

3. Private and public ownership of water areas – structures and implications of the Finnish model

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1 STARTING POINTS IN THE LEGAL SYSTEMS

It may be said that in most legal systems land areas or certain categories thereof are either subject to private ownership or they are not. However, in the case of various surface water areas in state sovereignty,¹ the very diverse legal systems often combine elements of property rights, public law and public access in several ways. Broadly, it may be assumed that the public law ingredients are predominant regarding territorial waters in the seas on the one hand, and probably least visible regarding small brooks and natural ponds on the other hand. But this is, of course, a generalization. Moreover, there are generally significantly more inherent stakeholders than just one vis-à-vis a certain water area or part thereof. This results from the natural characteristics of the water as an element and often also from the mere fact that a property law system based on cadastral survey, typical for land areas, has been extended to water areas. Moreover, the rights of public access and general rights of use are characteristic, as is the possibility for various actors and interested parties to resort to measures of a more or less expropriatory nature, these often being more far-reaching than in the case of land areas.

¹ Water area here means surface water areas, i.e. groundwater areas are not covered by the term.

2 GEOMORPHOLOGICAL AND HYDROBIOLOGICAL BACKGROUNDS OF PROPERTY LAW AND WATER LAW

The Finnish natural watercourse systems typically consist of series and branches of numerous, diversely alternating lakes of various shapes and sizes, rivers, brooks and other formations, each having their individual natural characteristics. These characteristics also define their protection and use. The formations are often complex in shape and dotted with a myriad islands. This often causes the sub-systems and single water bodies to lack any clear discernible individual extension. Hence, the natural watercourse systems in Finland are far from the typical continental river basins which have strongly influenced the EU Water Framework Directive.² Consequently, these basins are not easy to master through any management system or a property law system. This has also made the application of the water formation typology provided in the WFD somewhat difficult. In the WFD (Article 2) ‘body of surface water’ has been defined as ‘a discrete and significant element of surface water such as a lake, a reservoir, a stream, river or canal, part of a stream, river or canal, a transitional water or a stretch of coastal water’.

In reality, some discretion and use of imagination has been inevitable here. The same holds true regarding the notion of ‘sub-basin’ which in the WFD stands for ‘the area of land from which all surface run-off flows through a series of streams, rivers and, possibly, lakes to a particular point in a water course (normally a lake or a river confluence)’. ‘River basin district’ again is more an administrative than a geomorphological notion. According to the WFD it is ‘the area of land and sea, made up of one or more neighbouring river basins together with their associated groundwater and coastal waters, which is identified under Article 3(1) as the main unit for management of river basins’. Because the watercourse systems flowing into the sea are very diverse with regard to size and form, the merging of neighbouring basins has been inevitable on the one hand. On the other, some of the natural total basins are geographically so extensive and diverse that they are not very suitable as functioning management and planning units.

² 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 [2000] OJ L327/1 (hereafter WFD).

Notoriously, the integrated management approach provided in the WFD is largely based on management planning, i.e. River Basin Management Plans and the ancillary Programmes of Measures. The actual judicial role of the Plans and Programmes in substantive decision-making, especially on projects affecting a certain level of water quality, has nevertheless remained rather vague or uncertain, in spite of the multitude and detailed nature of WFD provisions regulating the planning system. The problem and the possible contradiction have been observed and discussed by many authors.³ The normative status of the Plans has been regarded as a major question.⁴ In a well-known landmark case, namely *The Weser Case*,⁵ the European Court of Justice (ECJ) settled one of the main problems: the dispute over the legal status of the WFD objectives. The ECJ concluded, in short, that the objectives had to be regarded as legally binding.⁶

In Finland, the most important decisions affecting the use, protection and status of waters are those made under the permit mechanisms of the Water Act (587/2011, as amended later on) and the Environmental Protection Act (527/2014, as amended later on). In these Acts, the legal effect of the national modifications of the River Basin Management Plans has been explicitly provided only for some situations with limited scopes (see below).

Generally, the preconditions of various projects and measures related to water or water areas are decided upon in individual permit procedures

³ See, among others, William Howarth, 'Aspirations and Realities under the Water Framework Directive: Proceduralisation, Participation and Practicalities' (2009) 21 *JEL* 391, 410–412, 417; William Howarth, 'Accommodation without Resolution? Emission Controls and Environmental Quality Objectives in the Proposed EC Water Framework Directive' (1999) 1 *Environmental Law Review* 6–26; J.J.H. van Kempen, 'Countering the Obscurity of Obligations in European Environmental Law: An Analysis of Article 4 of the European Water Framework Directive' (2012) 24 *JEL* 499, 520–33; Andrea M. Keessen, Jasper J.H. van Kempen, Marleen van Rijswijk, Jan Robbe and Chris W. Backes, 'European River Basin Districts: Are They Swimming in the Same Implementation Pool?' (2010) 22 *JEL* 197–221; and Emilia Korkea-aho, 'Legal Interpretation of EU Framework Directives: A Soft Law Approach' (2015) 40 *EL Rev* 70–88.

⁴ Jussi Kauppila, 'Pintaveden normatiivinen tila' in YPOV (2011) V 11, 36–40 sees the main reason for this in the difficulty to define the plans clearly as either legal-normative or factual-descriptive. This also makes their status as a source of law obscure.

⁵ C-461/13 *Bund für Umwelt und Naturschutz Deutschland eV v Bundesrepublik Deutschland* [2015] OJ C294/3.

⁶ See e.g. the analysis in Tiina Paloniitty, 'The Weser Case: Case C-461/13 BUND V GERMANY' (2016) 28 *JEL* 151–8.

of the Water Act and the Environmental Protection Act, often without any, or any significant, impact or contribution by any prior planning of a more general nature. The main focus is on the individual project plan and the impact report concerning the actual project. The permit procedure with its participatory elements is based on such plans. This applies to both one-time construction projects of extremely varied purposes, kinds and sizes, such as hydroelectric plants, dams, quays, piers, jetties, canals and waterways, timber floating facilities, water abstraction or transfer pipes, sewage outlets, embankments, bridges, road banks, water reservoirs, fish farm constructions, extraction of sand from the seabed, flood-prevention measures, drainage and ditching, filling of water areas with earth, dredging, or clearing of rapids or straits on the one hand, and continuous and possibly permanent activities such as discharge of waste water and other water-polluting emissions, water intake from natural sources,⁷ and water-level regulation on the other hand. One-time and continuous sub-regimes may also mix, typically in projects for damming up or impounding water or lowering the surface levels. The various preconditions set forth in a permit decision typically aim to prevent or mitigate detrimental and harmful impacts on other interests, be they either private or public, use or conservation/protection.

The general land-use planning system provided in the Land Use and Planning Act (132/1999, as amended later on) also applies to water areas as such, but its impacts are generally rather vague, especially regarding the core areas of water management and water area management. However, the detailed land-use plans pursuant to the aforementioned act have to be observed, where in force and relevantly applicable. Moreover, according to judicial practice, the more general land-use plans may also, under the same act and among other viewpoints, be taken into account in the permit considerations, particularly in the important weighing of interests. In the past, there have been legislative efforts to create a special and parallel mechanism for general water management, but they have not resulted in any legislation.

Initially, when the WFD was adopted, it was perceived as a re-vitalization of such a general planning approach in Finland. However, for several reasons, and especially due to the many legal uncertainties involved, these expectations did not materialize. The technical and administrative provisions for the planning mechanism are quite extensive and also detailed. This can be seen, especially, in the Act on the

⁷ Either surface or ground water, but also the impacts of each may be intermingled.

Arranging of Water Management and Marine Waters Management (1299/2004),⁸ and the respective Government Decrees (particularly decrees 1301/2004 and 1040/2006).⁹ Direct references to the Management Plans in the Water Act and the Environmental Protection Act are, in turn, few. Despite this, and outside the direct scope of application of such provisions, references to the contents of and information contained in the Plans are today quite common in practice, e.g. in the reasoning parts of permit decisions.

On the other hand, nowadays there is also other EU-based planning legislation affecting the same water law and permit regime, such as the planning provided in Directive 2007/60/EC on the assessment and management of flood risks,¹⁰ as implemented in the Flood Risk Management Act (620/2010).

3 PROPERTY LAW DEVELOPMENTS AND WATERS

The proprietary status of water areas has typically evolved as a result of long-time historical development. Among the Nordic countries, Sweden and Finland make up the eastern group, with a common legislative history until 1809. Property law, having its roots in medieval laws, was already rather sophisticated at that time. One of its fundamental features was that inland waters, lakes and rivers, as well as inner territorial waters in the sea, were subject to ownership of the adjacent shore land. More precisely, a water area belonged to that land proprietor whose shore land happened to be located nearest to the water in comparison to any other land proprietor. The right of the water area owners was, due to the natural differences between lands and waters, conceived in a specific manner. Above all, it was a matter of fishery rights, and, regarding waterfalls in rivers, a matter of rights to water power. Also the resources of the bed bottom were included. Water traffic was regarded as free to anyone, where physically possible in existing circumstances. Abstraction of water

⁸ The Act also covers the implementation of the Marine Strategy Framework Directive, i.e. 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 [2008] OJ L164/19.

⁹ On the legislation, see Pekka Vihervuori, *Environmental Law in Finland* (Wolters Kluwer 2014) 329–36.

¹⁰ Directive 2007/60/EC of the European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks [2007] OJ L288/27.

was seldom a problem, because there was generally no scarcity thereof. Of course, irregularities and local specialities were often present.

The early influence of public law (in later terminology) had two main expressions, their histories intertwined with each other – and particularly that history where a fundamental medieval document was fabricated by a later (sixteenth-century) Swedish monarch to establish a suitable legal basis, influenced by the continental notion of *ius regale*. This was a matter concerning the valuable rivers. For one thing, in all (proper) rivers (but not in brooks etc.) the middle part was *ex lege* regarded as the so-called (*royal*) artery, or main channel, in order to preserve possibility of open boat traffic (and timber floating), as well as to maintain fish migration. It was consequently not allowed for anyone to close the rivers off by dams of any kind. For another, the fishery rights in the most important rivers hosting migratory salmon and trout – particularly the rivers in the north – were established as a privilege of the Crown. A further early implication of public law (or of the subjective powers of the Crown) was that only the inner belt of the territorial waters in the sea followed the rule on the right of the respective coastland owner.

Also the question of boundaries between different property owners had to be tackled – or not exactly those between the current owners but between the respective property entities, which were very static. Fixed boundaries were, naturally, often indiscernible in large or complex and vaguely shifting water formations. However, even though the existence of property boundaries in water areas was generally acknowledged, judicial proceedings in order to attain more precision and certainty were needed in conflict situations, like those emerging from competing fishery interests and alleged rights. Exact boundaries on official maps are a later phenomenon overall. Today all boundaries are digitalized in the cadastral database of the National Land Survey.

All this, of course, impacted the various forms of utilization and water resource/area management. In addition, any harmful alteration of water bodies was at least in principle forbidden already in the early eighteenth century, as were various polluting activities. However, the scale of the impacting measures in practice was generally rather small until the era of industrialization, due to the lack of technical development. For example, the damming of major rivers became technically possible rather late.

In 1809, the eastern part of the Swedish Kingdom (Finland) became separated from the rest of the Swedish Kingdom as it fell under the rule of the Russian Empire. From there on, Finland was an autonomous Grand Duchy under the Russian Emperor. However, Swedish legislation and the judicial system were preserved. Gradually, the two legal systems adopted some divergent traits, including in property law and water law.

This development was swifter in Sweden, while in Finland the Czar, in the capacity of Grand Duke, did not permit summoning the Finnish legislature until 1863. That was the era of intensive industrialization. In 1809–1863 only home government decrees based on old laws were regarded as possible.

The Watercourse Decree of 1868 was the first codification of water (management) law and a parliamentary law level codification was enacted in 1902. The regulation on proprietary entities in water areas was then, as previously, an integral part of cadastral land (registered conveyance) law, and hence mainly outside the notion of proper water law. The land law regime was very static as such, but due to a certain vagueness concerning old regulation applied in new circumstances, the principles of ownership of water areas aroused major interest at the same time, from both politicians and legal scholars.¹¹ In spite of these legislative developments, many contested property questions remained unsolved until twentieth-century judicial practice.

In comparison to Sweden, property systems were still very similar in general, because the later Swedish developments had been gradually taken into account in law drafting. Yet, one difference was remarkable: It was at the outset unclear in Finland what the notion of shore land actually meant in the old rule that attached a certain water area to the nearest adjacent shore land. There were two main alternatives for a proprietary entity to own the water area, the very coast land property as such on the one hand, and the whole registered village to which that land property, as a part, belonged on the other. Thus, consequently, these alternatives resulted in different outcomes. According to the latter, the water areas within the outer boundaries of each registered village were, pursuant to a general rule on all village-level common utilities and according to their respective numeric shares, jointly common to all land properties of the village. Whereas, according to the first-mentioned alternative, the water areas would belong to one single land property only. This option had become predominant in Sweden, but in Finland the

¹¹ For example, in rapids being potential sources of water-power, new technology had, in the late 1800s, opened new needs and new possibilities for hydroelectric projects. The old focus of legislation had been on sharing major rapids for several old-fashioned water-mills, but this soon became history, and the new goal was to combine the falls in several rapids by damming and clearing. In Finnish major rivers, many such projects were also fatal to migratory fish. The old artery rule was often turned aside, through exception laws or otherwise. The remaining natural rapids are now largely protected by a specially targeted law, but they still remain in private ownership.

village-level model eventually prevailed. Hence, after an uncertain period in judicial practice, it was not possible to buy the water power of a water area (rapid) by buying only some narrow shore strips. The relevant property exchange was hence transferred to the level of village shares.

On village-level in general, i.e. between different villages, the same old rule had generally appeared less problematic. To clarify the rights to fishery in a certain area, some early litigation had taken place. Soon after the adoption of the water property legislation of 1902, practically all village-level boundaries in water areas became officially defined, and after gaining legal force once, the boundaries remain permanent. Naturally, due to lack of boundary markers in larger open water areas, the boundaries became, and they still are, only dot lines on the map (or today actually bits in the cadastral part of the electronic Land Information System of the National Land Survey).

Even today the majority of Finnish inland waters and territorial waters are subject to village-level joint (shared) ownership, unless owned by the state. The number of individual shareholders may vary between a couple and several thousands, according to the numeric shares of each shareholding landowner, based on cadastral law. Also the areal extent varies strongly. In principle, each shareholder has the right to separate a certain water area equivalent to his share from the common area, but the legislator has been reluctant here. According to the present Cadastral Survey Act¹² (554/1995, as amended later on), Article 137: sharing shall not cause any other shareholder harm, and it is moreover required that the sharing has to be necessary for a specific use or that another particular reason exists. There is *ex lege* a statutory shareholders' association for each jointly owned area. Today many of them, but not all, have been permanently organized. The previous statutory fishery associations of villages have been merged with the shareholders' associations. Thus, they execute a dual role. Although village-level joint ownership is the prevalent type of property ownership in water areas, there are also water areas belonging to a certain land property, as well as water areas that make up a registered property alone.

In the course of time, property transactions regarding parcelling out of land may have included clauses on the division and transfer of shares in common water areas, and where specifically not agreed upon, they have been default clauses in property law, with different content within different time periods. The shares can also be transferred and registered

¹² The literal translation 'Real Estate Formation Act' is used in some contexts.

separately.¹³ As a result, all property owners in the village are not necessarily shareholders in the village's water areas. Some may also have water areas of their own.

There are of course also other exceptions. One general exception pursuant to an old rule is that a small lake or pond without water connection to another water body via a brook etc. belongs to the surrounding land property only and hence not to the village waters. This rule was, however, only effective in certain historic situations concerning land consolidation, and it is not applicable any more as such. Such an area may become common again, now in relation to a smaller number of properties, where agreed upon in connection with property transactions and when duly registered.

4 STATE OWNERSHIP

State ownership of water areas also derives from old property law. The rights of the villages, which according to the old basic idea follow the right to the adjoining land, are not without areal limits. In such major inland lakes where the open water area in the middle exceeds eight kilometres in length and breadth, the area of private ownership (normally that of the villages) only covers the part of the lake that reaches to the distance of 500 metres from the depth curve of two metres in average water level conditions. According to the respective, legally valid cadastral surveys, there are today nine such lakes. In addition, and even more remarkably, the same regulation applies to Finnish territorial waters in the Baltic Sea. Major islands may be surrounded by their own private water area. All the waters in the sea and the nine lakes beyond the outer boundary of the private areas belong to the state, as public water areas. Previously such areas were often described as *res nullius* or *res extra commercium*, but in 1966 the legislator explicitly declared state ownership. On the other hand, the material powers of the state regarding public water areas are more limited than those of private owners, especially due to public rights to fishing and hunting.

Within the large state forest areas, which are mainly situated in Northern Finland, all surface waters, and there are many, normally belong to the surrounding land area (or the adjoining shore areas), according to the old fundamental rule. These waters, as well as all public

¹³ This may be motivated by the desire to have (at least some) fishing right, or decimal share of the water power value (without any guarantee of having it realized).

water areas in the sea and the nine lakes mentioned above, are possessed by the Finnish Forest and Parks Service (Metsähallitus), which is a complicated mix of a state enterprise and a public authority. The general tasks of Metsähallitus include the sustainable and profitable management, use and protection of the natural resources and other property possessed by it. In total more than 12 million hectares of land and water areas are governed by it.

5 THE CORE POWER OF A WATER AREA OWNER

Regarding land properties, it is quite natural that no explicit general rule on the powers of an owner has been enacted, neither in Finland nor in other countries. Yet, the (surface) water areas are an exception. In Finland such rules – although the literal object here is the right to water as fluid¹⁴ substance – are contained by Chapter 2 of the Water Act (the Chapter titled ‘Public rights, obligations and restrictions’). Due to the overall focus on fluid substance, groundwater and abstracted water are also covered. According to Section 1 of Chapter 2 (‘Ownership and property administration of water’), ‘the water in a water tank, well and other water abstraction facility is owned by the owner of the tank, well or water abstraction facility. The water in a spring and artificial pond is owned by the owner of the ground.’ And then follows the important clause regarding proper (surface) water bodies and groundwater as well: ‘Within the limitations provided in this Act, any other water with an open surface and groundwater is administered by the party to whom the water or land area in question belongs, unless otherwise provided by the right of another party.’ The expression *vallita* in Finnish and *råda över* in the Swedish-language version, which refers to something less than e.g. *possess*, has been translated as *administrate*.¹⁵ The important thing to note is that the verb *own*, used in the two preceding sentences regarding water as substance, has been intentionally avoided here, although the owner of this very *area* is at stake.

It is moreover provided in the same Section that in a river or brook that is shared half-and-half by two real estates or two jointly owned areas of real estates, the owner of each of the halves has the right to an equal share of the water flowing in the river or brook. This is related to the old property law principle defining the two water-area halves, but in a

¹⁴ However, the same applies also to frozen water (ice).

¹⁵ This is similar to the unofficial translation of the Water Act on the Finnish official legislation data website <Finlex.fi>.

different way, in order to avoid the need to define the course and division of actual water streams between the two geographical halves. On the other hand, the rule as such does not create any right to obtain a permit for water-power use or water abstraction, in any quantities. Alongside rivers with different property entities on both sides, the basic right to water power is hence divided in half by water discharge, not by area.

Pursuant to Section 2 of Chapter 2 of the Water Act ('Certain rights and obligations'), 'the rights and obligations provided for in this Act concerning a water area or land area belong to the owner of the area, unless otherwise provided below or separately'. Additionally, provisions on the right of a shareholder of a jointly owned water area to (individually) use such area are laid down in the Act on Jointly Owned Areas (758/1989, as amended later on). The last-mentioned possibility in practice only makes small scale individual measures possible – and only in relation to the rest of the shareholders, and especially not in relation to the provisions of the Water Act.

6 PUBLIC AND GENERAL RIGHTS

However, being only a part of the total management regulation in the Water Act, the whole of Section 2 of Chapter 2 (above) is only the starting-point, which does not guarantee the proprietor any concrete expectations. First, there are rights of public access and use. Regarding passage in a water body (Section 3 of Chapter 2), everyone has, unless otherwise provided by law, the right, without inflicting unnecessary damage, harm or disturbance, to: (1) move in a water body and on its ice-covered surface; (2) anchor in the water body on a temporary basis; (3) float timber in the water body; (4) swim in the water body; and (5) temporarily move traps and other movable objects in a main channel or public channel that hinder passage or timber floating, as well as such movable objects outside the channel that unreasonably hinder passage or prevent timber floating.

The horizontal extent of a water body towards land is defined according to the average water level (based on long-time observations, where there are any, or assessed otherwise). Yet, as a practical solution, it has been explicitly provided that the public rights of access and use, common fishing rights included, also always apply to land areas beyond the average water level when such a land area (often a narrow belt) is actually covered by water.

Everyone also has the right (Section 4 of Chapter 2) to abstract water or take ice from a water body for a personal need on a non-permanent

basis. The more or less narrow land belt between the average water level line, if lower, and the actual water level line, if higher, is included here. Everyone also has the right to occasionally take a small quantity of water or ice from a streamlet belonging to another subject or from a spring (fountain) that is not in regular use by its owner or by another person with the permission of the owner. It is required, however, that the abstraction of water or the taking of ice may not cause harm or any more than a minor disturbance to the owner of the area or to other right holders.¹⁶

Moreover, certain rights of general character extend to horizontal relations between property units. Regarding abstraction of surface water, it is provided (Chapter 4, Section 3) that the owner or possessor of a land property is, without any consent or authorization by public authority, *ex lege* entitled to use alien property so that he or she may abstract surface water from the water area of another subject, but only for ordinary household use on the property. Typically a shoreland property and the adjoining water area are here at stake. It is also required that the water intake does not result in consequences which create the obligation to obtain a water management permit. In addition, the abstraction shall not cause harm to those abstracting water from the same water area on the basis of a permit issued by a permit authority or ownership or occupancy of the water area.

Also a shoreland owner or possessor to whom the adjoining water area does not belong and who does not possess shares to the water area, is nonetheless entitled to place certain minor constructions in such offshore water area belonging to someone else (Section 5 of Chapter 2 of the Water Act). He or she has the right to place an anchor post or mooring buoy for private use, or to build a jetty, boathouse or another comparable construction on his or her shore that extends to an alien water area. Water areas taken into special use are excluded. It is, however, necessary that the building or use of the construction does not require a permit under the Water Act and that the whole undertaking can be done without inflicting damage or causing substantial harm to the owner of the water area.

Moreover (Section 6), anyone who suffers from sludge, shallow water or a similar nuisance regarding the use of a water body may, without the consent of the owner of the water area, carry out a measure necessary for

¹⁶ Irrespective of this, all water springs in natural or natural-like state are protected for conservation reasons against measures that might endanger the natural status, by the same Water Act.

removing the nuisance in order to improve the state and possibilities of use of the water body. In such a case it is further required that a permit under the Water Act is not needed and no substantial harm to the owner or polluting impacts in the water area are caused. The same applies to the placing of dredged material in the water area owned by someone else. However, the position of the adjoining shoreland is different, and the protection of the owner stronger: The placing of dredged material on alien land area is subject to the owner's consent. However, a permit authority may grant the right to place dredged substance on land, instead, if this does not cause any notable harm to the use of the area and if no permit under the Environmental Protection Act, due to pollution risk, is needed.

7 GENERAL RESTRICTIONS

A general rule on general obligations in the use of water resources and water areas is provided in Section 7 of Chapter 2 of the Water Act. Pursuant to it, a water (or water resources) management project – that being an extremely extensive expression that covers practically the whole variety of different activities, measures and constructions under the Water Act – shall be implemented, and water resources and water areas otherwise used, in such a way that the project does not cause any avoidable infringement of a public or private interest, as far as the purpose of the project or use can be attained without an unreasonable increase in the costs relative to total costs and without any detrimental consequences to be caused. Both public and private interests are relevant here, and hence not only the private interests of the active party but also the private interests of the outsiders to be impacted.

This general rule is only the starting point; the important permit system of the Water Act is the most crucial factor affecting the sphere of freedom of owners and others. As in Section 7 of Chapter 2, the permit regulation as a whole can be considered as a mix of public and private law; the application and interpretation of law is, however, mainly vested in the administrative bodies and administrative courts. Criminal proceedings are very rare.

First (Section 2 of Chapter 3), a prior permit by the (state) permit authority is always needed if a project may cause certain physical changes and impacts on other interests. The provided impact test stage by stage is the following: there is (I) a likely change in the state, depth, water level or flow, shore, or aquatic environment of a water body or the quality or quantity of groundwater; (II) this change (I) results in a risk of

flooding or general shortage of water; or (2) results in detrimental changes in the natural environment and the way it functions or deterioration in the ecological status of a water body or groundwater body; or (3) significantly reduces the beauty of nature, causes deterioration in the amenities of the environment or in cultural values or the suitability of the water body for recreational use; or (4) poses a risk to human health; or (5) substantially reduces the yield of an important or other groundwater body suitable for use for water supply purposes, or otherwise impairs its usability or causes other damage or harm to the water abstraction or the use of water as drinking water; or (6) causes damage or harm to fishing or fish stocks; or (7) causes damage or harm to waterborne traffic or timber floating; or (8) jeopardizes the conditions for a brook channel to remain in a natural state; or (9) violates the public interest in another manner similar to the above; or (10) results in loss of benefit for the water area of another person, or fishing, water supply, land, real estate or other property. However, a permit is not needed due to (10) if the loss of benefit in (10) is caused to certain private interest(s) only and the interested subject(s) has (have) consented to the project.

There are several more reasons which demand a prior permit, however, and all of them cannot be reviewed here. These are mainly situations where a permit is required irrespective of the alleged consequences and impacts. This category (Section 3 of Chapter 3 of the Water Act) contains, among others, any closure or narrowing of an artery or public channel or timber floating channel and placement of a device or another obstruction that hinders the use of the channel; construction of a bridge or a transport device over a public or main channel and a tunnel or water, sewer, power or other line under such a channel, transforming a land area permanently into a water area by raising the water level in a water body; and any construction of a hydropower plant. Also for dredging, placing of dredged materials and removal of usable bottom material, a water management permit is largely required irrespective of harmful consequences. A permit is also required for altering an existing project for which a permit has already been granted, if the change violates relevant public or private interests.

Although groundwater as such is not discussed here, it is worth mentioning (also regarding same-time indirect impacts on surface waters) that a prior permit is always (that is, irrespective of the other applicable criteria) required also for abstraction of groundwater for water supply and for other abstraction of groundwater when the quantity exceeds 250 m³ per day, as well as for any other measure (typically extraction of gravel) where at least 250 m³ per day of water is, as a side-effect, continuously removed from a groundwater formation. Typically, Finnish

groundwater areas are extensive and often exceed horizontally several land property boundaries, as do the formation and horizontal movements of groundwater. Thus, the measures and impacts on groundwater at a certain point can very easily have effects somewhere else. The right of the area owner to administrate groundwater¹⁷ is consequently very narrow.

8 PRECONDITIONS FOR WATER MANAGEMENT PERMITS

As a starting point, a water management permit pursuant to the Water Act *shall* be granted if the project does not significantly violate public or private interests. This takes place in practice only regarding ‘innocent’, typically small-scale projects. Otherwise, the weighing of interests rule (Section 4 of Chapter 3) is applied. Here a pluralistic view on (various, perhaps even conflicting) public interests and private interests has been adopted. To achieve a positive outcome for the permission, it is required that the benefit gained from the project to public or private interests is considerable in comparison with the losses incurred for public or private interests.¹⁸

As a private benefit gained from the project is at stake, the increase in the utility value of property resulting from the improved productivity or usability of a land or water area or other property and any immediate other benefits gained from the project are taken into account.

Relevant private-interest losses again encompass the following: (1) right of use or right to purchase another’s property granted to the applicant as a part of the permit; (2) costs incurred from damage and right of use that the applicant has separately agreed on in order to implement the project, and the costs of acquisition of areas voluntarily handed over to the applicant; and (3) other losses incurred by a subject not participating in the project or by a (compelled) passive partner in a joint ditch drainage project.

When it comes to weighing the interests regarding the benefits and losses caused to public interest, a general assessment has to be made. A monetary value may be used in the assessment only if it is possible to define the amount of the benefit or loss in monetary terms.

¹⁷ See Section 5 above.

¹⁸ See in general e.g. Niko Soininen, *Vesioikeudellinen perusteluvelvollisuus* (2016); with an English summary ‘Transparencies in legality: A legal analysis of the reason-giving requirement in water management permitting in Finland’.

In addition, and without a distinction between private and public interests, the matters included in a Management Plan under the Act on the Arranging of Water Management and Marine Waters Management with respect to factors related to the state and use of waters in the area impacted by the project shall be taken into account in the assessment of benefits and losses.

In the permit deliberation, a locally valid, detailed plan pursuant to the Land Use and Building Act shall be taken into account (if there is such a plan). In addition, the provisions of the same act on the legal effects of regional plans and municipal master plans shall be taken into account. When deciding on a permit, it shall be ensured that the permit does not complicate the preparation of a land use plan in any significant way.

Nevertheless, and irrespective of the result of interest weighing, a permit shall not be granted at all if the project jeopardizes public health or safety, causes considerable detrimental changes in the natural state of the environment or the aquatic environment and its functions, or causes considerable deterioration in the local living or economic conditions. There is only one case where this rule (more accurately its predecessor in the previous Water Act) has been applied with a result negative to the project.

In water abstraction, the weighing of interests is complemented by provisions in Section 5 of Chapter 4, in order to coordinate, where necessary, the different needs for water intake and use. If there is not enough water to meet the needs of all users, the following order of precedence applies: (1) abstraction of water for use near the abstraction site for ordinary household use of the properties there; (2) abstraction of water for the water supply of the local community; (3) abstraction of water for the use of local industry or otherwise for use in the locality and abstraction of water serving the water supply of a community outside the locality; and (4) abstraction of water to be conducted or transported for use elsewhere for a purpose other than supplying water to a community.

9 RIGHTS OF USE AS A PROPERTY LAW TOOL IN PERMITTING CONTEXT

In practice, it is often the case that the applicant does not have prior ownership or possession of the impacted area or of all or even part of the exact area that is to be subject to construction or otherwise directly used. Even a total outsider from the property point of view may be granted a water management permit in several circumstances. However, regarding the total outcome of a permit procedure that results positively for the

applicant, the applicant, or now more properly the permit receiver, shall, and will, hold rights of use to all the areas required for the project. 'Use' in this context stands for direct use and certain crucial immediate impacts, not including the areas of various detrimental consequences only. In practice, 'use' as a rule means placing of constructions in an alien water or land area, filling a water area or part thereof with soil substance and thus making it a new land area, or elevating the average water level of a water body thus altering all shoreland areas of the water body into water areas up to the new calculated average water level.

If the applicant does not own the area or possess a permanent right of use, a permit may only be granted if the applicant is granted the right of use to the area as a part of the very permit decision. Sometimes it may suffice for granting of permit that the applicant presents a reliable account of how the right of use will be arranged otherwise (Section 4 of Chapter 3).

In short, if the applicant does not have all the necessary permanent rights of use beforehand, such rights may, provided that the preconditions for the permit are otherwise met, be granted (Sections 12 and 13 of Chapter 2) only if the applicant owns or permanently possesses more than one half of the required area. Regardless of this requirement of prior possession, a similar right of use may be granted for certain minor measures in someone else's area: (1) to build a minor construction in a water body in the area of another subject or jointly owned area provided that the water body is not substantially changed; (2) to cause water to rise temporarily into an alien area; (3) to carry out cleaning work in an alien area; (4) to straighten or widen the bed to a minor extent; or (5) to place removed bottom substance on alien land or in an alien water area that is not taken into special use. Also rights to remove or alter alien structures may be included in a permit decision.

Totally irrespective of prior ownership or possession, and regarding a water management project of any kind or scope, the necessary rights to use alien property, compulsory purchase of property included, may be granted to the applicant by the permit authority, if the project is regarded to be required by a public need (Section 13 of Chapter 2). Here a state or municipality authority as a permit applicant is most often involved.

Regarding water abstraction, different rules on rights of use are applicable. If the level of general abstraction rights is exceeded, the permit authority may grant the applicant a right to the abstraction of surface water in the area of another subject (Section 3 of Chapter 4). A permit decision may here and otherwise include the right to place a water main for the purpose of abstracting water in an alien area (Section 8 of Chapter 4). The placing of a water main in an alien area shall be done in

a way that the nuisance caused by it is minimized. The area in which the water main is located shall not be used by the owner or by others in a way that might damage the water main or cause unreasonable difficulties to its maintenance.

In all cases, full compensation for losses caused by the granted right of use is provided for, and also decided upon by the permit authority.

10 THE PERMIT MECHANISM AS A FRAMEWORK FOR PARTICIPATION AND COOPERATION

The Finnish permit mechanism as a framework is also used for several side-regulations with different purposes, among others to master the effects of scattered property and ownership structures. One of them regards utilization of jointly owned hydropower. Only the basics may be presented here: A subject who owns at least one fifth of hydropower in a part of a water body that can be used in an appropriate manner in one and the same plant may initiate the construction of a power plant necessary for taking water-power into use. Such an initiative may also be taken jointly by those hydropower shareholders who own at least one fifth of the hydropower to be taken into use. If an agreement can be reached on taking the power into use, the initiative-maker (who is normally the permit applicant) shall make an offer with the intent to participate, to all those who own at least one hundredth part of such hydropower. The initiative-maker and those entitled who wish to participate in the project may be jointly granted a water management permit¹⁹ to construct a power plant and, in connection with this, the necessary permanent right to use against compensation regarding the shares of the passive shareholders, provided of course that the ordinary preconditions for a permit otherwise exist.

In Finnish water law,²⁰ a typical permit for a water management project is far from being a mere consent or authorization. In fact, a permit is often an instrument for balancing of interests, rights and expectations, and for mitigation. The main tool for this is the imposing of different tailored provisions ('conditions') in the permit in order to protect various public interests and alien private interests. The same idea, as a starting point, has been expressed already in Section 7 of Chapter 2 of the Water

¹⁹ A permit is always needed for a hydroelectric plant (Section 3 of Chapter 3 of the Water Act).

²⁰ This applies to Finnish environmental law in general, pollution prevention law included.

Act,²¹ but the more explicit requirements in Chapter 3 are crucially important in practice.

Each permit decision shall issue the necessary regulations on (1) avoiding any nuisance resulting from the project and its implementation; (2) landscaping and other elimination of traces of measures; and (3) measures and devices necessary for preserving the status of water bodies and groundwater. Where the project affects the water level or water flow in a water body, the permit shall also include the necessary provisions regulating the maximum and minimum water levels and water flow. If the project at stake simultaneously causes pollution of surface water or poses a risk thereof, the provisions of the Environmental Protection Act that set the requirements for provisions (or regulations) to be imposed in individual permits are additionally applicable.

Moreover, there are specific provisions on the imposing of various monitoring and reporting obligations, obligations to maintain or arrange accessibility and transport connections, as well as fish stock and fisheries management obligations and fisheries management fees. In all cases, both public and private interests are taken into account.

The project-category-specific chapters (Chapters 4–10 of the Water Act) include additional rules on provisions to be set forth in permits. For example, regarding abstraction of water, a permit shall also contain provisions on the location of the necessary structures, monitoring the quantities of water abstracted and measures that may be taken to secure water supply in special situations.

In principle, all expected losses and damages resulting from the permitted project are compensated. The decision on pecuniary compensations is *ex officio* decided upon by the permit authority.

A permit is, as a rule, permanent in principle, but the provisions set forth in a permit may be altered later on, depending on the category and nature of the project. For special reasons, a permit may be granted for a fixed term only. A permit decision may also include an order on a periodic review of the permit provisions regarding the aquatic environment and its use in case this is necessary to avoid significant harm. Upon application by a party, the permit authority may in certain circumstances review the provisions in the permit and issue new ones. In certain legally determined situations, a permit may also be ordered to expire.

All permit decisions can be appealed against in administrative courts by various private and public stakeholders, local and environmental

²¹ See Section 7 above.

associations included. The courts may also directly amend the contents of a permit where necessary.

11 CONCLUSIONS

In Finnish law, the water management permit is the main instrument for the arranging of relationships between various property owners and other stakeholders. The group of subjects is determined by the actual project, natural conditions and the property structure of the area. Regarding pollution of waters, the same may be said of the environmental permit pursuant to the Environmental Protection Act. The two permits also make up the main tool to implement the Plans and Programmes pursuant to the Act on the Arranging of Water Management and Marine Waters Management, and, indirectly, the WFD.