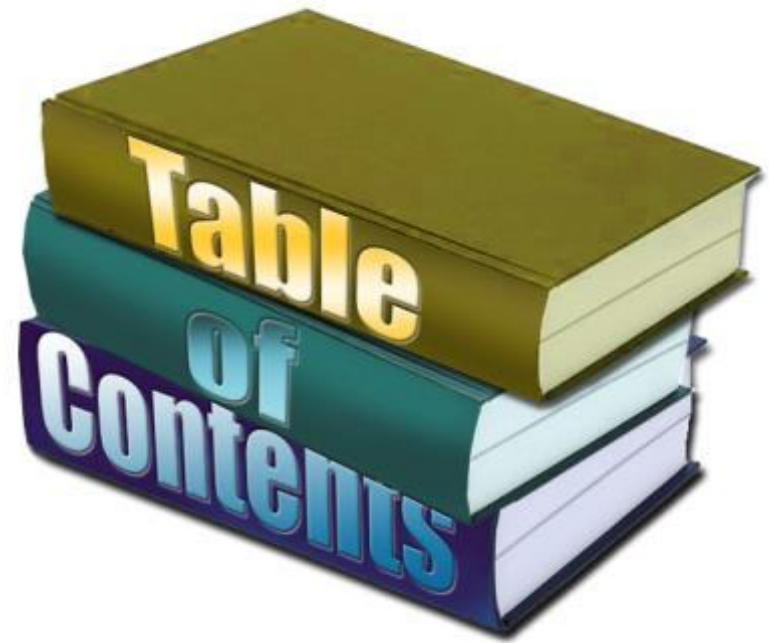




Bringing Back Environmental Flows: The case of migratory fish and the lack of legal adaptivity in Finnish rivers

EELF Conference 2017, Copenhagen, Denmark, 30 August 2017

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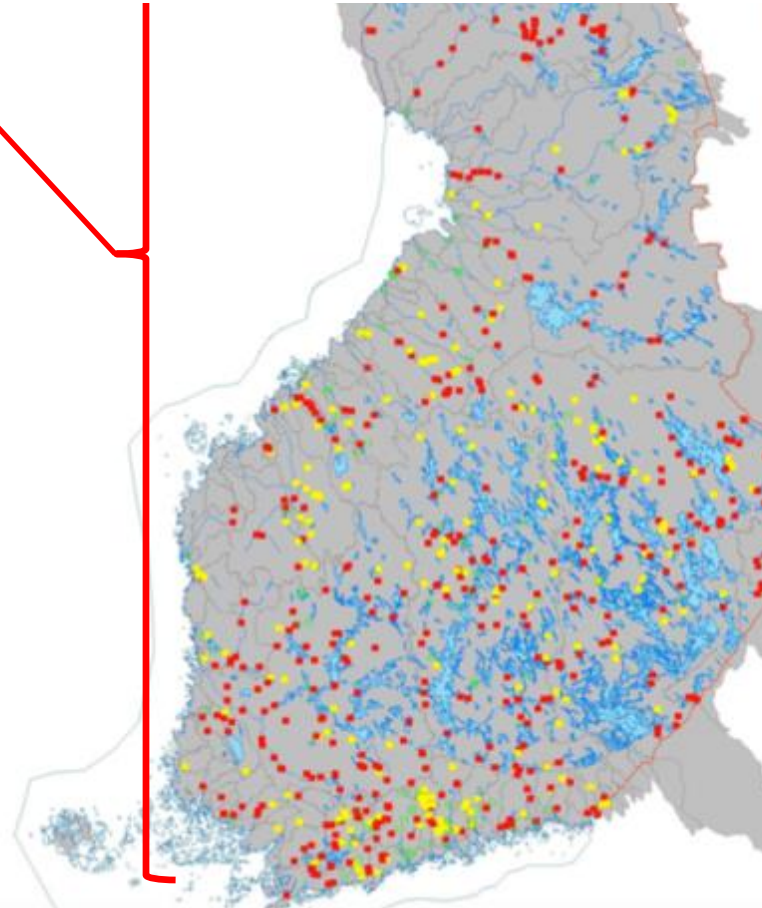


- Background
- Mal-adaptivity of Finnish water law
- New pressures for legal adaptivity
- Alternative legal strategies to enhance fish migration
- Conclusions

Red lights for migratory fish

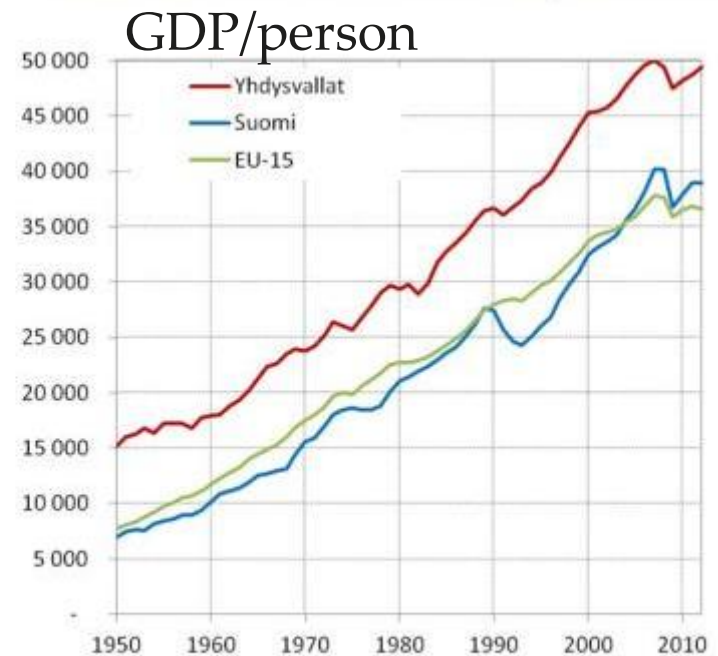


"Almost all large Finnish rivers flowing to the Baltic Sea have been dammed for hydropower production." (HELCOM 2011)



History of damming Finnish rivers

- Economic slump after WW II
- Need for economic development and electricity to fuel it
- Hydropower crucial in the energy mix
- Investment and energy security



Lähde: The Conference Board Total Economy Database, January 2013,
<http://www.conference-board.org/data/economydatabase/>



Mal-adaptivity of Finnish Water Law

Finnish Water Act (587/2011)

- Hydropower permits are **permanent (no time limitation)**
→ not possible to cancel existing permits
- Limited possibilities to add permit conditions or change old ones
 - SAC: new provisions regarding fisheries may not be added
- Hydropower as private property → loss of hydropower must be compensated to the permit holder

Possible measures to (re)balance the utilization of environmental flows



Drivers for adaptivity

EU Water Framework Directive

- Member States shall protect and enhance all artificial and heavily modified bodies of water, with the aim of achieving good ecological potential (art. 4.1)(a)(iii))
- Annex V: fish fauna and ecological continuum included in good ecological status/potential
- Programmes of measures shall periodically review freshwater impoundment projects (art. 11.3(e))

Finnish Strategy for Migratory Fish

- Goal: Strengthen the vitality of threatened and vulnerable migratory fish populations
- Measures that maintain and restore the natural reproductive cycles
- Water flow improvements, fishways, natural rapids restoration

EU case law

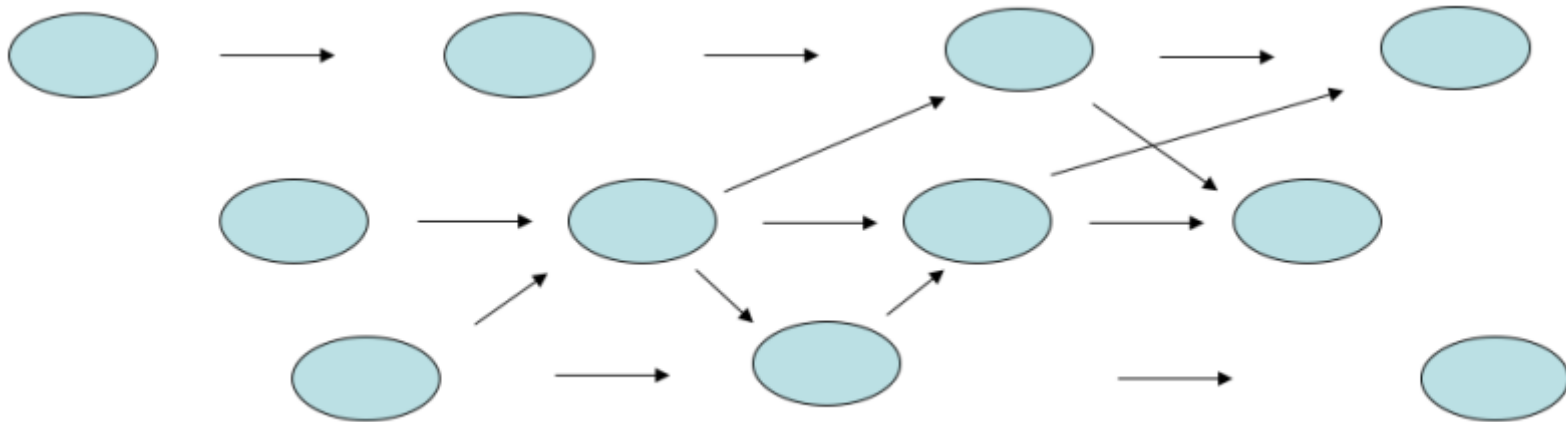
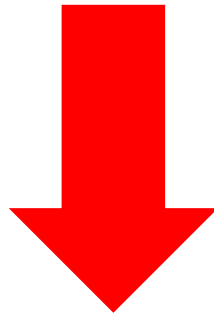
- Weser Case (ECJ C-461/13)
 - Scheme to deepen the river Weser to enable larger container vessels to call at some ports
 - 1. The Member States are required
 - unless a derogation is granted
 - to refuse authorisation for a project where it may cause deterioration of the status of a water body or jeopardise the attainment of good water status
 - 2. Deterioration occurs as soon as the status of at least one of the quality elements falls by one class
- Schwarze Sulm Case (ECJ C-346/14)
 - Authorisation for the construction of a hydropower plant
 - 1. Construction of a hydropower plant may be an overriding public interest
 - 2. All of the conditions for the derogation were taken into account and were rightly considered to be met
 - 3. Fishway and other mitigating measures required

Environmental objectives and migratory fish

- WFD: Legally binding environmental objectives
 - Environmental objectives linked to undisturbed migration of fish (annex V)
 - Programme of measures (art. 11.3(e))
 - To achieve the environmental objectives
 - Controls over the impoundment of fresh surface water must be periodically reviewed and updated
- ➔ Legally binding environmental objectives affect the review of water permits

From mal-adaptive to adaptive management

Single decision



Alternative legal strategies for adaptivity

- Do nothing?
 - legal and political requirements
- Cooperation with no legal changes
- Re-interpretation of current Finnish law
 - new permit requirements under existing law?
- Legislative changes

Conclusions

- Mal-adaptive legislative choices cast long shadows over water management
- Drivers for adaptivity:
 - EU-law as the main driver
- Way forward:
 - from mal-adaptive to adaptive management
 - re-interpretation and legislative changes

