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# The EU's Stringent Jurisdictional Protection of Its Surface Waters

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## Abstract

In 2000, the European Parliament and the Council adopted the Water Framework Directive, whose ultimate objective was to attain a good ecological status for all surface, transitional, coastal and groundwaters in the Union by the end of 2015. The directive gave Member States a large margin of discretion in the implementation of its provisions. However, the quality of European waters remains largely mediocre. In that context, two judgments delivered by the Court of Justice, one in 2015 and one in 2022, provide a strict interpretation of the directive's provisions in the domain of surface waters. The first establishes that any deterioration of the ecological status, even if small, is prohibited. The second specifies that, except for derogation, temporary, short-term degradations are not allowed either. The conclusions of those cases are applicable to other types of water bodies and may lead to an improvement in their management.

## Keywords

Water Framework Directive – pollution – surface waters – protection – enhancement – restoration – European jurisprudence – margin of discretion – binding rules

## 1 Introduction

Water pollution is still one of the main aspects of the environmental crisis, whose gravity has not necessarily diminished in spite of the accumulation of regulatory regimes at EU and at domestic level. The ecological characteristics of the aquatic environment compound the difficulties to regulate water management. For a long time, it was considered that the solution to pollution is dilution. However, the phenomenon of dissolving pollutants has quickly reached its limits, particularly in the case of insoluble materials and solid waste.

In order to achieve a high level of environmental protection at EU level,<sup>1</sup> several framework directives are setting binding objectives that are strongly influenced by scientific considerations (favourable conservation status of natural habitats, good ecological status of water). This technique, which aims to achieve a certain level of quality in ecosystems by stages, permeates two framework directives on water:

- Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy<sup>2</sup> (hereinafter *WFD*), which required Member States to protect their coastal waters, transitional waters, groundwaters<sup>3</sup> and inland surface waters,<sup>4</sup> and notably to reach at least a “good status” for the latter by the end of 2015.
- 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 (Marine Strategy Framework Directive),<sup>5</sup> which insisted that Member States must “achieve or maintain good environmental status in the marine environment by the year 2020 at the latest”.<sup>6</sup>

1 TEU, Article 3, para. 2 and TFEU, Article 191, para. 2.

2 OJ 2000 L 327/1.

3 Which are furthered protect by Directive 2006/118/EC of the European Parliament and of the Council of 12 December 2006 on the protection of groundwater against pollution and deterioration, OJ 2006 L 372/19.

4 Further protected by Directive 2008/105/EC of the European Parliament and of the Council of 16 December 2008 on environmental quality standards in the field of water policy, amending and subsequently repealing Council Directives 82/176/EEC, 3/513/EEC, 84/156/EEC, 84/491/EEC, 86/280/EEC and amending Directive 2000/60/EC of the European Parliament and of the Council, OJ 2008 L 348/84.

5 OJ 2008 L 164/19.

6 Marine Strategy Framework Directive, Article 1.

Member States have a wide margin of discretion as to how to meet these obligations of result. This leeway is necessary given that the obligation of achieving good surface water status<sup>7</sup> or groundwater status<sup>8</sup> faces many challenges as different sectoral policies (products, waste, listed installations, agriculture, land use, water transport, nature protection) influence both the quantity and quality of water resources. What is more, these impacts vary significantly from one Member State to another. Indeed, the pressure on water bodies in Spanish Andalusia, stemming from the persistent drought puts, is nothing comparable to the situation of water bodies in Finland's Lapland.

## 2 The Water Framework Directive's Principles

The adoption of the WFD in October 2000 constituted a radical change as it took these regional differences into account, consequently allowing Member States to more flexibly manage their water bodies<sup>9</sup> and “to insert policy instruments from different policy fields into programmes of measures.”<sup>10</sup> In addition, water resources were henceforth regulated in their entirety, and no longer according to a sectoral logic.<sup>11</sup> This framework directive innovates in many ways by obliging Member States to develop basin policies<sup>12</sup> and to set quality objectives for each watercourse.<sup>13</sup> It regulates the management of surface, underground, transitional and coastal waters<sup>14</sup> in order to prevent and reduce pollution, promote sustainable use, protect the environment, improve the status of aquatic ecosystems and mitigate the effects of floods and

7 WFD, Article 2, para. 18.

8 WFD, Article 2, para. 20.

9 *S. van Holten & H.F.M.W. van Rijswick*, The consequences of a governance approach in European Environmental Directives for flexibility, effectiveness and legitimacy, in: M. Peeters & R. Uylenburg (eds.), *EU environmental legislation: Legal perspectives on regulatory strategies*, 2014, p. 14.

10 *H.F.M.W. van Rijswick & Ch. W. Backes*, Ground Breaking Landmark Case on Environmental Quality Standards? The Consequences of CJEU ‘Weser-judgment’ (C-461/13) for Water Policy and Law and Quality Standards in EU Environmental Law, *JEEPL* 2015 (12), p. 364-365.

11 With the exception of marine environments, which are governed by the above-mentioned Framework Directive 2008/56/EC.

12 In line with the Convention on the Protection and Use of Transboundary Watercourses and International Lakes of 17 March 1992, United Nations Treaty Series 1936, p. 269 (*van Rijswick & Backes, supra* note 10 at p. 363).

13 See *N. de Sadeleer*, *Commentaire Mégret: Environnement et marché intérieur*, 2010, p. 276 to 280.

14 WFD, Article 2, paras. 1 to 7.

droughts.<sup>15</sup> In order to achieve this, the WFD reckons upon several principles of primary law: the integration principle,<sup>16</sup> the polluter pays principle,<sup>17</sup> the principle of sustainable development,<sup>18</sup> the standstill principle<sup>19</sup> and, in particular, the prevention principle.<sup>20</sup> Indeed, the latter is the cornerstone of this new regulatory approach as the directive set out an obligation of result for the Member States: they must achieve “good status” of the targeted water bodies by 22 December 2015<sup>21</sup> or, under certain strict conditions, by 2027.<sup>22</sup> This “good status” is determined according to biological, hydromorphological and physico-chemical quality indicators defined in annexes II and V of the Directive.

These indicators, which differ according to the type of water body, allow for the latter’s categorisation within one of five ecological status classes. Regarding surface water bodies, the following general definitions of ecological quality are given:<sup>23</sup>

- High status: “There are no, or only very minor, anthropogenic alterations to the values of the physico-chemical and hydromorphological quality elements for the surface water body type from those normally associated with that type under undisturbed conditions. The values of the biological quality elements for the surface water body reflect those normally associated with that type under undisturbed conditions, and show no, or only very minor, evidence of distortion.”
- Good status: “The values of the biological quality elements for the surface water body type show low levels of distortion resulting from human activity, but deviate only slightly from those normally associated with the surface water body type under undisturbed conditions.”
- Moderate status: “The values of the biological quality elements for the surface water body type deviate moderately from those normally associated with the surface water body type under undisturbed conditions. The values

15 WFD, Article 1.

16 WFD, Recital 16 of the preamble.

17 WFD, Article 9.

18 WFD, Article 1(b).

19 WFD, Article 1(a).

20 WFD, Article 4, paras. 1(a)(i) and 1(b)(i), and Article 10.

21 WFD, Article 4, para. 1(a)(ii) and 1(b)(ii).

22 WFD, Article 4, paras. 4 and 5. These conditions relate either to disproportionate costs or technical infeasibility (*B. Klauer, K. Sigel & J. Schiller, Disproportionate costs in the EU Water Framework Directive – How to justify less stringent environmental objectives, Environmental Science & Policy 22016 (59), p. 10–11.*)

23 WFD, Annex V, point 1.2. et Table 1.2.

- show moderate signs of distortion resulting from human activity and are significantly more disturbed than under conditions of good status.”
- Poor status: “Waters showing evidence of major alterations to the values of the biological quality elements for the surface water body type and in which the relevant biological communities deviate substantially from those normally associated with the surface water body type under undisturbed conditions.”
  - Bad status: “Waters showing evidence of severe alterations to the values of the biological quality elements for the surface water body type and in which large portions of the relevant biological communities normally associated with the surface water body type under undisturbed conditions are absent.”

The management of European water bodies is done on the basis of river basin districts,<sup>24</sup> which must be identified by Member States and for which they must ensure the production of river basin management plans.<sup>25</sup> It is thus up to the Member States to organise monitoring programmes to assess the “water status within each river basin district”,<sup>26</sup> taking into consideration the “principle of recovery of the costs of water services”.<sup>27</sup> On the other hand, they are also responsible for drawing up programmes of measures, which contain both “basic measures” – which consist of the “minimum requirements to be complied with”, contained in an exhaustive yet vague list<sup>28</sup> –, and potential “supplementary measures” – additional measures whose aim is to complement the basic measures and which are contained in a non-exhaustive list.<sup>29</sup>

As Directive 2000/60 was adopted on the basis of Article 175(1) EC (now Article 192(1) TFEU), it is a minimum harmonization. Consequently, Member States may, in accordance with Article 193 TFEU, adopt more stringent measures. Thus, the ultimate objective of the Directive is to achieve and maintain at least a “good status” of all surface waters in the Union.<sup>30</sup>

The WFD has succeeded in reducing the increase in contamination of continental waters, particularly through the discharge of domestic and industrial effluents. However, the objectives set by the directive are far

24 A river basin is defined as an “area of land from which all surface run-off flows through a sequence of streams, rivers and, possibly, lakes into the sea at a single river mouth, estuary or delta” (WFD, Article 2, para. 13). A river basin district is thus an “area of land and sea, made up of one or more neighbouring river basins together with their associated groundwaters and coastal waters” (WFD, Article 2, para. 15).

25 WFD, Articles 3 and 13.

26 WFD, Article 8, para. 1.

27 WFD, Article 9, para. 1.

28 WFD, Article 11, paras. 1, 2 and 3(a) to (1).

29 WFD, Article 11, paras. 2 and 4, and Annex VI.

30 See WFD, Recital 26 of the preamble.

from being achieved. According to the most recent data from the European Environment Agency for the period 2010-2015, coastal waters have the highest proportion of good or very good ecological status (61.02%), followed by lakes (56.13%), rivers (43.87%) and finally transitional waters (32.96%).<sup>31</sup> Moreover, the forms of pollution have evolved over time: the contamination of watercourses by fermentable organic matter has been replaced by acutely toxic chemical pollution, which is more difficult to combat because of its diffuse nature.<sup>32</sup> Long conscious of those threat's significance, the European legislator has adopted, in 1991, a directive regarding the "collection, treatment and discharge of urban [and some industrial] waste waters",<sup>33</sup> which is currently the object of a recast proposal.<sup>34</sup>

### 3 The European Jurisprudential Protection of Surface Water Bodies

In two landmark judgments, the Court of Justice of the European Union (CJEU) has clarified the scope of the duty to prevent deterioration. The first judgment, delivered on 1 July 2015 by the Grand Chamber,<sup>35</sup> concerns the mandatory nature of the obligation to prevent deterioration of surface water bodies and the obligation for public authorities to avoid any deterioration of water quality within the five classes established in accordance with Annex V of the Directive. The second judgment, handed down on 5 May 2022 by the Second Chamber of the Court,<sup>36</sup> requires Member States to assess the short-term temporary impacts of programmes and projects affecting the quality of a body of surface water. Following the same logic as the previous judgment, the CJEU ruled that this type of deterioration is prohibited unless an express authorisation is granted by way of derogation.

31 *European Environment Agency*, Ecological status of surface waters in Europe, 2021, <https://www.eea.europa.eu/ims/ecological-status-of-surface-waters>.

32 *European Environment Agency*, Signaux de l'AEE 2020, vers une pollution zéro en Europe, 2020, p. 20 to 23 and 43 to 45.

33 Council directive 91/271/EEC concerning urban waste water treatment, OJ 1991 L 135/40, Article 1.

34 Proposal for a Directive of the European Parliament and of the Council concerning urban wastewater treatment (recast), COM (2022) 541 final, 26 October 2022. The aim of this recast is to respond to three challenges: Extending the focus to unaddressed pollution sources, aligning the directive with the European Green Deal, and increasing the "level of governance" by improving monitoring and reporting methods (p. 2 and 3).

35 Case C-461/13, Bund für Umwelt und Naturschutz Deutschland [2015].

36 Case C-525/20, Association France Nature Environnement [2022].

In these two judgments, the CJEU applies a flagship principle of environmental law,<sup>37</sup> the aforementioned principle of prevention, to surface waters in the same way as it has done in the field of habitat conservation.<sup>38</sup>

At a time of climate change, when droughts and floods are on the increase throughout Europe, these two judgments are likely to play a significant role as water quality is likely to deteriorate due to sudden and violent climatic events. Indeed, floods significantly deteriorate the quality of surface waters, as they carry a lot of hazardous waste (oil products, used oil, chemicals, etc.) in their wake, while droughts increase the concentration of chemical pollutants in smaller volumes of water.

#### 4 Prevention and Improvement: The Two Axes of Water Policy

In line with the principle of prevention, environmental policy is not limited to mitigating the damages caused by pollution. Since many ecosystems are still in a poor or bad, and often deteriorating, state,<sup>39</sup> environmental policy also obliges the authorities to endorse a more pro-active approach in improving the state of the environment, erasing past mistakes. This restoration of ecosystems involves, among other things, the decontamination of polluted soils,<sup>40</sup> the removal of artificial structures from watercourses in order to restore natural flow, water sewage, the restoration of riverbanks, the establishment of buffer strips along water courses,<sup>41</sup> the introduction of populations of extinct species, etc.

<sup>37</sup> *N. de Sadeleer*, *Environmental Principles*, 2nd ed., 2020, p. 85 to 133.

<sup>38</sup> Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, OJ 1992 L 206/7.

<sup>39</sup> Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee – The state of nature in the European Union: Report on the status and trends in 2013-2018 of species and habitat types protected by the Birds and Habitats Directives, COM (2020) 635 final, 15 October 2020, p. 5 and 6.

<sup>40</sup> See Directive 2004/35/CE of the European Parliament and of the Council on environmental liability with regard to the prevention and remedying of environmental damage, OJ 2004 L 143/56; and Regulation (EU) 2019/1010 of the European Parliament and of the Council on the alignment of reporting obligations in the field of legislation related to the environment, and amending Regulations (EC) No 166/2006 and (EU) No 995/2010 of the European Parliament and of the Council, Directives 2002/49/EC, 2004/35/EC, 2007/2/EC, 2009/147/EC and 2010/63/EU of the European Parliament and of the Council, Council Regulations (EC) No 338/97 and (EC) No 2173/2005, and Council Directive 86/278/EEC, OJ 2019 L 170/115.

<sup>41</sup> See GAEC 4 in Annex III of Regulation (EU) 2021/2115 of the European Parliament and of the Council establishing rules on support for strategic plans to be drawn up by Member

This dual obligation is in line with the environmental requirement of Article 191(1), first indent, TFEU requiring Member States to contribute to “the preservation, protection and improvement of the quality of the environment”. Thus, many EU legal acts include both an obligation to prevent deterioration and an obligation to improve the environment. This is particularly the case with Article 4(1) of the WFD, which imposes two distinct but intrinsically linked objectives.<sup>42</sup>

On the one hand, as a preventive measure, Member States “shall implement the necessary measures to prevent deterioration of the status of all bodies of surface water”.<sup>43</sup> On the other hand, they had to “protect, enhance and restore all bodies of surface water (...) with the aim of achieving good surface water status, ecological potential and surface water chemical status at the latest for [the end of the year 2015]”.<sup>44</sup>

Indeed, it appeared to the members of the European Parliament that the mere obligation to achieve “good status” of water bodies would not have been sufficient to protect water resources, as a water body classified in a category higher than “good status” could deteriorate to the point of entering the latter category. For this reason, the European Parliament proposed an amendment to distinguish between the obligation to achieve “good status” and the obligation to prevent deterioration by introducing a new indent in Article 4(1) of the Directive, which clearly states the latter obligation.<sup>45</sup>

## 5 The Binding Nature of the Obligation to Prevent Water Deterioration

Article 4(1)(a) of Directive 2000/60, which lays down these obligations of prevention and improvement in relation to surface waters, does not merely set out, in a programmatic manner, simple management planning objectives, but has binding effects, once the ecological status of the body of water concerned has been determined, at each stage of the procedure prescribed by that

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States under the common agricultural policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulations (EU) No 1305/2013 and (EU) No 1307/2013, OJ 2021 L435/1.

42 Case C-461/13, *Bund für Umwelt und Naturschutz Deutschland* [2015], para. 39.

43 WFD, Article 4, para. 1(a)(i).

44 WFD, Article 4, para. 1(a)(ii) and (iii).

45 Case C-461/13, *Bund für Umwelt und Naturschutz Deutschland* [2015], para. 41.



directive. This provision therefore does not only contain general obligations, but also concerns specific projects.<sup>46</sup> In this regard, the CJEU ruled as follows:

“Unless a derogation is granted, any deterioration of the status of a body of water must be prevented, irrespective of the longer term planning provided for by management plans [prescribed by article 13] and programmes of measures [prescribed by article 11]. The obligation to prevent deterioration of the status of bodies of surface water *remains binding at each stage of implementation* of Directive 2000/60 and is applicable to every surface water body type and status for which a management plan has or should have been adopted. The Member State concerned is consequently *required to refuse authorisation for a project where it is such as to result in deterioration* of the status of the body of water concerned or to jeopardise the attainment of good surface water status, unless the view is taken that the project is covered by a derogation under Article 4(7) of the directive.”<sup>47</sup>

Considering that all water bodies must be part of a river basin management plan,<sup>48</sup> public authorities can thus never, in the context of this review, balance environmental and socio-economic interests. Unless a derogation applies, the objectives contained in Article 4(1) are binding and “must be applied strictly”.<sup>49</sup>

The obligation to refuse authorisation for a project that would lead to the degradation of a surface water body has important consequences in terms of impact assessment. Indeed, the assessment prescribed by the WFD is not limited, by the application of technical thresholds, to certain economic or industrial activities. There is therefore no *de minimis* rule. The directive only prescribes, regarding “pollutants or groups of pollutants presenting a significant risk to or via the aquatic environment, including such risks to waters used for the abstraction of drinking water”,<sup>50</sup> an evaluation compliant with Regulation 793/93<sup>51</sup> and the adoption of specific measures with the aim, as a first step, of

46 Case C-461/13, Bund für Umwelt und Naturschutz Deutschland [2015], paras. 43 and 47.

47 Case C-461/13, Bund für Umwelt und Naturschutz Deutschland [2015], para. 50, we underline.

48 WFD, Article 13 and 3.

49 *van Risjwick & Backes*, *supra* note 10 at p. 369.

50 WFD, Article 16, para. 1.

51 Council Regulation (EEC) No 793/93 on the evaluation and control of the risks of existing substances, OJ 1993 L 84/1, which has been replaced by the REACH Regulation (Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as

a gradual “reduction of discharges, emissions and losses of substances” and, eventually, of their cessation or phasing out.<sup>52</sup>

The concept of project is not further defined in the WFD, which only mentions it among the non-exhaustive list of supplementary measures contained in Annex VI, nor is it defined in the judgments – the German judgment concerns the development of a waterway while the judgment against the French government concerns a decree on the “*schémas directeurs d'aménagement et de gestion des eaux et schémas d'aménagement et de gestion des eaux*”.<sup>53</sup> However, insofar as the latter aims to establish a general framework for the protection of water,<sup>54</sup> this notion must be interpreted extensively, in the same way as the CJEU has interpreted the concept of project in the field of habitat protection.<sup>55</sup> It follows that Member States are obliged to consider at least the impact of all projects that may cause deterioration in the status of a body of water.

However, what if an industrial installation that is not subject to an impact assessment under the EIA Directive,<sup>56</sup> which only applies to installations above a certain threshold, were to have delirious effects on the quality of a water body? Although the WFD leaves a wide margin of discretion to the States, it nevertheless specifies that, by 2010, they had to “ensure an adequate contribution of the different water uses, disaggregated into at least industry, households and agriculture, to the recovery of the costs of water services, based on the economic analysis conducted according to Annex III and taking account of the polluter pays principle”.<sup>57</sup> Said economic analysis aims at establishing a long-term forecast of the supply and demand in a specific basin and, in turn, “make judgements about the most cost-effective combination of measures in respect of water uses to be included in the programme of measures under Article 11”.<sup>58</sup> Consequently, an industrial installation, even if too small to be subject to the EIA directive, will have to comply with those measures (prior notification, prior authorisation, emission controls, etc.) and potentially to compensate degradation, for example through water pricing.<sup>59</sup> According to

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well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, OJ 2006 L 396/1).

52 WFD, Article 16, paras. 2 and 6.

53 Case C-525/20, Association France Nature Environnement [2022], para. 2.

54 WFD, Article 1.

55 See Opinion of Advocate General Fennelly in Case C-256/98, Commission v France [1999] ECR I-2489.

56 Directive 2011/92/EU of the European Parliament and of the Council on the assessment of the effects of certain public and private projects on the environment, OJ 2012 L 26/1.

57 WFD, Article 9, para. 1, 2nd -.

58 WFD, Annex III.

59 See *J. Berbel & A. Expósito*, The Theory and Practice of Water Pricing and Cost Recovery in the Water Framework Directive, *Water Alternatives* 2020 (13(3)), p. 659 to 673.

the European Commission, most Member States had an authorisation regime in 2021. Furthermore, despite half of them still permitting small discharges, the overwhelming majority had measures in place aiming at stopping pollution from reaching surface waters in particular.<sup>60</sup>

In any case, the CJEU seems to apply to the field of water the same reasoning as in the field of habitat protection. According to established case law, in the event of uncertainty as to the possible threats that a plan or project could pose to the integrity of a Natura 2000 site, the authorities must, in accordance with the precautionary principle, refrain from granting authorisation, or at least impose operating conditions capable of avoiding the negative impact.<sup>61</sup> The same applies to the improvement of the ecological status of water bodies, which also relates to both quality and quantity.

### 5.1 *Obligation to Prevent Deterioration within the Classes*

According to Annex V of the WFD, the different types of surface water are divided into the five classes mentioned above (high, good, moderate, poor, or bad) by means of limit values for the different biological quality criteria, which indicate the “boundaries” between classes.

Thus, in accordance with a so-called “one out all out” rule,<sup>62</sup> the classification of a surface water body depends on the worst value of the applicable parameters. Consequently, a water body is classified in the next lower class as soon as the ratio of one of the quality thresholds falls below the level corresponding to its current class.<sup>63</sup> In other words, no weighting of all values is provided, which would have had the effect of reducing the significance of a particular impact. Therefore, downgrading does not require that all parameters fall below the level applicable to the selected class.<sup>64</sup> The national authorities are thus obligated to adopt the necessary measures to continuously improve the quality of the water in order to prevent its deterioration.

In line with this reasoning, the CJEU further held in its judgment of 1 July 2015 that the prohibition on deterioration of the status of a body of surface water

60 Report from the Commission to the Council and the European Parliament on the implementation of the Water framework Directive (2000/60/EC), the Environmental Quality Standards Directive (2008/105/EC amended by Directive 2013/39/EU) and the Floods Directive (2007/60/EC) – Implementation of planned Programmes of Measures, New Priority Substances, Preliminary Flood Risk and Areas of Potential Significant Flood Risk, COM (2021) 970 final, 15 December 2021, p. 9.

61 Case C-127/02, *Landelijke Vereniging tot Behoud van de Waddenzee* [2004] ECR I-7448, para. 57.

62 Case C-461/13, *Bund für Umwelt und Naturschutz Deutschland* [2015], para. 59.

63 WFD, Annex V, point 1.4.2.

64 *van Risjwick & Backes*, *supra* note 10 at p. 373.

in Article 4(1)(a)(i) applies “as soon as the status of at least one of the quality elements, as defined in Annex v of that Directive, deteriorates by one class, *even if that deterioration does not result in a deterioration in the classification of the surface water body as a whole*”.<sup>65</sup> This encourages Member States to prevent any deterioration in the status of a body of surface water within a class. This interpretation excludes that, as the *Bundesrepublik Deutschland* contended, only “serious impairment” would constitute deterioration of the status of a water body. If this interpretation had been followed, all values other than the lowest value could be lowered by micro-pollution without any legal consequences.<sup>66</sup>

## 5.2 *Obligation to Prevent Short-Term Deterioration without Long-Term Consequences*

Certainly, deteriorations that have irreversible effects on the overall status<sup>67</sup> of the water body are prohibited. These include the construction and operation of infrastructure such as dams, reservoirs, hot water discharges from nuclear power plants,<sup>68</sup> and even the concreting of riverbanks.

Human activities, whether in the form of programmes or projects, have multiple effects on the aquatic environment, some of which are not necessarily irreversible. For this reason, article 4(6) of the WFD provides that such temporary deterioration “shall not be in breach of the requirements of this Directive if this is the result of circumstances of natural cause or *force majeure* which are exceptional or could not reasonably have been foreseen (...) or the result of circumstances due to accidents which could not reasonably have been foreseen”, provided that measures to oversee the declaration of such damage and to prevent subsequent damage are implemented.<sup>69</sup>

Furthermore, the directive does not define the “temporary” character of the deterioration of the status of a water body. The authors of the directive wished to limit the scope of application of this derogation by emphasising the exceptional nature of this type of deterioration.

The French Council of State asked the CJEU whether Article 4 of the WFD should be interpreted as allowing Member States, when authorising a programme or project, not to consider their temporary, short-term impacts

65 Case C-461/13, *Bund für Umwelt und Naturschutz Deutschland* [2015], para. 69, translated and underlined by us.

66 Case C-461/13, *Bund für Umwelt und Naturschutz Deutschland* [2015], para. 62.

67 WFD, Article 2(17).

68 Case C-411/17, *Inter-Environnement Wallonie ASBL, Bond Beter Leefmilieu Vlaanderen* [2019], para. 94.

69 WFD, Article 4, para. 6(a) to (e).

on the status of a surface water without long-term consequences. Indeed, the French authorities considered that a temporary deterioration in water status should not be avoided so long as it has no long-term impact on water quality.

Reckoning on a literal and contextual interpretation of the Framework Directive, the CJEU dismissed this argument, considering that “when assessing the compatibility of a particular programme or project with the objective of preventing the deterioration of water quality”, States must take into account temporary, short-term impacts which do not persist in the long term, unless such impacts “have, by their very nature, little effect on the status of the concerned bodies of water”.<sup>70</sup>

France, supported by other Member States, had argued that temporary deterioration was not covered by the prevention obligation, since the WFD provides for a monitoring regime spaced out over time. Indeed, its Annex V provides for different monitoring frequencies: while substances of concern have to be monitored monthly, macroinvertebrates and fish, as well as morphological conditions such as the depth and structure of the bed or bank of lakes and rivers, only have to be monitored every six years.<sup>71</sup> Only the hydrological characteristics of rivers (quantity and dynamics of water flow, connection to groundwater bodies) should be continuously monitored.<sup>72</sup> In other words, the French government argued that, because the frequency of monitoring of the parameters involved in the study of the impact of human activity on the state of surface water, with a view to placing it in a particular category, was variable, temporary deteriorations were not necessarily detectable and, therefore, could not fall under the preventive regime.

The French government relied in particular on a guidance document<sup>73</sup> co-developed by the Member States, the EFTA countries and the European Commission, and according to which national authorities could disregard a limitation of deterioration in the short term when it had no long-term

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70 Case C-525/20, *Association France Nature Environnement* [2022], para. 45.

71 WFD, Annex V, point 1.3.4.; See also Case C-525/20, *Association France Nature Environnement* [2022], paras. 40 et 41.

72 WFD, Annex V, points 1.3.4. and 1.1.1.

73 Common Implementation Strategy for the Water Framework Directive and the Floods Directive – Guidance Document No. 36 – Exemption to the Environmental Objectives according to Article 4(7) – New modifications to the physical characteristics of surface water bodies, alterations to the level of groundwater, or new sustainable human development activities, December 2017, [https://circabc.europa.eu/ui/group/9ab5926d-bed4-4322-9aa7-9964bbe8312d/library/ef4bb326-cccf-4f90-a283-7bea542c7e48?p=1&n=10&sort=modified\\_DESC](https://circabc.europa.eu/ui/group/9ab5926d-bed4-4322-9aa7-9964bbe8312d/library/ef4bb326-cccf-4f90-a283-7bea542c7e48?p=1&n=10&sort=modified_DESC).

consequences.<sup>74</sup> However, this document is not legally binding.<sup>75</sup> Following the opinion of its Advocate General Rantos,<sup>76</sup> the CJEU thus rejected the argument of the French government. It considered that the interpretation adopted in this document contradicted the general scheme of the WFD and the objectives it pursues.<sup>77</sup> Indeed, the WFD's rationale is to prevent any further deterioration, which in our view would implicitly result from a standstill principle, despite the latter not being recognised in primary EU law. In other words, the WFD requires, by avoiding any form of degradation of water quality, whether long or short-term, temporary or permanent, that the quality of the aquatic ecosystem be constantly improving.<sup>78</sup>

This implies an obligation to assess any plan or project likely to lead to a deterioration of the status of surface waters<sup>79</sup> and, in case of a negative assessment, to refuse the adoption of the programme, project,<sup>80</sup> or (piece of) legislation.<sup>81</sup>

That said, in the event that it is demonstrated that the implementation of the plan or project would breach the obligation of prevention, it could nonetheless go ahead in two cases:

- It can only have, due to its nature, little impacts on the concerned water bodies' status;<sup>82</sup>
- The competent authority authorises it insofar as the derogation conditions set out in the fourth paragraph of Article 4 are met.

With regard to the first hypothesis, it is difficult to determine the “little impacts” of a project “on the status of the water bodies concerned”. The line between “little impacts” and a direct, indirect or potential impact, or even a risk of impact, is indeed tenuous. As for the second hypothesis, the derogation conditions must be interpreted strictly.

74 *Id.* at p. 21 and 22, in particular lines 674 to 679.

75 As stated in the fourth paragraph of the document's disclaimer.

76 Opinion of the Advocate General Rantos in Case C-525/20, *Association France Nature Environnement v Premier ministre* [2022], paras. 69 et seq.

77 Case C-525/20, *Association France Nature Environnement* [2022], para. 31.

78 Case C-525/20, *Association France Nature Environnement* [2022], paras. 31 et seq.

79 In the field of nature conservation, the assessment required by the Habitats Directive “is not a merely formal process of examination, but must allow a detailed analysis which satisfies the conservation objectives of the site in question, as set out in Article 6, particularly as regards the protection of natural habitats and priority species” (Case C-441/03, *Commission v Kingdom of the Netherlands* [2005] ECR I-3052, para. 22).

80 Case C-461/13, *Bund für Umwelt und Naturschutz Deutschland* [2015], para. 50.

81 Case C-525/20, *Association France Nature Environnement* [2022], paras. 16 and 45.

82 Case C-461/13, *Bund für Umwelt und Naturschutz Deutschland* [2015], para. 31.

## 6 Beyond Surface Waters

Although the two studied cases relate to surface waters (lakes and rivers), we have seen that the WFD also applies to coastal, transitional and groundwaters. Consequently, the obligations of a preventive nature notably extend to aquifers, many of which suffer from diffuse pollution, particularly of agricultural origin.<sup>83</sup>

In that regard, the CJEU has also recently had to rule on the deterioration of underground waters. In a landmark judgment concerning the groundwater bodies of the Almonte-Marismas aquifer in the Doñana protected natural area in Andalusia, the Court stressed that the aim of the WFD is “to achieve, through coordinated action, ‘good status’ of all EU waters, including groundwaters”.<sup>84</sup> Moreover, invoking the case-law of the judgment of 1 July 2015, it states that “it is clear from the scheme of Article 4 of Directive 2000/60 that a deterioration of the status of a body of water, even if transitory, is authorised only subject to strict conditions and that the threshold beyond which breach of the obligation to prevent deterioration of the status of a body of water is found must be low”.<sup>85</sup>

This Spanish case confirms two things. First, all water body types must receive a strict protection in accordance with the Water Framework Directive. Second, the strict protection conferred by case-law to one water body type (here surface waters) extends to other types of water (in this instance groundwaters).

## 7 Conclusion

As many of Europe’s watercourses are transboundary, the protection of aquatic ecosystems occupies a central place in the Union’s environmental policy. However, pressures on water resources have been increasing for a long time, both in terms of quantity (abstractions, intensive agriculture, etc.) and quality (discharges, degradation of watercourses).<sup>86</sup>

Through the cases discussed above, the CJEU has endorsed a rigorous interpretation of the obligations contained in Directive 2000/60 establishing a framework for Community action in the field of water policy. Member States must therefore do everything possible to avoid the degradation of their water bodies.

<sup>83</sup> *European Environment Agency, supra* note 32 at p. 19 to 21.

<sup>84</sup> Case C-559/19, *European Commission v Kingdom of Spain* [2021], para. 37.

<sup>85</sup> Case C-559/19, *European Commission v Kingdom of Spain* [2021], para. 48.

<sup>86</sup> *European Environment Agency, supra* note 31.

Alas, despite the WFD constituting a “modern system of water law that tries to combine a need for flexibility, policy discretion and subsidiarity on the one hand and an on-going improvement and effective protection of Europe’s waters on the other hand”,<sup>87</sup> and even though the Court of Justice stringent application of its provisions, the directive’s results remain unsatisfactory.

Nevertheless, the judgment of 5 May 2022 epitomizes the transition, after 50 years of environmental policy,<sup>88</sup> from a defensive approach to the impacts of pollution to a proactive approach to reclaiming nature. More than a mere shift, it is an accumulation of requirements for the Member States. This results, in accordance with Article 191 TFEU, in both a proactive and reactive approach, as the WFD requires from national authorities to “improve and restore” water bodies.

The most recent regulatory trends at EU level confirm this expansion of the paradigm. One should bear in mind the European Commission’s Communication “Towards Zero Pollution for Air, Water and Soil”<sup>89</sup> as well as the recent draft regulation of the European Parliament and the Council on nature restoration.<sup>90</sup> With the rise of a host of environmental challenges, prevention is no longer enough. Ecosystems need to be restored to counteract the deleterious effects of climate change.

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87 *van Risjwick & Backes, supra* note 10 at p. 374.

88 Modern Environmental law came into being with the adoption of the Declaration of the United Nations Conference on the Human Environment (often abbreviated as the Stockholm Declaration), adopted in 1972 in Stockholm.

89 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Pathway to a Healthy Planet for All, EU Action Plan: ‘Towards Zero Pollution for Air, Water and Soil’, COM (2021) 400 final, 12 May 2021.

90 Proposal for a Regulation of the European Parliament and of the Council on nature restoration, COM (2022) 304 final, 22 June 2022.