

## COUNTRY REPORT: BELGIUM

### Water Management and Maritime Spatial Planning

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#### Introduction

This country Report aims to provide an overview of the legislative and policy related initiatives in Belgium, as well as pending initiatives, with regard to the governance of water issues. The topic "water" is increasingly being given priority by law and policy makers in Belgium. The legislative landscape governing the water sector is therefore going through a myriad of changes.

This contribution aims to set out the most important Acts implementing the recently issued European set of regulations related to water policy, both onshore as well as offshore. More specifically, this Report will give an overview of the implementation in Belgium of respectively the *Water Framework Directive*<sup>1</sup> (including the *Flood Directive*) and the *Marine Strategy Framework Directive*.<sup>2</sup>

The governance of water related issues in Belgium is divided between the three regions (the Flemish Region, the Walloon Region, and the Brussels Capital Region) and the federal level. For example, the protection of the environment (the aquatic environment) is a regional competence, whereas the governance of activities in the North Sea and the protection of the marine environment is a federal competence. Indeed, the low tide line marks the end of regional and the beginning of federal competence.

The Country Report is split into two main sections: recent legislative developments in general water management and the mitigation of floods, with a focus on the Flemish Region; and recent developments in the marine area under the jurisdiction of Belgium.

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<sup>1</sup> Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy.

## Water Management and the Mitigation of Floods

In this section, the recent laws relating to the implementation of a European Directive of major importance in the water sector, namely the Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy (the *Water Framework Directive*), are discussed.

The *Water Framework Directive (WFD)* marks 2015 as the target year to achieve a good ecological and chemical status of the surface waters.

The main legislative instrument to govern water-related issues in the Flemish Region is the *Decree on Integrated Water Policy* of 18 July 2003.<sup>3</sup> This *Decree* provides for a general framework for the application and incorporation of specific water laws. Throughout the period 2010 to 2012, the *Decree on Integrated Water Policy* has been substantially altered.

One of the corner stones of the *WFD*, and of the *Decree on Integrated Water Policy*, is the adoption of River Basin Management Plans (or RBMPs). There are four river basin districts in Belgium, namely the Rhine, the Seine, the Scheldt and the Meuse, whereby the two latter cover the larger part of the territory. The Belgian coastal waters form part of the International River Basin District of the Scheldt.

In November 2012, the European Commission issued a report on the implementation of the *WFD* in Belgium.<sup>4</sup> The report provides a SWOT analysis of the RBMPs submitted by Belgium, whereby one of the main strengths relates to the fact that the ecological and chemical status assessment methods have been developed for all water categories, and one of the main weaknesses relates to the determination that most measures are defined in a general manner, without a specific timeline of implementation.

It should be noted that only the two RBMPs of the Flemish Region (namely of the Scheldt and the Meuse) and the Federal plan on the coastal waters have, at the time of writing of this Report, been submitted to the European Commission. The draft RBMPs for the Walloon Region are under consultation until 18 January 2013. The Brussels Region has submitted a

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<sup>2</sup> Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy.

<sup>3</sup> Belgian Official Journal 14 November 2003.

notification to the European Commission of its adoption of the RBMPs in July 2012. The Commission has to date, not yet assessed these. In this regard, the Commission referred Belgium to the Court of Justice of the European Union for failure to adopt and report the RBMPs to the Commission. The Court of Justice issued its judgment on 24 May 2012, considering that neither the Brussels Capital Region nor the Walloon Region adopted their respective RBMPs in time, and therefore established the failure of Belgium to comply with the obligations included in the *WFD*.<sup>5</sup>

Article 4(4) provides for the possibility to apply for an extension of the deadline of 2015 to obtain good environmental status of the waters. Both the RBMP of the coastal waters and the Flemish RBMPs have applied for this extension.<sup>6</sup>

On the basis of article 4(5) of the *WFD*, member states may request to apply less stringent environmental objectives for specific bodies of water, provided certain conditions are met. Neither the federal RBMP nor the two RBMPs submitted by the Flemish Region have requested the application of article 4(5) of the *WFD*.

The competent authorities are currently preparing the second generation of RBMPs for Belgium. These should be submitted to the European Commission by 2015.

At the level of the Flemish Region, the run up to and the issuance of the first generation of RBMPs made clear that the applicable legislative and regulatory framework is needlessly complex.

Indeed, the Flemish Region distinguishes four different planning levels: the river basin management plans at the level of the river basin district; the water policy note at the level of the Flemish Region; the river catchment management plans at the level of the sub-basin; and the sub-river catchment management plans at the level of the sub-sub-basin. This myriad of plans results in sometimes cumbersome processes and organization. Therefore, initiatives were taken to substantially alter the *Decree Integrated Policy*, so as to simplify the planning process as to water management and better tune the activities on the different

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<sup>4</sup> *Commissions Staff Working Document accompanying the Report from the Commission to the European Parliament and the Council on the Implementation of the Water Framework Directive (2000/60/EC) – River Basin Management Plans*, COM (2012à), 670.

<sup>5</sup> Namely Articles 13(2), (3) and (6); Article 14(1c); and Article 15(1).

<sup>6</sup> See, for example, *River Basin Management Plan Coastal Waters*, 108. The natural circumstances do not allow these goals to be obtained those by 2015.

levels. The Flemish Government has principally approved an amendment to the Decree on 20 July 2012.

The bottom line of the draft Decree pertains to the integration of plans and planning levels. The river catchment management plans and the sub-river catchment management plans, for example, are absorbed by the RBMPs for the Scheldt and the Meuse. The relevant advisory bodies have submitted their advice on the amending Decree on 13 September 2012<sup>7</sup> but at the time of writing, the amending Decree has not yet entered into force.

The implementation of the *WFD* has been further enhanced by the Order of the Flemish Government of 21 May 2010 concerning special obligations of the river basin districts, which entered into force in January 2011.<sup>8</sup> The main merits of this Order relate to the mapping of ground water bodies.<sup>9</sup> The Order stipulates that any significant increase in the concentration of polluting substances in the ground water bodies should be reversed and set out in the river basin management plans.<sup>10</sup>

Other important recent legislative changes in the water framework in the Flemish Region, pertain to the implementation of the Directive 2007/60 of the European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks (the *Floods Directive*). The *Decree Integrated Water Policy* was amended by the Decree of 16 July 2010 (the *Floods Decree*), to implement this Directive into Flemish legislation.<sup>11</sup>

The *Floods Directive* aims to enable member states to better calculate the risks of floods and to put measures in place to mitigate the damage caused by floods.<sup>12</sup>

The *Floods Decree* slightly amends the definition of “floods” as included in the *Floods Directive*. For example, the explicit exclusion of floods from sewerage systems is not

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<sup>7</sup> The Flanders Social-Economic Council, the Environment and Nature Council of Flanders and the Strategic Advisory Council for Agriculture and Fisheries.

<sup>8</sup> *Belgian Official Journal*, 2 July 2010.

<sup>9</sup> In the Annex to the Order.

<sup>10</sup> Article 4 of the Order of 21 May 2010.

<sup>11</sup> *Belgian Official Journal*, 19 August 2010.

<sup>12</sup> In the Brussels Capital Region, the *Flood Directive* is implemented through the Order of the Brussels Capital Region of 24 September 2010 concerning the assessment and management of flood risks. In the Walloon Region, the *Flood Directive* is implemented through the Decree of 4 February 2010 modifying Book II of the *Water Code*.

adopted, as it is not always possible to distinguish whether floods result from sewerage systems or watercourses.<sup>13</sup>

In accordance with the *Floods Directive*, the member states should publish flood risk management plans by 22 December 2015.<sup>14</sup> The *Floods Directive* also stipulates that the efforts related to the drafting of flood risks management plans should be coordinated with those related to the drafting of river basin management plans. As, in the Flemish Region, the RBMPs already include provisions with regard to floods. The Decree does not retain the concept of flood risks management plans as self-standing document, but instead stipulates that flood risk management provisions should be included in the RBMPs by 22 December 2015.<sup>15</sup>

This initiative is in line with the recently implemented policy measures in the Flemish Region to reduce the amount of plans in the area of water management, as discussed above.

The *Floods Directive* provides for the possibility of member states to designate the same or different authorities as in light of the *WFD*. In the Flemish Region, the Coordination Committee on Integrated Water Policy (CIW), which is the commission responsible for the coordination of integrated water policy, was designated as competent body in the framework of the floods legislation.

Belgium was hit by heavy floods in November 2010, after which date a thorough evaluation of the legal regime governing floods issues was carried out. This review led to alteration of the instrument of the water test. The concept of the water test entails that the authority, which decides upon the granting of licenses (such as a building permit) or the approval of plans (such as zoning plans), should assess the impact of such licenses or plans on the water system. The result of this assessment is then included in the license or plan via a "water paragraph".

Since the entry into force of the *Decree on Integrated Water Policy*, the water test has been a valuable instrument in the water policy in the Flemish Region.<sup>16</sup> The Order of the Flemish Government of 14 October 2011, modifying the Order of 20 July 2006 determining the rules

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<sup>13</sup> *Flemish Parliamentary Works*, 549 (2009-2010). Also, flood by mountain streams is not a reality in the Flemish Region, and is therefore not included in the definition.

<sup>14</sup> *Floods Directive*, Article 7.5.

<sup>15</sup> *Floods Directive*, Article 7.

<sup>16</sup> *Decree on Integrated Water Policy*, Article 8.

for the application of the water test, has substantially altered the application of the instrument.<sup>17</sup> The provisions of the new Order entered into force on 1 March 2012. The water test has been simplified, both as to content as well as the formal aspects. Indeed, the Order of 20 July 2006 provided for various "judgment schemes" included in the Annex of the Order, on the basis of which the water test should be carried out. These were considered to be overly complex, and are now replaced by a single provision, which also clearly sets out the thresholds to request advice from the designated advisory body.<sup>18</sup> Whereas the request for advice from the designated advisory body was merely recommended on the basis of the previous Order, the new Order marks the evolution towards obligatory advice sourcing. Finally, the new Order elaborates the list of licenses and plans submitted to the scrutiny of the water test.

### **Maritime Spatial Planning**

As the number of marine activities in the Belgian part of the North Sea steeply increases over the years, amongst others, due to the continuing deployment of offshore technologies, smart and efficient usage of the marine space is becoming more and more of a pressing issue.

The evolution towards integrated maritime spatial planning is strongly promoted at the level of the European Union. Indeed, maritime spatial planning was identified as one of the pivotal instruments to support the implementation of the *EU Integrated Maritime Policy*.<sup>19</sup> In Belgium, the marine legislative framework has been revised in order to introduce into law the concept of marine spatial planning.

More specifically, the Act of 20 July 2012 modifying the Act of 20 January 1999 for the protection of the marine environment in the marine areas that come under the jurisdiction of Belgium (the *Marine Environment Act*)<sup>20</sup>, provides the foundation of multi-dimensional planning in the Belgian part of the North Sea.

The newly included chapter in the *Marine Environment Act* effectively forms the basis of a future integrated and binding spatial plan, promulgated through a Royal Decree. The spatial

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<sup>17</sup> *Belgian Official Journal*, 14 November 2011.

<sup>18</sup> Articles 3 and 5 of the Order of 20 July 2006, as modified by the Order of 14 October 2011.

<sup>19</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Maritime Spatial Planning in the EU – Achievements and Future Development* (2010) COM, 771.

plan is defined as a plan that organizes the desired three-dimensional and temporary structure of human activities, on the basis of a long-term vision and on the basis of clear economic, social and ecological goals.<sup>21</sup> Due to the fact that the spatial plan is characterized as being three-dimensional, the water and air column are included in the planning process.

The aim of the plan is to set out the framework on the basis of which future activities in the North Sea will be carried out. The plan will set out the conditions under which these activities may take place.<sup>22</sup> Once the draft plan is drawn, an environmental impact assessment shall be carried out, and broad public consultation will take place.

The procedure to be followed for the adoption of the spatial plan has been set out in the *Royal Decree* of 13 November 2012 concerning the creation of an advisory body and the procedure for the adoption of a maritime spatial plan in the Belgian marine areas.<sup>23</sup> The following steps should be taken before adopting the plan. The Minister firstly submits a preliminary draft of the spatial plan to the advisory body, composed of delegates from eleven relevant public entities. The latter should then provide a motivated advice within 30 days following receipt of the draft from the Minister. Once the advisory body has provided its input, the draft will be subject to public consultation, which will also extend to the socio-economic effects of the draft spatial plan. The *Royal Decree* not only provides that the spatial plan should be subject to national scrutiny, but that it should also be reviewed by relevant (non-) neighboring states. Indeed, the draft spatial plan should be submitted to the competent authorities of the Netherlands, France, the United Kingdom and any other state the Minister considers relevant. These transboundary consultations should, in principle, last for sixty days.

This Act should have a major impact on the development of renewable energy technologies in the Belgian part of the North Sea. For example, the plan will indicate whether and where a new zone for the development of offshore technologies should be placed. Indeed, the area in the North Sea reserved for the development of offshore energy production has recently become fully saturated. In this regard, the Governmental Agreement Di Rupo I of December 2011 stipulates that the Government should make a decision on the delineation of a new area for the development of wind energy in the North Sea.<sup>24</sup>

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<sup>20</sup> *Belgian Official Journal*, 11 September 2012.

<sup>21</sup> Article 2, 30° of the Act of 20 January 1999 as modified by the Act of 20 July 2012.

<sup>22</sup> *Report in the Belgian Senate on the draft Act modifying the Act of 20 January 1999*, 5-1685/2.

<sup>23</sup> *Belgian Official Journal*, 28 November 2012.

<sup>24</sup> *Draft Statement on the General Policy*, 1 December 2000.

Indeed, the *Royal Decree* of 20 December 2000 concerning the conditions and procedure for the granting of domain concessions<sup>25</sup> (the *Decree on Concessions*), delineates a zone for the implantation of wind turbines in the Belgian part of the North Sea. On the basis of this Decree and the procedures included therein, seven domain concessions are to be granted to enterprises developing offshore wind technologies. The concessions are granted through Ministerial Decrees. In 2012, the last remaining available zones have been designated by means of Ministerial Decisions, resulting in a saturation of the delineated concessions zone for the development of offshore technologies for the time being.<sup>26</sup>

Another recent amendment to the existing legal framework is the *Royal Decree* of 11 April 2012 creating a safety zone around the artificial islands, installations and devices for the production of energy from water, tides and wind in the sea areas under the jurisdiction of Belgium.<sup>27</sup> This *Royal Decree* sets out the outer limits of respectively wind turbines, wind turbine parks and wind turbine park zones, and creates a safety zone of 500 meters around these outer limits. Within these 500 meters, intrusion by ships is prohibited. Several exemptions apply, for example to conduct scientific research or for war ships.<sup>28</sup>

At the time of writing, there are initiatives pending to amend the legal framework governing the support mechanisms applicable to renewable technologies deployed in the Belgian part of the North Sea.<sup>29</sup> On the basis of the existing *Royal Decree* of 16 July 2002, the support for wind energy amounts to 107 EUR/MWh for the first 216 MW installed capacity, and 90 EUR/MWh beyond this first 216 MW. The proposed amendment introduces a new category for installations producing electricity from water and tides (on the basis of the existing *Royal Decree*, these technologies are included in the "residual category"), which will be granted 20 EUR/MWh. It is therefore likely that discrepancies in the amount of support applicable to wind on the one hand, and waves and tides on the other hand, will exist in the legal framework.

Another recent development in the legislative landscape governing the North Sea is the *Royal Decree* of 23 June 2010 concerning the marine strategy for the Belgian part of the

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<sup>25</sup> *Belgian Official Journal*, 30 December 2012.

<sup>26</sup> *Ministerial Decision* of 1 June 2012 and *Ministerial Decision* of 2 July 2012.

<sup>27</sup> *Belgian Official Journal*, 1 June 2012.

<sup>28</sup> Article 5 of the *Royal Decree* of 11 April 2012.

<sup>29</sup> Introduced by the Commission for Electricity and Gas Regulation.

North Sea, which puts forward a step-by-step approach in reaching its goals.<sup>30</sup> This *Royal Decree* aims to partially implement the Directive 2008/56/EC establishing a framework for community action in the field of marine environmental policy (*Marine Strategy Framework Directive*). The *Royal Decree* aims to enable a good environmental status of the Belgian sea areas by 2020. This environmental status explicitly excludes the chemical and ecological status of the surface waters.<sup>31</sup> Indeed, these aspects of environmental wellbeing are covered by other regulations, such as the *Water Framework Directive*, discussed above.

The *Royal Decree* sets out six phases throughout which the main goals of the *Marine Strategy Framework Directive* should be implemented.<sup>32</sup> The first phase pertains to the analysis of the current environmental status and an economic and social analysis of the use of the marine environment. The second phase sets out the characteristics of a good environmental status of the marine environment. The third phase is meant to set out a series of environmental goals. The deadline for completion of the three first phases expired on 15 July 2012.<sup>33</sup> These reports have been made publicly available by the competent authorities. In the fourth phase, monitoring programs are to be set out for the continuing analysis of the environmental status. This phase should be completed by 15 July 2014. In the fifth phase, a program of measures to reach or sustain the good environmental status should be developed by 15 July 2015. These first five phases mainly consist out of preparatory measures. In the sixth and final phase, which is the phase of implementation, the program should be applied, namely by 15 July 2016.

### Reflections on Recent Legislative Developments

With regard to the implementation of the *Water Framework Directive*, the first generation of RBMPs in Belgium showed signs of growing pains, mainly due to an abundance of planning levels and administrative bodies involved. The recent initiatives to overhaul the applicable framework so as to simplify the operational processes in the run up to the adoption of the second generation RBMPs, should therefore be marked as a positive evolution.

The key words in the run up to the second generation of RBMPs should be “integration” and “coordination”. The former pertains to, for example, the integration of the governance of

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<sup>30</sup> *Belgian Official Journal*, 13 July 2010.

<sup>31</sup> Articles 2 and 3 of the *Royal Decree* of 23 June 2010.

<sup>32</sup> Article 3 of the *Royal Decree*.

<sup>33</sup> The draft reports within the first three phases have been reviewed by the Strategic Advisory Council for Agriculture and Fisheries, which submitted its advice on 29 May 2012.

floods risks into the RBMP's, whereas the latter pertains to, amongst other things, the coordination between the different authorities in Belgium, on a regional and federal level.

Considering the limited space available in the part of the North Sea under Belgian jurisdiction, a comprehensive legal framework that facilitates a maximization of efficient use of that space is paramount. The recent legislative initiatives embodied in the Act of 20 July 2012 and the *Royal Decree* of 13 November 2012 lay the groundwork in this regard. It seems that wind energy, in the short and medium term, will remain the most attractive technology to be deployed in the Belgian part of the North Sea, considering the discrepancy in the level of support granted to the respective technologies.