



# The Water Test in the case law of the Council for Permit Disputes and the Council of State

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# What is the water test?

An obligation for permitting authorities and authorities adopting plans and programmes to check in advance whether the activity, plan or programme in case can have a significant/meaningful adverse effect on the environment resulting from a change in the state of water systems or their components brought about by human activity (= **harmful effect**)

Those effects include effects on human health and the safety of permitted buildings and infrastructure located outside delineated flood zones, on the sustainable use of water by humans, on fauna, flora, soil, air, water, climate, landscape and built heritage, a deterioration in the status of a body of water, as well as the relationship between one or more of these elements



# What is the water test?

If the activity, plan or programme can have a harmful effect, **measures** should be imposed to:

- prevent this;
- Or to reduce this as much as possible
- Or if prevention or reduction is not possible, to restore the adverse effect
  - If the harmful effect consists of reduction of water infiltration or reduction of space for the water system, compensated is also possible

**If measures are impossible, the permit must be refused or the plan/programme cannot be approved**

# What is the water test?

## ► Special case: quantitative state of groundwater

If an activity, plan or programme, causes either separately or in combination with one or more existing permitted activities, plans or programmes, an adverse effect on the quantitative status of groundwater which cannot be prevented by the imposition of appropriate conditions or modifications to the plan or programme:

- permit may only be granted/plan or programme may only be approved because of imperative reasons of overriding public interest.
- + government imposes appropriate conditions to minimize, restore or compensate for the harmful effect.
  - × E.g. drinkingwater production center Heers, permit for 2 years (CofPD 17/08/2023, n° RvVb-A-2223- 1168)
  - × E.g. Flood protection v. Nature protection (formal reasoning necessary) (CofPD 5/04/2016, nr. RvVb/A/1516/0907)

# What is the water test?

## ▶ Permits:

→ Art. 1.3.1.1, §5, first section Decree Integrated Water Management (DIWM):

e.g.

× Environmental permit for building activities

× Environmental permit for facility exploitation, if relevant

→ List in Order Flemish Government 20/7/2006

## ▶ Plans and programmes:

→ Art. 1.3.1.1, §5, second section DIWM:

× e.g. spatial plans

→ List in Order Flemish Government 20/7/2006

# How is the water test done?

- ▶ No general guidance on the occurrence of harmful effects (not anymore...)
- ▶ Set of plans indicating (potential) flood risks
  - Including **flood hazard maps** art. 6.3 Floods Directive (sea, fluvial and pluvial for low probability (1000 years), medium probability (100 years) and high probability (10 years) based upon climate scenario 2050, consolidated in 2020)
  - Linked with the obligation to demand a non-binding **water advice** of a water management entity (Order Flemish Government 20/7/2006, annex 1)
- ▶ Obligation to take into account relevant water management plans
  - Signals problems, opportunities,...
- ▶ Obligation to take into account relevant objectives and principles DIWM
  - WFD + FD + Convention of Helsinki...





# How is the water test done?

- ▶ **A formally reasoned decision (water paragraph) is needed**
- ▶ **Reuse of water tests:**
  - different permits for one activity/plan followed by a permit application: authorities can decide one water test is enough
- ▶ EIA or SEA needed: contains analyses/evaluation harmful effects and measures
- ▶ [www.waterinfo.be](http://www.waterinfo.be):
  - Maps of flood prone areas, recently flooded areas, groundwater streams
  - “water-safe building and living”
- ▶ Order FG ‘Rain water regulation’:
  - standard measures to deal with precipitation on roofs, paved surfaces,..., **promoting water reuse**



# Why a water test?

- ▶ Prevention of a wide range of harmful effects
  - DIWM 2003, implementation of EIA Dir. 2004
    - × 1998 implementation showed significant deficiencies
  - Spatial planning ignoring the physical environment to some extent
    - × SEA 2001
- ▶ Accent on prevention of floods....
  - [Scheldt delta](#)
  - Water management 1950 onwards
  - Flanders implemented the Floods Dir. in the DIWM
    - × With integrated planning



# Case law

Take the test, ask the water advice

- ▶ First case law was wake up call....
  - First case law after implementation of the decree of 18 July 2003 draws the attention to the existence of the water test
- ▶ Environmental permit for facility exploitation if relevant:
  - It is not relevant if it is clear that the subject of the application cannot have an adverse effect or if the permit must be refused for other reasons (CofS 04/06/2009, n° 193.847)
- ▶ The water test is not only obligatory for flood prone areas
  - CofS 14/9/2010, n° 207.356

# Case law

Take the test, ask the water advice (2)

- ▶ Do not ignore potential harmful effects stating those problems can be addressed by civil law/ in civil courts
  - CofPD 9/08/2016, n° RvVb/A/1516/1427
  - Harmful effects = significant or meaningful effects
- ▶ Ask the right water management authority a water advice
  - CofPD 30/05/2017, n° RvVb/A/1617/0907

# Case law

## Plan followed by permits or permits by permits/re-use of the water test

- Watersystem impact must be addressed on the planning level
  - × Spatial plans need to have a water test, this cannot be deferred to permit application later on (CofS 16/06/2008, n° 184,207)
  - × as found in the allotment permit (CofPD 2/07/2013, nr. RvVb/A/2013/0357)
  - × Except when the plan is too vague to perform the water test or cannot address all the issues relevant to do the test
- Re-use of the water test allotment permit – building permit:
  - × only possible if the water test in allotment permit has looked at all the relevant aspects (CofPD 07/09/2023 n° RvVb-A-2324-0019)

# Case law

- ▶ Only to remediate watersystem problems caused by the object of the permit/plan:
  - CofS 20/02/2008, n° 179.933
  - Not for flood problems on the other side of the industrial site where no activities will take place according to the permit application (CofS 24/06/2010 n° 205.739)
  - × But with repermitting the water test is applied to the whole industrial site CofS 03/05/2016, n° 234.624, CofPD 1/06/2023, n° RvVb-A-2223-0918
  - Not to tackle pre-existing watersystem problems caused by bad permit policies in the neighbourhood/by poor maintenance of a ditch CofPD 22/12/2022, n° RvVb-A-2223-0383

# Case law

- ▶ Evaluate the water advice, stay critical:
  - Merely referring to a water advice stating infiltration possibilities may have been misjudged will not suffice (CofPD 0/09/2019, n° RvVb-A-1920-0018)
  - The authority giving the water advice cannot suggest measures “which *could* eliminate the harmful effect” (CofPD 15/10/2020, n° RvVb-A-2021-0147)
  - Merely stating that the project is compliant with the objectives of the DIWM is not sufficient (CofPD 25/03/2021, n° RvVb-A-2021-0782)

# Case law

## Choose the relevant measures

- ▶ It must be certain that the measures will suffice/positive impact of measures must be certain
  - (CofPD 4/10/2016, nr. RvVb/A/1617/0120; CofPD 20/05/2021, nr. RvVb-A-2021-0994)
- ▶ Refuse the building permit if the whole concept of the building needs re-thinking to make it flood-proof
  - (CofS 2/06/2010, nr. 204.597)
- ▶ Building bans or restrictions based upon the water test can be necessary in zones on spatial plans where urban development is admitted
  - (CofS 2/6/2010, n° 204,597)



# Case law

## Maps and more maps as annexes to Order FG 20/07/2006....

- 2006: 1 map with potential flood zone (natural flood zone rain or river) and effective flood zone (recently flooded areas) : annex 1
- 2023: 3 kinds of flood hazard maps as annex III, IV and V from 1/1/2023 on...
  - × sea, fluvial and pluvial; with low probability (1000 years), medium probability (100 years) and high probability (10 years); climate scenario 2050, consolidated in 2020
- ▶ No blind use of annexes III, IV and V!
  - Those maps only have a supportive value (preliminary works!) (CofPD 22/12/2022, n° RvVb-A-2223-0383)
    - × E.g. to choose the place hazardous waste can be temporary stocked in a facility situated in a potential flood zone (CofPD 1/06/2023, n° RvVb-A-2223-0918)
  - Map annex I 'always comes first' (CofPD 16/02/2023, n° RvVb-A-2223-0540)



# Case law

## What about future initiatives to combat floods?

- By taking future flood preventing initiatives into account to decide no harmful effect is possible - initiatives for which no permit application has yet been submitted, let alone a permit has been granted - the authority relies on an uncertain future event which is inconsistent with the water test (CofPD 02/04/2019, n°. RvVb-A-1819-0804)
- × For many flood control initiatives, it takes years before they are converted into permit applications...

# Case law

Do not only look at flood risks...

▶ Contrary to what the applicant argues, the water test accompanying the spatial plan does not only take into account flood risks, it also evaluates the impact of the plan on hydrography, pollution risks for ground- and surface water, the migration of aquatic species,... (CofS 20/02/2008, nr. 179.933)

▶ **Risk of groundwater pollution:**

→ tractor maintenance area near drinkingwater production facility, parking and storing 2ehand cars: liquid-tight floor needed (CofPD 14/01/2020, n° RvVb-A-1920-0431 16/06/2022, n° RvVb-A-2122-0870)

▶ Address potential building stability problems caused by groundwater drainage needed for underground constructing

→ CofPD 24/10/2017, n° RvVb/A/1718/0172, CofPD 06/08/2019, n° RvVb-A-1819-1272



# Case law

Do not only look at flood risks...(2)

- ▶ **Ground water flow** (risk of seepage, stability of buildings, salinization,...)

→ CofS 16/12/2021, n° 252.440; CofPD 19/05/2022, n° RvVb-A-2122-0767

- ▶ **Drought**

→ By choosing a buffer facility to compensate the lack of infiltration possibilities caused by the high density of buildings, it is unclear how the principles and goals of IWM, e.g. risks of drought, have been taken into account (CofPD 16/12/2021, n° RvVb-A-2122-0309)

→ Impact of a new groundwater extraction on existing extractions already under pressure by climate change (CofPD 10/08/2023, n° RvVb-A-2223-1164)



# Case law

## Do not only look at flood risks...(3)

### ▶ Harmful effect on nature

- activity causes damage to Swamp spirea habitat, no preventative measures in the permit (CofS, 11/04/2006, n° 157.464); effect on a pool and its associated fauna and flora (CofPD 12/02/2019, n° Rvvb-A-1819-0611); effects on a spring and its vegetation (CofPD 21/03/2017, n° RvVb/A/1617/0674)
- Ignoring the impact of constructing a flood zone on the further deterioration of the brook valley and its habitats violates the goal of the DIWM to protect and enhance the status of aquatic ecosystems and, with regard to their water needs, terrestrial ecosystems and wetlands directly depending on the aquatic ecosystems (CofPD 8/07/2021, n° RvVb-A-2021-1194)
- Reinforcing a waterbank thus breaking the connection water-vegetation justifies refusing the permit (CofPD 3/09/2020, n° RvVb-A-2021-0002)



# Conclusions

- ▶ By promoting a correct application of the water test, the Council of State and the Council for Permit Disputes:
  - help to protect our watersystems against a wide range of harmful effects, thus protecting our citizens and our environment
  - × Synergy with Habitat Directive
    - Different administration of the Flemish Government
  - × Complementary to EIA and SEA
  - assure effects of climate change are integrated into the water test