

18th Meeting of the EG on Groundwater of the IKSE

Non-Deterioration-Clause (NDC)

TOP 5.1.9_Anlage 1_146. LAWA-VV

Verschlechterungsverbot

Thesenpapier

gemäß Produktdatenblatt Nr. 2.4.8 des LAWA-Arbeitsprogramms
Flussgebietsbewirtschaftung 2013-2015

Stand: 12.09.2013

Purpose of the Position Paper

- initially: Basis of a der guidance document on the NDC
- but: The Bund-Länder-Committee on Water (LAWA) decided lately at its plenary meeting:

Decision:

The LAWA takes note of the report and the associated draft of the position paper on the plenary meeting and thanks the working group.

The LAWA-Vollversammlung asks the Juristic Working Group, to intermit the work on the guidance document till the European Court came to a decision, and recomends to use the position paper meanwhile.



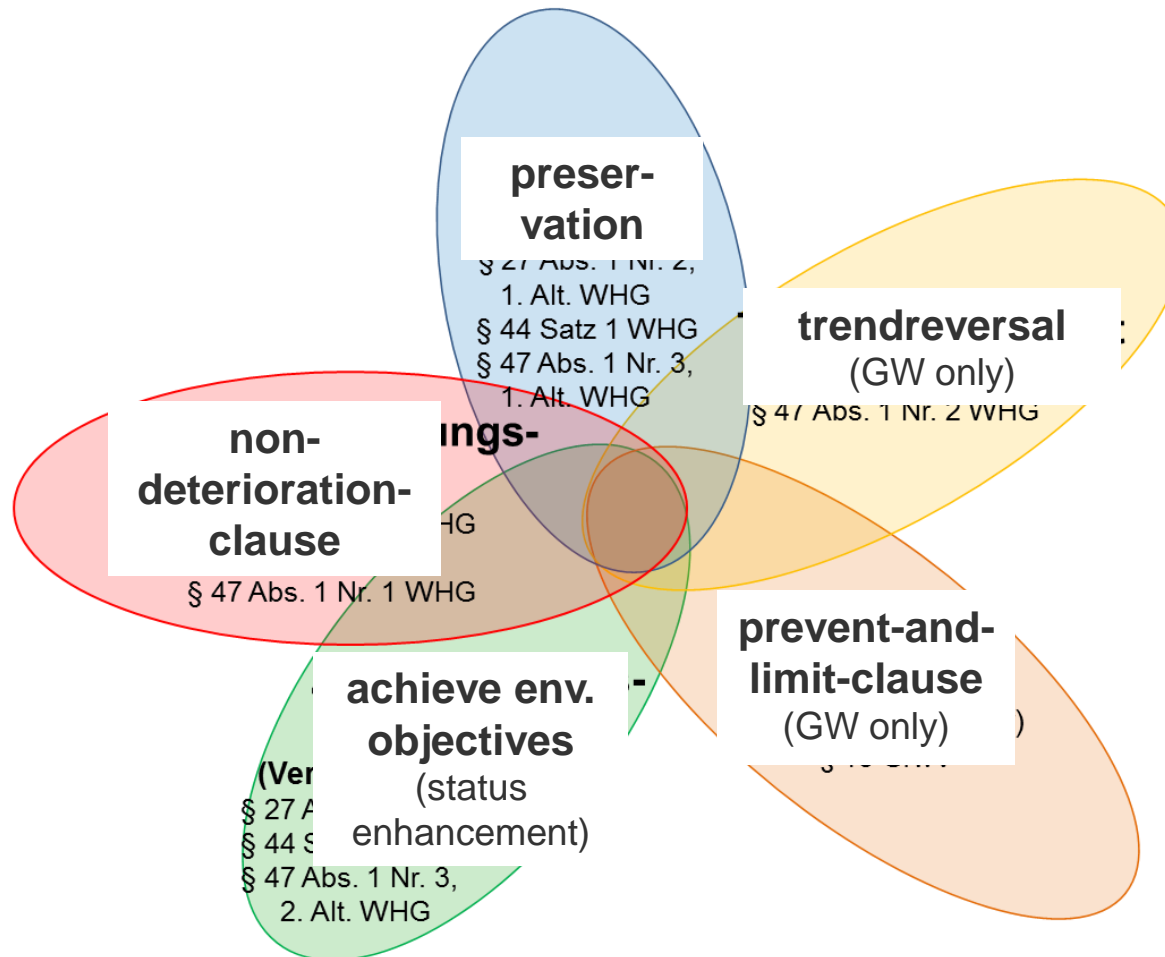
Position Paper = Working Material

Selected Aspects

- Reference point: entire waterbody (WB) inclusive its impacts on other WB,
not: „the waterquality“ (thesis no. 8)
- Solely the Non-Deterioration-Clause is considered,
not: all environmental objects (thesis no. 1 und 18)

Annex 1 of the policy paper

Non-deterioration-clause as part of the system of the environmental objectives



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- Solely the Non-Deterioration-Clause ist considered, not: all environmental objects (thesis no. 1 und 18), just their relation not: national law



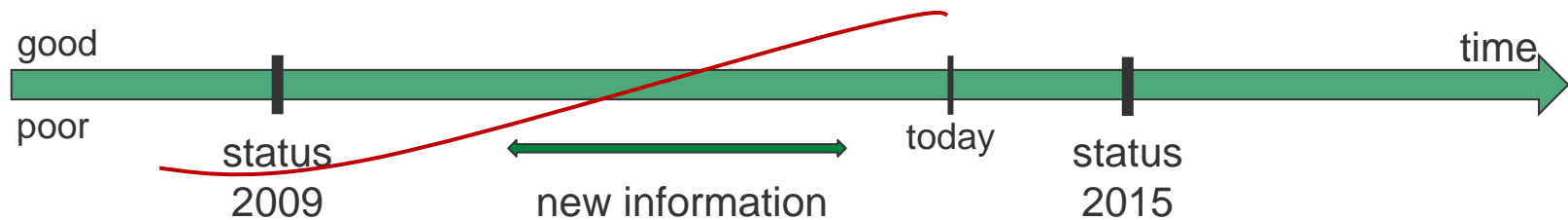
The demands of the national law
have to be considered cumulatively
in addition to the
Non-Deterioration-Clause.
(thesis no. 19)



The
Non-Deterioration-Clause
is of equal rank as the other
environmental objectives
(thesis no. 1 und 18)

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not: national law
- Status of reference: status of the WB as established in the recent RBMP in force, new information (MON!) should be taken into consideration (thesis no. 10)



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- Reference point: entire waterbody (WB) inclusive its impacts on other WB,
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- Status of reference: status of the WB as established in the recent RBMP in force,
new information (MON!) should be taken into consideration (thesis no. 10)
- Deterioration solely when status class changes? 3 approaches (thesis no. 11):
Status-Class-Theory / differentiating approach / Status-Quo-Theory

Non-Deterioration-Clause of

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the groundwater,
the GW-quality,
the chem. GW-constitution
≠ GW-Body

the **status** of a GWB

„Differentiating approach“

Staus-Class-Theory

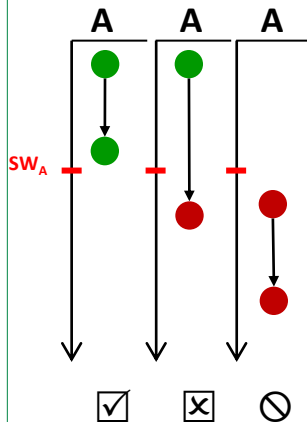
Status-quo-Theory

Not a subject of the position paper nor the
guidance document

1-dimensional
(1 parameter)

Eine nicht
zustandsrelevante
Verschlechterung ist
zulässig.

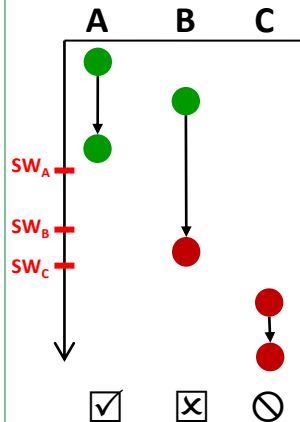
Parameter



2-dimensional
(> 1 parameter)

Obwohl GWK wegen C
schon im **sZ**, ist Ver-
schlechterung von B (für
sich zustandsrelevant) nicht
zulässig. Verschlechterung
von A (für sich nicht zu-
standsrelevant) ist zulässig.

Parameter

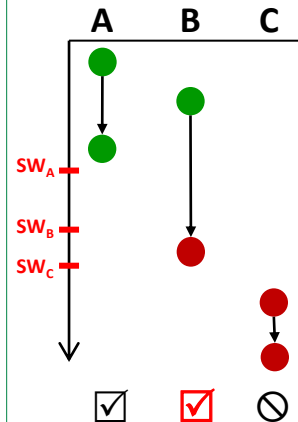


Verschlechterung von A (für sich nicht
zustandsrelevant) ist in jedem Fall zulässig.

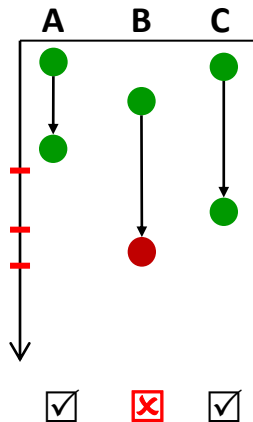
Wenn GWK wegen C
schon im **sZ**, ist Ver-
schlechterung von B
(für sich zustands-
relevant) **zulässig**.

Wenn GWK im **gZ**, ist
Verschlechterung
von B für den GWK
zustandsrelevant und
nicht zulässig.

Parameter

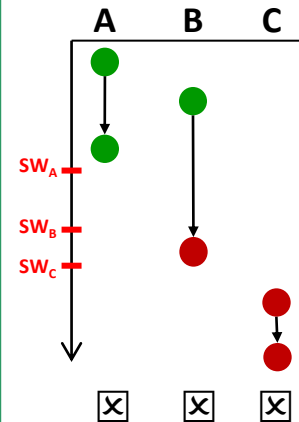


Parameter



Keinerlei, auch keine
nicht zustandsrelevante
Verschlechterung ist
zulässig.

Parameter



☑ tolerabl ☒ prohibited

⊖ NDC inapplicable; preservation of the status, achievement of
the env. objectives and trendreversal will be applied

Differentiating Approach for GWB

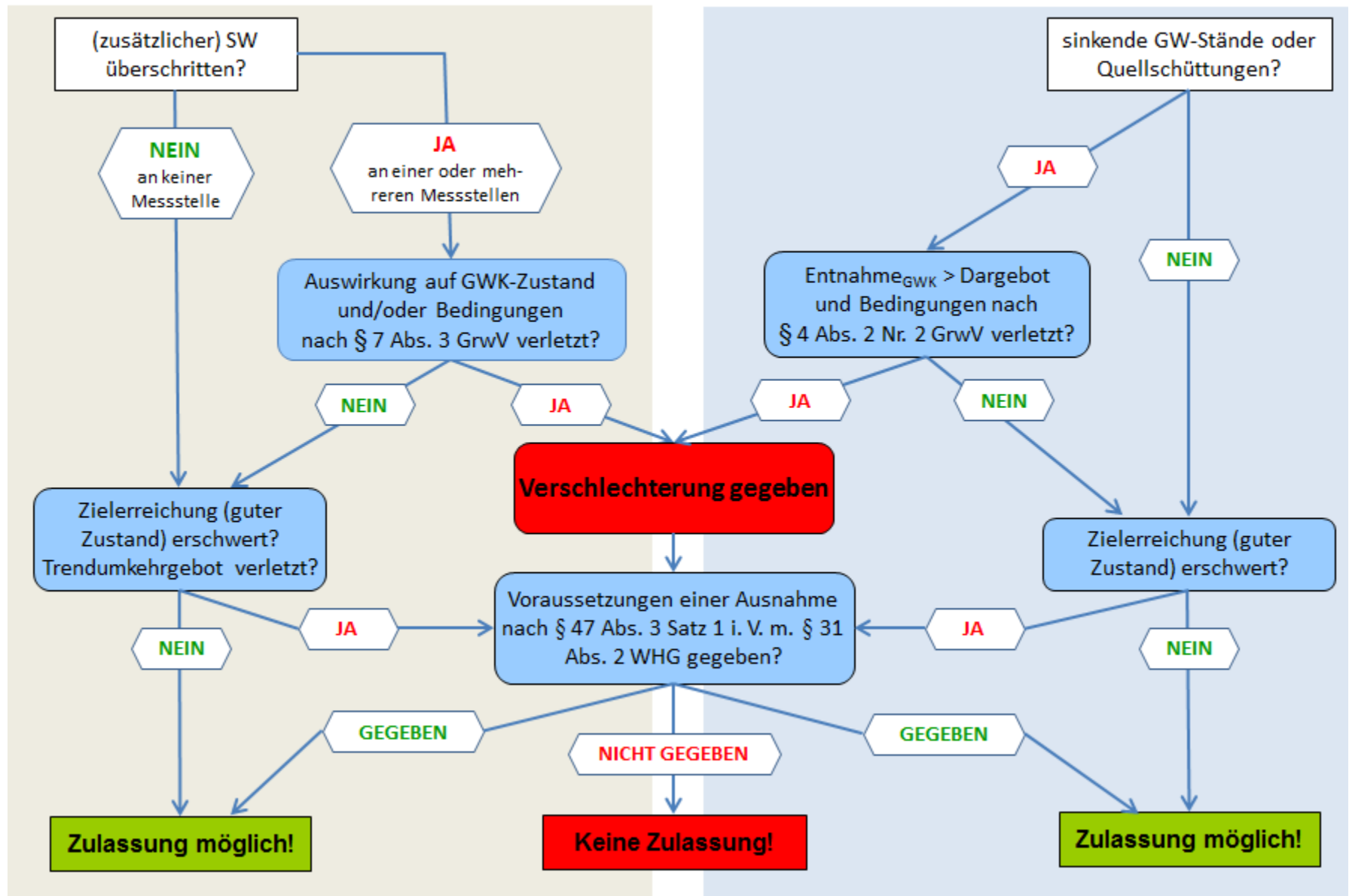
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chemical status

quantitative status



Reference for a preliminary ruling of the German Federal Administrative Court (BVerwG) to the European Court of Justice EuGH (11.07.2013)

question 1

Is the environmental objective of no deterioration

← compulsory law

or

→ a mere target value ?



BVerwG

Permit a project only, when the conditions of an exemption are fulfilled (Art. 4 (7) WFD)



- Permit a project without exemption
- Environmental objective „No Deterioration in WB-status“ is just one issue amongst others

Question 2

Is it a deterioration, when the status class does not change ?

BVerwG

YES,

because there is a substantial,
negative impact on the
ecologic system.

NO,

because the status class does not
change.

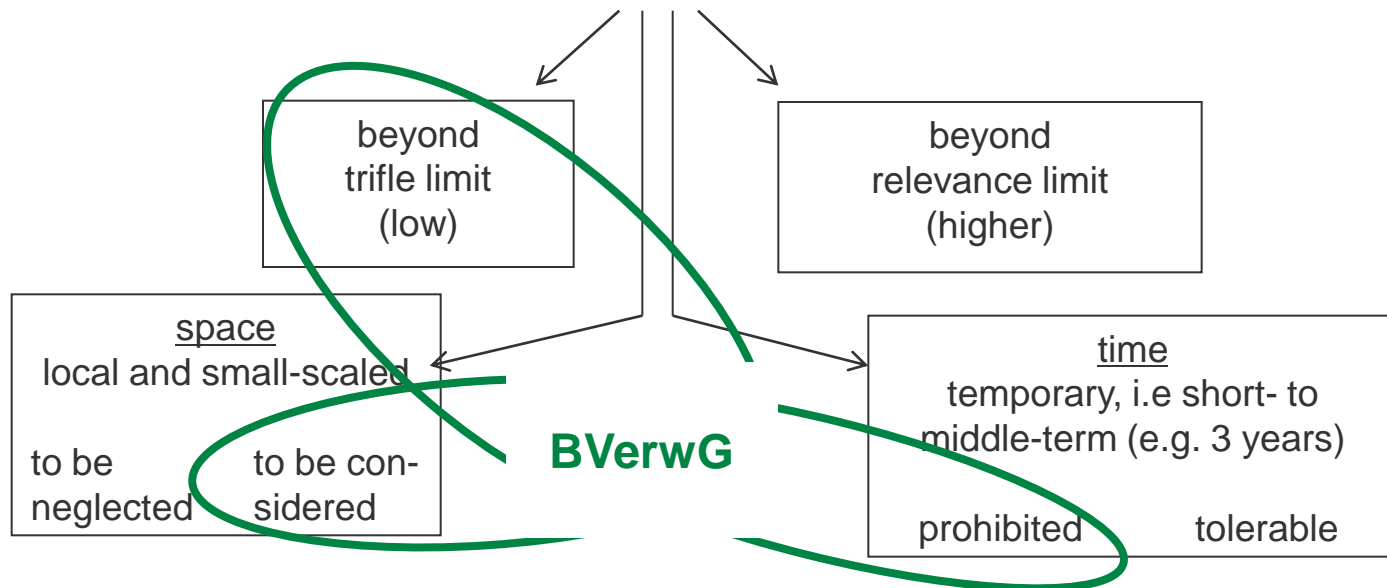


If NO → Question3



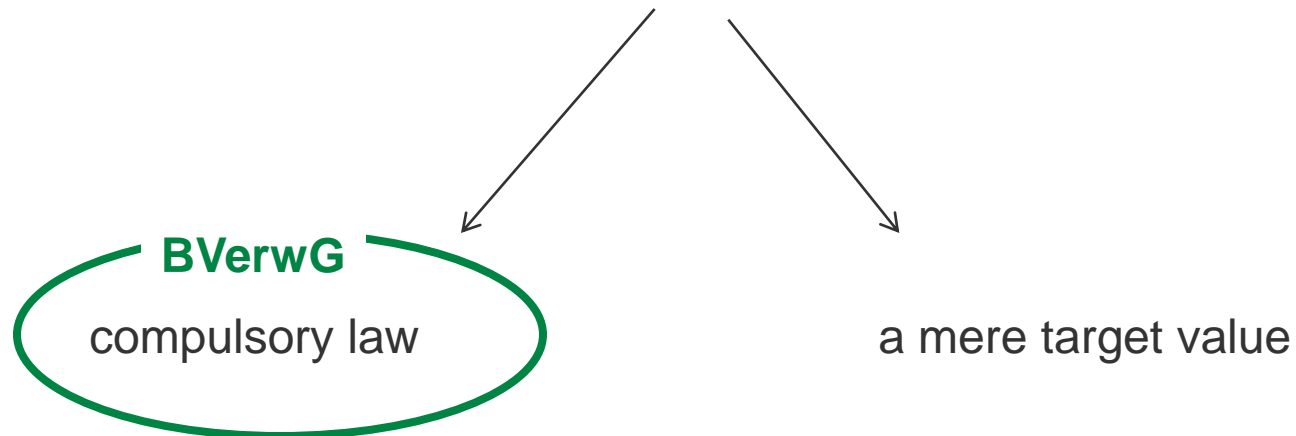
Question 3

What is a deterioration, if question 2 is answered with „NO“?



Question 4

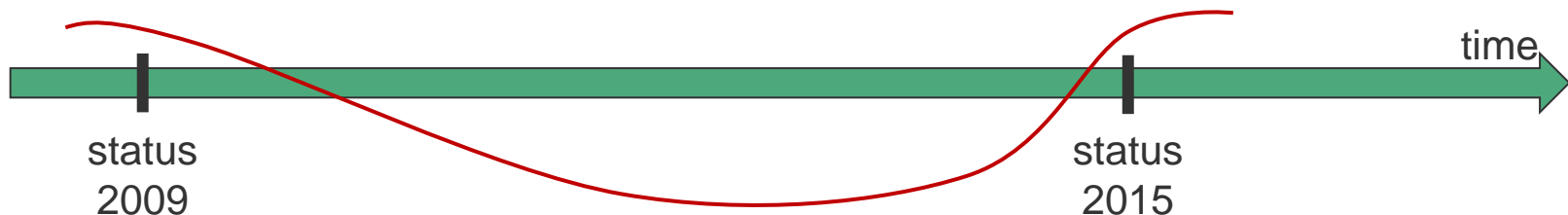
Is the environmental objective „enhancement of the status“



I.e., has the enhancement clause a relevance on it's own when a project is examined to be permitted (in general, but especially, when Question 2 is answered in the negative)?

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not: national law
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Status-Class-Theory / differentiating approach / Status-Quo-Theory
- Temporary deterioration
only: between 2 status assessments (thesis no.12)
otherwise: not temporary → exemption is required (thesis no.14)



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- Temporary deterioration
only: between 2 status assessments (thesis no.12)
otherwise: not temporary → exemption is required (thesis no.14)
- not a deterioration:
natural variations (thesis no.13)
compensation within the WB (thesis no.15)

Application of the position paper - Conclusion

- When it is intended to permit a project, that may affect the status of the whole WB (thesis no. 3)
- In the interpretation of the exemption clauses (thesis no. 4)
- Compulsory law (thesis no. 5)
- Priority of the technical assessment of the authorities (thesis no. 6), even though NDC can be controlled by the court.
- NDC is not governed by watermanagement discretion, but there is a selections discretion concerning measures (thesis no. 7)
- NDC is to be considered cumulatively in addition to the national law and it is of equal rank as the other environmental objectives (thesis no. 1, 18 und 19).