

§ 4 Water resources law [Wasserhaushaltsrecht]

I. Introduction to water resources law

1) The law relating to the most important but also most conflict-prone natural resource

- a natural resource only available on a few planets, which is
 - vital for all terrestrial life (including the human body)
 - essential for agriculture (and, thus, human food supply)
 - important in many industrial processes (in the steel, chemical and pharmaceutical industry)
 - important in the extraction of other natural resources (e.g. mining, fracking)
 - important in energy production (e.g. as coolant)
 - important as transport route (esp. for heavy goods)
 - important for many leisure activities (recreation, water sports, tourism)
- clean and drinkable water is a rare and fragile resource that is likely to be at the centre of future water conflicts and wars
 - Not in Germany: Its total volume of water withdrawal (20 billion m³) corresponded in 2019 to 1.4 % of the long-term potential water supply. More than 88.6 % of the water supply was available to the ecosystems. However, Germany's overall water footprint (which includes the water used abroad for the production of imported goods) was much higher.
- to achieve a fair balance between the different utilisation interests and to protect the water resources from excessive use, *water bodies need to be managed professionally* on the basis of a well-designed and well-adjusted water resources law
 - this will not only secure sustainable water supply but also minimise water conflicts
- ASEAN honours the special importance of water for human life by recognising an innovative *human right to safe drinking water and sanitation* in art. 28 lit. e of the *ASEAN Human Rights Declaration (AHRD)*

2) German federal law, largely implementing European Union law and supplemented in details by Land law

- the directly applicable water resources law is essentially German federal law
 - the *Water Resources Act (WRA)* [Wasserhaushaltsgesetz] (see infra, II.)
 - the Groundwater Ordinance [Grundwasserverordnung]
 - the Surface Waters Ordinance [Oberflächengewässerverordnung]
 - the Drinking Water Ordinance [Trinkwasserverordnung]
- however, this German federal law largely implements European Union Directives (EU secondary law that does not apply directly in the member states but must be transposed to domestic law)
 - the *Water Framework Directive (WFD)* (Directive 2000/60/EC; see infra, III.)
 - the Ground Water Directive (Directive 2006/118)
 - the Surface Water Directive (Directive 2008/105)
 - the Drinking Water Directive (Directive 2020/2184)
 - the Urban Wastewater Treatment Directive (Directive 2024/3019)
 - the Floods Directive (Directive 2007/60)
- in addition, supplementing water acts of the Länder apply
 - provisions on the use, maintenance and development of water bodies, on water supply and wastewater facilities, flood protection and *water supervision*
 - the Länder are entitled by art. 72(3) phrase 1 no. 5 Basic Law and some special clauses in the WRA to *concretise and even deviate* from the regulations in the WRA (within the framework set by the WFD)

II. The EU Water Framework Directive (WFD) of 2000 (Directive 2000/60/EC)

- the basis of water resources law in Europe:
 - framework for EU measures and guidance for the water legislation in the member states
 - combines several modern approaches to water management and protection
- aims to achieve a *good chemical and ecological status of EU waters until 2027* (art. 1)
 - enhanced protection and improvement of the aquatic environment
 - reduction of water pollution
 - sustainable water use
 - mitigation of the effects of floods and droughts
 - and a *holistic, also transborder water management*
- sets ambitious environmental objectives, to be achieved by *programmes of measures* (art. 4, 11)
- has introduced *river basin districts* in Europe that can be transnational, to ensure close cooperation between neighbouring states
- has introduced *river basin management plans* as planning instrument (art. 13)
 - for each river basin district, a plan must be developed
 - transnational districts shall, if possible, be managed by a single, transnational plan (art. 13(3))
- provides for *registers of protected areas* in the member states (art. 6)
- requires *extensive monitoring* programmes for the surface water and groundwater status and the protected areas (art. 8)
- is supplemented by two so-called daughter directives:
 - *Ground Water Directive* (Directive 2006/118) (sets European groundwater standards)
 - *Surface Water Directive* (Directive 2008/105) (sets European environmental quality standards for surface water)

III. The German Water Resources Act (WRA) [Wasserhaushaltsgesetz] of 2009

1) General aspects

- a single, comprehensive law covering
 - the management of water resources,
 - the *protection* of the water (as drinking water) and
 - the *protection against* the water (as floods)
 - takes full public control & management of water bodies and resources for granted
 - implements the EU Water Framework Directive and goes beyond
 - applies to surface waters, ground water and coastal waters (sect. 2 WRA)
 - surface waters are flowing waters (rivers and creeks), stagnant waters (lakes and ponds) and artificial surface waters (e.g. barrages)
 - under the water acts of the Länder, surface waters are classified according to their importance
- aims to protect water bodies as usable assets, part of the ecosystem, basis of human life and habitat through sustainable water management (sect. 1 WRA)
- *principle of sustainable water management with a high level of environmental protection*
 - regulated in detail with many aspects in sect. 6 WRA
 - water bodies shall be used in the public interest and, in harmony with this, also in the interests of individuals
 - includes to maintain water bodies in a natural or near-natural state
 - includes to avoid impairments of terrestrial ecosystems and wetlands directly dependent on water bodies
 - includes to *prevent possible consequences of climate change*
- public water supply as an *essential task of the public service* [öffentliche Daseinsvorsorge] (sect. 50 et seq. WRA)
 - principle of primary supply from local water sources (sect. 50(2) WRA)
 - special rules for enhanced water protection in local *water protection areas* [Wasserschutzbiete], which are important for the local public water supply (sect. 51, 52 WRA)
- legal limits of ownership with regard to waters (sect. 4 WRA)
 - no ownership of water from flowing surface waters or groundwater
 - no right of the land owner to develop (expand, deepen, upgrade) a water body
 - no right of the land owner to use a water body without a required authorisation

- **demanding rules concerning the management of surface waters** (sect. 25 et seq. WRA):
 - primary objective to avoid any deterioration of their ecological and chemical status (sect. 27 WRA)
 - prohibition to introduce solid substances in order to dispose of them (sect. 32 WRA)
 - restrictions on the accumulation or discharge of water (sect. 33 WRA)
 - demanding obligations of landowners or responsible public bodies to maintain their water bodies [Gewässerunterhaltung] (sect. 39 - 41 WRA)
- **general rules on *sewage disposal*** (sect. 54 et seq. WRA)
 - details are regulated in Land law
- ***strict liability*** (liability without fault) for damages caused by introducing or discharging substances or affecting a water body in another way and thereby adversely changing the water quality (sect. 89 WRA)

2) The need for an authorisation for water usage

a) **Definition of water usage (use of water bodies)** [Gewässerbenutzung]

- any action that has an impact on a water body, in particular... (→ cf. sect. 9 WRA)
 - extraction and discharge of water
 - removal or insertion of solid substances from/to the water
 - measures likely to affect water quality
 - damming and lowering of water bodies
 - fracking
 - underground storage of reservoir water from fracking or oil/gas mining

b) **The principle**

- any use of a water body requires a *permit or approval* of the water authority (sect. 8)
 - permit[Erlaubnis] is a simple, easy to revoke authorisation that allows to use the water
 - approval [Bewilligung] is an advanced authorisation that creates a more secure legal position, a *right to use* the water, and also protects from civil claims of third parties
- the permit/approval can only be granted if there are no detrimental changes to the water body expected that cannot be avoided or compensated (sect. 12(1) WRA)
 - see for more, specific restrictions and requirements sect. 13a - 14 WRA
- even then, granting it is at the *discretion of the water authority* (sect. 12(2) WRA)
 - there is *no right* of the citizen to be granted authorisation!
- water usage permits and approvals and other decisions related to a water body are registered in *water book* [Wasserbuch] (sect. 87 WRA)
- water users who are permitted to discharge daily more than 750 cubic metres of wastewater must appoint a *water protection officer* [Gewässerschutzbeauftragter]

c) **Exceptions**

- do not allow any introduction or discharge of substances into the water

aa) **common use (free public use) of surface waters** [Gemeingebrauch] (sect. 25 WRA)

- a concept following a classical differentiation in German administrative law
 - the conventional, common use of public spaces for their ordinary public purposes is free [Gemeingebrauch], while the special use for particular private purposes [Sondernutzung] requires a special authorisation subject to a fee
- "common use" is defined in the water acts of the Länder
 - this takes account of the different socio-cultural and -economical conditions in the various Länder
- common use usually includes
 - bathing, washing, swimming, diving, ice skating
 - rowing, paddling, canoeing, sailing, surfing, use of model boats
 - manual extraction of a small quantity of water (no commercial use)
 - watering and washing livestock
 - discharge of (clean) groundwater, spring water and rainwater
- common use activities are free under water resources law but often restricted under nature conservation law, public security law or rules of the land owner

- bb) owner's and neighbour's use of surface waters** (sect. 26 WRA)
 - *only* conventional use *for their own needs* that does not affect others or causes detrimental changes to the water
- cc) groundwater extraction or discharge for the own household or farm** (sect. 46)
 - only if it does not affect significantly the water balance
 - can be - and often is - restricted under the water acts of the Länder (cf. sect. 46(3))

d) Special: the need for authorisation for a well

- ground water extraction by an own well generally requires permit or approval (sect. 8)
 - this applies in particular to commercial enterprises, factories, hotels etc.
- *exception*: if the groundwater is used in the *own household or farm* (sect. 46(1) WRA)
 - allows to use well water as service water (to run washing machine, water garden and cattle etc.)
 - use as drinking water requires additional steps under the Drinking Water Ordinance (regular analyses, monitoring by public health office etc.)
- *exception from the exception*: Land water law can deviate (sect. 46(3) WRA); in many Länder it insists on authorisation, limits the quantity of freely usable groundwater or authorises the authorities to do so
- *drilling a well* must in any case be *notified* one month in advance to the authority, who will examine whether authorisation is required (cf. sect. 49 WRA)
- an own well does not entitle to be exempted from the *compulsory connection to and use of the public water supply* [Anschluss- und Benutzungszwang] and its charges

IV. Drinking water supply

- according to sect. 37 et seq. of the *Infection Protection Act (IPA)* [Infektionsschutzgesetz], water intended for human consumption must be of such a quality that its consumption or use is not likely to cause any damage to health, in particular through pathogens
- details are regulated in the *Drinking Water Ordinance* [Trinkwasserverordnung, new version from 2023], which is not based on the WRA but the IPA and also serves to implement the EU *Drinking Water Directive* (Directive 2020/2184, originally from 1980)
- the Drinking Water Ordinance regulates strict requirements for
 - the quality of drinking water (with low limit values for pollutants)
 - water supply systems (including water pipes)
 - drinking water treatment
 - drinking water testing
 - consumer information
 - and monitoring by the public health authorities (not the water authorities)
- due to the EU Drinking Water Directive and its implementation, *tap water is drinkable* without health risk in most (but not all) EU member states
 - in some regions of some member states, it even tastes good, so that it is not necessary to buy mineral water for everyday use