention next to the Convention on the Protection of the Rhine. The Convention and the Protocol pertain to the discharge of chlorides into the Rhine. After yearlong negotiations and the at first not very successful attempt at regulation – that is, the Chloride Convention of 1976 - , a solution to the problem of the Rhine's chloride pollution could be found between Rhine riparian States. In the Additional Protocol of 1991, France obliged herself to reduce the discharge of Chlorides into the Rhine. Moreover, the Protocol fixed certain concentration limits for chlorides in the Rhine. If the discharge exceeds the limits, it must be stopped and the remaining chloride deposited. The Netherlands declared herself ready to contribute to the solution of the problem as lower riparian State. The costs are divided proportionately among the Rhine riparian States. Auditing disputes between France and the Netherlands were settled in a dispute settlement procedure before the Permanent Court of Arbitration.

⁶⁸ S. *UNECE*, Capacity for Water Cooperation in Eastern Europe, Caucasus and Central Asia: River Basin Commissions and Other Institutions for Transboundary Water Cooperation, New York 2009, for more information on river basin commissions.

⁶⁹ Cf. *Nollkaemper*, 'The Evolution of the Regime for the River Rhine', in *Subedi* (ed.), *International Watercourses Law for the 21st Century: The Case of the River Ganges Basin*, Ashgate 2005, pp. 151–66; *Kamminga*, 'Who Can Clean Up the Rhine: The European Community or the International Rhine Commission?', in *Zacklin/ Caflisch* (eds), *The Legal Regime of International Rivers and Lakes*, The Hague 1981, pp. 371–87; *Lammers*, 'The Rhine: Legal Aspects of the Management of a Transboundary River', in *Verwey* (ed.), *Nature Management and Sustainable Development*, Amsterdam 1989, pp. 440–57; *Durner*, 'Die Sandoz-Katastrophe und das Umwelt-(Völker-)Recht: Ein Rückblick nach 20 Jahren', 93 *Jahrbuch des Umwelt- und Technikrechts*, Berlin 2007, pp. 7–30; *Tiroch*, 'Rhine River', in *Wolftrum* (Ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2008, online edition (forthcoming).

Danube River / International Commission for the Protection of the Danube River

(<http://www.icpdr.org>)

Convention on Cooperation for the Protection and Sustainable Use of the Danube River (signed 29 June 1994, entered into force 22 October 1994) [1996] [Federal Law Gazette II, p. 874].

The Danube is Europe's second-longest river. It flows through many States with different political and economic circumstances. The legal foundation for the cooperation of Danube States is the Danube Protection Convention. The convention was signed in 1994 and came into effect the same year. Its main objective is to safeguard the sustainable and equitable use of the Danube and the watercourses in her basin. The International Commission for the Protection of the Danube (ICPDR) was created in order to implement the objectives and is supported by a secretariat based in Vienna. Austria, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Germany, Hungary, Moldova, Montenegro, Romania, Serbia, Slovakia, Slovenia, and the European Union are members of the ICPDR.

The Danube Protection Convention is, next to the Convention for the Protection of the Rhine, one of the most important regional instruments for international cooperation in the field of water management in Europe. It is based on the acknowledged principles of water law, of which the securing of an equitable and sustainable use of the Danube as well as environmental protection are at the very fore. However, the States Parties also have other obligations, e.g. information, cooperation or mutual assistance obligations.⁷⁰

Germany's international cooperation does not, however, limit itself to the two most important German rivers. She is also a member and actively participates in the following commissions:

Elbe River / International Commission for the Protection of the Elbe River

(<http://www.ikse-mkol.org>)

Convention on the International Commission for the Protection of the Elbe (done 8 October 1990) [1991], OJ L 321, p. 25.

Oder River / International Commission for the Protection of the Oder River against Pollution

(<http://www.mkoo.pl>)

Convention on the International Commission for the Protection of the Oder (signed 11 April 1996), <<http://www.mkoo.pl/index.php?mid=1&aid=7>>.

Maas River / Internationale Maaskommission [International Commission for the Maas River]

(<http://www.cipm-icbm.be>)

⁷⁰ Cf. *Zeilinger*, 'Danube River', in *Wolfrum* (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2008, online edition.

Internationales Maasiibereinkommen [International Convention for the Maas River] (signed 3 December 2002, entered into force 1 December 2006) <http://www.cipm-icbm.be/files/files/accord_gand_d.pdf>.

Moselle and Saar Rivers / Internationale Kommissionen zum Schutze der Mosel und der Saar [International Commissions for the Mosells and Saar Rivers]
(<http://www.iksms-cipms.org>)

Protocol concerning the Establishment of an International Commission to Protect the Moselle against Pollution (signed 20 December 1961, entered into force 1 July 1962), 940 UNTS 211.

Protocol concerning the Establishment of an International Commission to Protect the Moselle against Pollution, 20 December 1961, <http://www.iksms-cipms.org/servlet/is/399/Saarprotokoll%20_dt.pdf>.

Additional Protocol between Germany and France concerning the Co-operation of the International Commissions for the Protection of the Rivers Moselle and Saar, 22 March 1990, <http://213.139.159.34/servlet/is/399/Ergaenzendes_Protokoll.pdf>.

Lake Constance / Internationale Gewässerschutzkommission für den Bodensee [International Commission for the Protection of Waters for Lake Constance]
(<http://www.igkb.de/>)

Convention on the Protection of Lake Constance Against Pollution (signed 27 October 1960, entered into force 10 November 1961) [Federal Law Gazette No. 289/1961 (Austria)].

Agreement Regulating the Withdrawal of Water from Lake Constance (with Final Protocol) (signed 30 April 1966, entered into force 25 November 1967), 620 UNTS 191.

Further International Regulations Related to Water Management

Water does not stop at international borders and the responsibility for watercourses transcends State borders. Alongside European Law, attention should be paid to some international regulations concerning the handling of transboundary watercourses and lakes. Subsequently the regulations pertaining to the legal handling of transboundary groundwater will be described.

Convention on the Law of the Non-Navigational Uses of International Watercourses (UN Watercourses Convention) (adopted and opened for signature 21 May 1997, not yet entered into force) (1997), 36 ILM 700.

The United Nations passed this convention in May 1997. It creates a framework for the use, management and protection of transboundary rivers and lakes. The *Draft Articles on International Watercourses* (1994) of the International Law Commission (ILC), which the UN General Assembly had mandated to address the topic of non-

navigational use of international watercourses in 1970, served as a trigger and precursor of the rules adopted therein.

The Convention declares that States who share watercourses shall be able to use these on an equal footing. It demands a sustainable and environmentally friendly use that prevents significant harm to other watercourse States.⁷¹ Furthermore, the States are obliged to cooperate and shall, for example, establish joint management mechanisms and determine joint water quality standards.⁷²

The Convention is regarded as a framework convention, which means that it provides the legal framework by, for instance, setting out procedures so that the States Parties can draw up specific terms together.

Germany signed the Convention on 13 August 1998.

UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (with Annexes) (done 17 March 1992, entered into force 6 October 1996), 1936 UNTS 269.

Amendments to Articles 25 and 26 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (done 28 November 2003, not yet entered into force), ECE/MP.WAT/14.

The Member States of the United Nations Economic Commission for Europe (UNECE) signed this convention in May 1992. It entered into force in 1996 and sets out the rules for the common management and the protection of transboundary watercourses, lakes, and wetlands in Europe and neighboring regions.

The UNECE Convention is also a framework convention and wishes to strengthen local, national, and regional measures for the protection of transboundary surface waters and groundwater as well as to safeguard their sustainable use.⁷³ It notably invites the riparian parties to establish “joint bodies”.⁷⁴

Germany signed the Convention on 18 March 1992 and ratified it on 30 January 1995.⁷⁵

The 2003 amendments to the UNECE Convention enable the accession of States that lie outside of the UNECE region. An accession seems viable notably for States bordering the UNECE region, eg. Iraq, Iran or Syria, when the amendments come into effect.

UNECE Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (adopted 17 June 1999, entered into force 4 August 2005), 2331 UNTS 202.

⁷¹ Cf. articles 5 and 7 UN Watercourse Convention.

⁷² Cf. articles 8 and 21 UN Watercourse Convention.

⁷³ Cf. *Proelß*, in *Graf Vitzthum* (ed.), *Völkerrecht*, 5th ed., Berlin 2010, p. 473.

⁷⁴ Article 9, para. 2 UNECE Convention.

⁷⁵ Federal Law Gazette 1994 II, p. 2334.

The Protocol on Water and Health to the 1992 UNECE Convention is an international agreement for the advancement of health through the amelioration of water management and the abatement of water-related diseases. The States Parties notably aim at providing access to drinking water and sanitation for everyone.⁷⁶

One of the Protocol's essential elements is the obligation of Member States set out in article 6 to establish national and/or local targets for the standards and levels of performance that need to be achieved for a high level of protection against water-related disease. These targets must enable a water management that protects human health and the ecosystems in accordance with the principles of sustainable development.⁷⁷

The Federal Republic of Germany signed the agreement on 17 June 1999 and ratified it on 15 January 2007. Since Germany has been implementing the Protocol's objectives for a long time, amendments to existing laws were not necessary when the Protocol entered into force.⁷⁸

International Customary Law and Non-binding Instruments

The Federal Republic is not only bound to its obligations from international conventions, but also to the international customary law in this area. The latter includes, for instance, the prohibition to create significant transboundary harm as well as the principle of equitable and reasonable utilization of transboundary resources.⁷⁹

Furthermore, there exist several, albeit legally non-binding regulatory instruments that partly express international customary law. One should not underestimate the effect of the so-called "soft law standards" in international law. In part, they greatly influence States' behavior and the development of international customary law. That is why they shall be briefly listed in the following:

1) The Helsinki Rules

International Law Association, "Helsinki Rules on the Uses of the Waters of International Rivers", in International Law Association (ed.), Report of the Fifty-Second Conference: Helsinki: 14-20 August 1966 (ILA London 1967), 484.

The International Law Association⁸⁰'s so-called *Helsinki Rules on the Uses of the Waters of International Rivers* of 1966 constitute the first draft codification of the law of navigational as well as non-navigational use of international watercourses.⁸¹ The

⁷⁶ Cf. article 6 (1) UNECE Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

⁷⁷ Article 6 (1) UNECE Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

⁷⁸ See <http://www.bundesregierung.de/Content/DE/Archiv16/Artikel/2005/12/2005-12-20-wasservorkommen-der-erde-schonen.html> (accessed on 11/19/2010).

⁷⁹ Proelß, in Graf Vitzthum (ed.), *Völkerrecht*, 5th ed., Berlin 2010, pp. 454 et seq.

⁸⁰ The ILA is a common-profit Non-governmental Organization whose objective it is to spread and advance international law and international private law. See Stein, "International Law Association", in Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press 2009, online edition.

⁸¹ McCaffrey, 'International Watercourses', in Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press 2008, online edition, p. 9.

draft included, for the first time, all important principles of water law, from the principle of reasonable use to the problem of the pollution of the environment to mechanisms of dispute settlement and thus fundamentally contributed to the legal development in this area.⁸²

2) Berlin Rules 2004

International Law Association, "Resolution No. 2/2004: Water Resources", in International Law Association (ed.), Report of the Seventy-First Conference: Berlin: 16-21 August 2004 (ILA London 2004), 15.

The Berlin Rules on Water Resources, also passed by the ILA on a Berlin conference in August 2004, constitute an advancement of the Helsinki Rules and pursue the objective to summarize not only the effective but also the emerging international customary law with respect to freshwater resources.⁸³

3) Agenda 21

UN Conference on Environment and Development, "Agenda 21" (14 June 1992), UN Doc A/ConF.151/26/Rev 1 vol I, 9.

Finally, the Agenda 21 is also an important document in the field of water management. It can be regarded as an action program for development and environment policy and is thus non-binding in legal terms. It is a result of the Conference on Environment and Development held in Rio de Janeiro in 1992. Chapter 18 comprises remarks on the "Protection of the Quality and Supply of Freshwater Resources: Application of Integrated Approaches to the Development, Management and Use of Water Resources."

The Status of Groundwater

UNGA Res 63/124, "The Law of Transboundary Aquifers" (11 December 2008), UN Doc A/Res/63/124.

Groundwater constitutes a very important water resource. However, until shortly, international law paid little attention to groundwater.

The UN Watercourse Convention includes groundwater to a limited extent, that is, when groundwater constitutes a unitary whole with surface waters and flows into a common terminus.⁸⁴ This narrow definition does not consider significant groundwater deposits that are independent of surface waters. Additionally, groundwater and surface waters do not necessarily have to share a terminus even if they constitute a unitary whole. Finally, surface waters are generally in the focus of the UN Watercourse Convention. In this context, the specific hydrogeological particularities of aquifers are not adequately taken into account.

⁸² Oswald, *Das Internationale Wasserrecht zwischen Konflikt und Kooperation: Die Entwicklung des Nilregimes*, Hamburg 1999, p. 129.

⁸³ Cf. Preface, Berlin Rules on Water Resources.

⁸⁴ Cf. article 2 UN Watercourse Convention.

The ILC's 2008 *Draft Articles on Transboundary Aquifers* are an important step on the international level. They were also recognized by the UN General Assembly. The Draft Articles affirm and codify the significance of groundwater and its sustainable management. They are based on the principles of fair and equitable utilization as well as on the prohibition of causing transboundary damages.

The UNECE Convention and the Water Framework Directive take groundwater into account more thoroughly on the regional, European level.⁸⁵

⁸⁵ See *UNESCO-IHP, Atlas of Transboundary Aquifers*, Paris 2009.