

Provisional text

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 3 December 2020 ([1](#))

Case C-559/19

European Commission
v
Kingdom of Spain
(Deterioration of the Doñana natural area)

(Environment – Directive 2000/60/EC – Framework for Union action in the field of water policy – Directive 92/43/EEC – Conservation of natural habitats and of wild fauna and flora – Deterioration of bodies of groundwater in the Doñana natural area – No further characterisation of those groundwater bodies or groups of bodies in the Doñana natural area which have been identified as being at risk – Appropriate basic and supplementary measures in the management plan for the Guadalquivir river basin district – Deterioration of various natural habitats)

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I. Introduction

1. In the southwest of Spain lies the Doñana natural area, where significant protected areas have been designated pursuant to the Habitats Directive (2) and the Birds Directive. (3) It also hosts, mainly outside those protected areas, the most important European growing areas for ‘red fruit’, particularly strawberries, for the irrigation of which significant quantities of groundwater are abstracted. That abstraction exceeds groundwater recharge, in certain areas at least, with the result that the groundwater level has been falling for many years.

2. The Commission considers that this infringes the prohibitions of deterioration under the Water Framework Directive (4) and the Habitats Directive and has therefore brought these proceedings against the Kingdom of Spain.

3. As regards the Water Framework Directive, this relates to the deterioration of the groundwater quantitative status throughout the Doñana area. But how is the notion of deterioration to be understood in this context? Does it mean a decline in groundwater reserves? Or is the unchanged use of groundwater, for irrigation of agricultural land for example, merely to be regarded as a continuation of the existing status without further deterioration? That is the central issue in this case.

4. It must also be clarified how groundwater baseline status is to be determined under the Water Framework Directive and what measures a Member State is required to establish in order to improve quantitatively bad groundwater status.

5. The alleged infringement of the Habitats Directive, on the other hand, does not concern groundwater, which is not directly protected by that directive, but the alteration of protected habitats in the abovementioned protected areas. The particular point in dispute is whether the reduction of the groundwater level results in the desiccation of those habitats.

II. Legal framework

A. *Water Framework Directive*

6. Article 1 of the Water Framework Directive sets out its objective:

‘The purpose of this Directive is to establish a framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater which:

(a) prevents further deterioration and protects and enhances the status of aquatic ecosystems and, with regard to their water needs, terrestrial ecosystems and wetlands directly depending on the aquatic ecosystems;

...

and thereby contributes to:

- the provision of the sufficient supply of good quality surface water and groundwater as needed for sustainable, balanced and equitable water use,

...’

7. Article 2 of the Water Framework Directive includes the following definitions:

‘...

11. “Aquifer” means a subsurface layer or layers of rock or other geological strata of sufficient porosity and permeability to allow either a significant flow of groundwater or the abstraction of significant quantities of groundwater.

12. “Body of groundwater” means a distinct volume of groundwater within an aquifer or aquifers.

...

26. “Quantitative status” is an expression of the degree to which a body of groundwater is affected by direct and indirect abstractions.

27. “Available groundwater resource” means the long-term annual average rate of overall recharge of the body of groundwater less the long-term annual rate of flow required to achieve the ecological quality objectives for associated surface waters specified under Article 4, to avoid any significant diminution in the ecological status of such waters and to avoid any significant damage to associated terrestrial ecosystems.

28. “Good quantitative status” is the status defined in table 2.1.2 of Annex V.

...’

8. Point 2.1.2 of Annex V to the Water Framework Directive describes good quantitative status of groundwater as follows:

‘The level of groundwater in the groundwater body is such that the available groundwater resource is not exceeded by the long-term annual average rate of abstraction.

Accordingly, the level of groundwater is not subject to anthropogenic alterations such as would result in:

- failure to achieve the environmental objectives specified under Article 4 for associated surface waters,
- any significant diminution in the status of such waters,
- any significant damage to terrestrial ecosystems which depend directly on the groundwater body,

and alterations to flow direction resulting from level changes may occur temporarily, or continuously in a spatially limited area, but such reversals do not cause saltwater or other intrusion, and do not indicate a sustained and clearly identified anthropogenically induced trend in flow direction likely to result in such intrusions.’

9. Article 4(1)(b) of the Water Framework Directive lays down the prohibition of deterioration and the requirement for improvement in respect of groundwater:

- ‘(i) Member States shall implement the necessary measures to prevent or limit the input of pollutants into groundwater and to prevent the deterioration of the status of all bodies of groundwater, subject to the application of paragraphs 6 and 7 and without prejudice to paragraph 8 of this Article and subject to the application of Article 11(3)(j);
- (ii) Member States shall protect, enhance and restore all bodies of groundwater, ensure a balance between abstraction and recharge of groundwater, with the aim of achieving good groundwater status at the latest 15 years after the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4 and to the application of paragraphs 5, 6 and 7 without prejudice to paragraph 8 of this Article and subject to the application of Article 11(3)(j);

...’

10. Article 4(1)(c) of the Water Framework Directive includes protected areas in the quality objectives of the Water Framework Directive:

‘...’

Member States shall achieve compliance with any standards and objectives at the latest 15 years after the date of entry into force of this Directive, unless otherwise specified in the Community legislation under which the individual protected areas have been established.’

11. Under Article 6 of and Annex IV to the Water Framework Directive, that provision covers inter alia protected areas under the Habitats Directive and the Birds Directive.

12. Article 4(4) of the Water Framework Directive allows the target date for good water status to be deferred:

‘The time limits laid down in paragraph 1 may be extended for the purposes of phased achievement of the objectives for bodies of water, provided that no further deterioration occurs in the status of the affected body of water when all the following conditions are met:

...’

13. Article 4(7) of the Water Framework Directive permits a departure from the environmental objectives, irrespective of the time limits for the requirement for improvement, under certain conditions.

14. Article 5 of the Water Framework Directive governs the assessment of water status:

‘1. Each Member State shall ensure that for each river basin district or for the portion of an international river basin district falling within its territory:

- an analysis of its characteristics,
- a review of the impact of human activity on the status of surface waters and on groundwater, and
- an economic analysis of water use

is undertaken according to the technical specifications set out in Annexes II and III and that it is completed at the latest four years after the date of entry into force of this Directive.

2. The analyses and reviews mentioned under paragraph 1 shall be reviewed, and if necessary updated at the latest 13 years after the date of entry into force of this Directive and every six years thereafter.’

15. Point 2.1 of Annex II to the Water Framework Directive regulates the initial characterisation of the status of groundwater bodies, which includes ‘the degree to which they are at risk of failing to meet the objectives for each groundwater body under Article 4’. Point 2.2 provides for further characterisation in certain cases:

‘Following this initial characterisation, Member States shall carry out further characterisation of those groundwater bodies or groups of bodies which have been identified as being at risk in order to establish a more precise assessment of the significance of such risk and identification of any measures to be required under Article 11. Accordingly, this characterisation shall include relevant information on the impact of human activity and, where relevant, information on:

...

- an inventory of associated surface systems, including terrestrial ecosystems and bodies of surface water, with which the groundwater body is dynamically linked,
- estimates of the directions and rates of exchange of water between the groundwater body and associated surface systems,
- sufficient data to calculate the long term annual average rate of overall recharge,

...’

16. Article 11 of the Water Framework Directive governs the measures which may be adopted by the Member States in order to achieve the objectives of the directive:

‘1. Each Member State shall ensure the establishment for each river basin district, or for the part of an international river basin district within its territory, of a programme of measures, taking account of the results of the analyses required under Article 5, in order to achieve the objectives established under Article 4. ...

2. Each programme of measures shall include the “basic” measures specified in paragraph 3 and, where necessary, “supplementary” measures.

3. “Basic measures” are the minimum requirements to be complied with and shall consist of:

(a) those measures required to implement Community legislation for the protection of water, including measures required under the legislation specified in Article 10 and in part A of Annex VI;

...

(c) measures to promote an efficient and sustainable water use in order to avoid compromising the achievement of the objectives specified in Article 4;

...

(e) controls over the abstraction of fresh surface water and groundwater, and impoundment of fresh surface water, including a register or registers of water abstractions and a requirement of prior authorisation for abstraction and impoundment. These controls shall be periodically reviewed and, where necessary, updated. Member States can exempt from these controls, abstractions or impoundments which have no significant impact on water status;

...

4. “Supplementary” measures are those measures designed and implemented in addition to the basic measures, with the aim of achieving the objectives established pursuant to Article 4. Part B of Annex VI

contains a non-exclusive list of such measures.

...’

B. Habitats Directive

17. Article 1(e) of the Habitats Directive defines good conservation status of habitats as follows:

‘...’

The conservation status of a natural habitat will be taken as “favourable” when:

- its natural range and areas it covers within that range are stable or increasing, and
- the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and
- the conservation status of its typical species is favourable as defined in (i)’.

18. Article 6(2), (3) and (4) of the Habitats Directive contains the central provision governing the protection of sites:

‘2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site’s conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

...’

III. Facts and pre-litigation procedure

19. The Doñana natural area lies in the southwest of the Iberian Peninsula, in the Spanish Autonomous Community of Andalusia. It covers inter alia Doñana National Park (established in 1969) and Doñana Nature Park (also known as the Nature Park surrounding Doñana or *Preparque*, established in 1989 and extended in 1997). In 2006, the Commission placed three important protected areas, namely ZECA/LIC ES0000024 Doñana, (5) ZECA/LIC ES6150009 Doñana Norte y Oeste (6) and ZEC ES6150012 Dehesa de Estero y Montes de Moguer, (7) on the first list of sites of Community importance for the Mediterranean biogeographical region. (8) The first of these sites has been a special protection area under the Birds Directive since 1987. (9)

20. According to the standard data forms, the sites host priority habitat type 3170*, Mediterranean temporary ponds, and habitat types 92A0, *Salix alba* and *Populus alba* galleries, and 92D0, Southern riparian galleries and thickets (*Nerio-Tamaricetea* and *Securinegion tinctoriae*). On the other hand, habitat types 91B0, *Thermophilous Fraxinus angustifolia* woods, and 9330, *Quercus suber* forests, are represented in only two of the sites, but are absent in the site ZEC ES6150012 'Dehesa del Estero y Montes de Moguer'.

21. These protected areas cover only parts of the Doñana natural area, which is the subject of the present case. For the purposes of the application of the Water Framework Directive, in the first management plan pursuant to Article 13, the Plan Hidrológico del Guadalquivir 2009-2015 (Guadalquivir Basin Hydrological Plan 2009 to 2015), (10) the natural area was amalgamated almost entirely into a single body of groundwater, Almonte-Marismas. (11) This administrative division corresponds largely to the geological aquifer of that same name, which does, however, also include an adjacent groundwater body, according to the submissions made by the Kingdom of Spain. The Almonte-Marismas groundwater body was not specified in Article 41 of that plan as one of the bodies of groundwater in respect of which the objective of good quantitative status was considered to be at risk. Rather, the overall objective of good status was prescribed for 2015. (12)

22. In the second management plan, the Plan Hidrológico del Guadalquivir 2016-2021 (Guadalquivir Basin Hydrological Plan 2016 to 2021), (13) the Almonte-Marismas groundwater body was divided up. Three of the five new groundwater bodies, Almonte (ES050MSBT000055101), Marismas (ES050MSBT000055102) and La Rocina (ES050MSBT000055105) are of bad quantitative status. (14) All three have a low groundwater level (15) while more groundwater is abstracted than recharged in the latter two. (16)

23. Following various complaints and a question in the European Parliament, the Commission initiated an investigation, on the basis of which it sent the Kingdom of Spain a letter of formal notice on 17 October 2014 calling on it, pursuant to Article 258 TFEU, to submit its observations on possible infringements of the Water Framework Directive and the Habitats Directive in relation to groundwater in the Doñana area. After the Kingdom of Spain had replied, the Commission sent it a reasoned opinion on 29 April 2016, raising the same complaints, and called on it to address the objections by 29 June 2016. Notwithstanding further replies by the Kingdom of Spain, the Commission brought the present action on 22 July 2019.

IV. Forms of order sought

24. The European Commission claims that the Court should:

- declare that, by failing to adopt the measures necessary to prevent the deterioration of the status of the bodies of groundwater in the Doñana region, by failing to carry out further characterisation of those groundwater bodies which are at risk, and by failing to identify the necessary measures and to include appropriate basic and supplementary measures in the programme of measures in the management plan for Guadalquivir river basin district, the Kingdom of Spain has failed to fulfil its obligations under: Article 4(1)(b) of the Water Framework Directive, in conjunction with Article 1(a) thereof and point 2.1.2 of Annex V thereto; Article 5 of the Water Framework Directive, read in conjunction with point 2.2 of Annex II thereto; and Article 11(1), Article 11(3)(a), (c) and (e) and Article 11(4) of the Water Framework Directive;
- declare that, by failing to take appropriate steps to avoid the deterioration of natural habitats and habitats of species for which the areas concerned (ZEPA/LIC ES0000024 Doñana, ZEPA/LIC ES6150009 Doñana Norte y Oeste and ZEPA ES6150012 Dehesa del Estero y Montes de Moguer) have been designated, the Kingdom of Spain has failed to fulfil its obligations under Article 6(2), read in conjunction with Article 7, of the Habitats Directive;
- order the Kingdom of Spain to pay the costs.

25. The Kingdom of Spain concludes its defence by asserting that the failure to comply with the Water Framework Directive and the Habitats Directive, which the Commission alleges in these proceedings, has not been proven at all. On the contrary, the Kingdom of Spain has demonstrated the consistent efforts, in the form of plans and management measures, which have been made in recent years to reverse the negative impacts that arose in the Doñana natural area as a result of activities that were promoted decades before the EU legislation was adopted.

26. For the first time in the rejoinder, the Kingdom of Spain expressly contends that the Court should:

- declare the action to be inadmissible or at least dismiss the action, and
- order the defendant institution to pay the costs.

27. The parties submitted written observations and presented oral argument at the hearing on 17 September 2020.

V. Legal assessment

28. In the Commission's view, the Kingdom of Spain has infringed the prohibition of deterioration under the Water Framework Directive in respect of groundwater in the Doñana area and, alongside that, it has also infringed the prohibition of deterioration under the Habitats Directive in respect of various habitats in the protected areas of Doñana. Furthermore, the Kingdom of Spain has not complied with its investigation obligations under the Water Framework Directive and has not established the measures necessary under that directive to bring about good groundwater status.

29. Although the Commission focuses primarily on the Water Framework Directive, I will begin by examining the Habitats Directive (see under B), as there is already settled case-law regarding the prohibition of deterioration in that field which cannot be applied directly to the interpretation of the prohibition of deterioration under the Water Framework Directive (see under D), but at least allows a comparison to be made. Before discussing this second prohibition of deterioration, however, I will examine the plea in law concerning the Kingdom of Spain's assessment obligations under the Water Framework Directive (see under C), since that assessment forms the basis for the further implementation of the Water Framework Directive, including the prohibition of deterioration. Lastly, I will consider the objection to the measures introduced by the Kingdom of Spain in the Doñana natural area (see under E). First of all, however, it is necessary to address whether the form of order sought by the Kingdom of Spain is actually effective (see under A).

A. *The form of order sought by the Kingdom of Spain*

30. The Kingdom of Spain did not formally set out the form of order sought in the defence even though under Article 124(1)(c) of the Rules of Procedure that written pleading must state the form of order sought by the defendant. The fact that the Kingdom of Spain formally sets out the form of order sought in the reply cannot remedy a potential infringement of Article 124(1)(c), as Article 126(1) provides that the reply may only supplement the defence. Accordingly, Article 127(1) permits new pleas in law in the course of proceedings only if they are based on matters of law or of fact which come to light in the course of the procedure. This must apply a fortiori to the form of order sought.

31. It must be recognised, however, that the Rules of Procedure do not prescribe any specific form for the forms of order sought. Consequently, forms of order sought may be stated not only expressly, but also implicitly. The conclusion arrived at in the defence can therefore also be construed as an implicit statement of the form of order sought. In so far as the Kingdom of Spain states therein that the infringements of the Water Framework Directive and of the Habitats Directive alleged by the Commission are not proven, it is implicitly claiming that the Court should dismiss the action as unfounded.

32. On the other hand, there is no basis in the defence for the application for costs in the reply. It is thus out of time and, consequently, inadmissible.

B. The prohibition of deterioration under Article 6(2) of the Habitats Directive

33. In the Commission's view, by failing to take the appropriate steps to avoid the deterioration of natural habitats and habitats of species for which the areas ZEPA/LIC ES0000024 Doñana, ZEPA/LIC ES6150009 Doñana Norte y Oeste and ZEPA ES6150012 Dehesa del Estero y Montes de Moguer have been designated, the Kingdom of Spain has failed to fulfil its obligations under Article 6(2) in conjunction with Article 7 of the Habitats Directive.

34. It is necessary in this regard first to clarify the subject matter of the plea in law and then the standard of proof for an infringement of Article 6(2) of the Habitats Directive before the arguments of the parties can be appraised in that light.

1. Subject matter and admissibility of the plea in law

35. By this plea in law, the Commission claims that certain habitats in the three protected areas designated under the Habitats Directive deteriorated as a result of the lowering of the groundwater level. The Commission placed those areas on the list of sites of Community importance on 19 July 2006 and Article 6(2) of the Habitats Directive has therefore been applicable to them since that date pursuant to Article 4(5) of that directive.

36. It is true that one of those protected areas had been designated under the Birds Directive in 1987 and was thus initially subject to Article 4 of that directive, and it has been protected by Article 6(2) of the Habitats Directive since 1994, pursuant to Article 7 thereof. However, the Commission does not allege that protected bird species are adversely affected either directly or indirectly such that this protection is immaterial in the context of the present case.

37. The Kingdom of Spain considers this plea in law to be inadmissible in so far as it concerns the area ES6150012 'Dehesa del Estero y Montes de Moguer' on the ground that it constitutes an extension of the subject matter of the proceedings. That area is not located within the former Almonte-Marismas groundwater body but was assigned to an adjacent groundwater body. In the reasoned opinion, the Commission confined the subject matter of the proceedings to the Almonte-Marismas groundwater body.

38. This argument must be rejected. From the start of the pre-litigation procedure, the Commission expressly included this area. (17) Furthermore, it is irrelevant for the purposes of an infringement of the Habitats Directive whether a protected area is to be assigned to a groundwater body which was established in the course of the implementation of the Water Framework Directive. The protected area therefore continues to fall within the subject matter of the proceedings.

39. Moreover, in the rejoinder, the Kingdom of Spain concedes that the adjacent groundwater body is also part of the same geological formation, the Almonte-Marismas *aquifer*. It was identified separately from the administrative subdivision of the Almonte-Marismas *groundwater body* only for the purposes of the application of the Water Framework Directive. If any misunderstanding regarding the scope of this plea in law arose from this assignment, it was therefore caused by the Kingdom of Spain itself. However, there is in fact no indication of any misunderstanding on the part of the Kingdom of Spain.

2. Criterion under Article 6(2) of the Habitats Directive

40. The Commission alleges that, by acquiescing to groundwater abstraction in the Doñana natural area, the Kingdom of Spain has infringed Article 6(2) of the Habitats Directive. Under that provision, Member States must take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of that directive.

41. In order to establish a failure to fulfil obligations within the meaning of Article 6(2) of the Habitats Directive, the Commission does not have to prove a cause and effect relationship between the activity and the deterioration of those protected areas.

42. Rather, in interpreting Article 6(2) of the Habitats Directive, it should be borne in mind that that provision is designed to ensure the same level of protection as Article 6(3). (18) The criterion for review for both provisions must therefore be the same. (19)

43. Under Article 6(3), a plan or project is permissible only if any reasonable scientific doubt that the conservation objectives for the site in question are unaffected can be ruled out. (20) In order to ensure this, an *ex ante* assessment of the implications of a plan or project for a protected site is to be carried out in the first stage, pursuant to the first sentence of Article 6(3), where there is a probability that a plan or a project will have significant effects on the site concerned. (21) In that case, approval is possible only if the assessment rules out any reasonable scientific doubt that it will not adversely affect the integrity of the site concerned. (22)

44. If there is no assessment of the implications for the site which reaches that conclusion, it is thus sufficient proof of an infringement of Article 6(2) of the Habitats Directive to establish the existence of a probability that an activity might cause such adverse effects. (23)

45. The simplified proof of an infringement of Article 6(2) of the Habitats Directive means that it does not necessarily follow from the finding of an infringement that the activity in question is definitively incompatible with Article 6. Rather, with an appropriate assessment satisfying the requirements laid down in Article 6(3) of the Habitats Directive, the Member State can dispel any reasonable scientific doubts that the activity adversely affects protected areas. Alternatively, it can justify the activity in accordance with Article 6(4) of the Habitats Directive. (24)

46. This interpretation of Article 6(2) of the Habitats Directive does give rise to assessment obligations in respect of activities which may ultimately prove to have no adverse effects on protected areas. However, this is a necessary consequence of the level of protection equally guaranteed by Article 6(2) and Article 6(3). Even if Article 6(3) is applied, it is possible that ultimately the measure at issue does not adversely affect the site's conservation objectives.

47. That level of protection is nevertheless justified as an expression of the precautionary principle, as it is the only way that plans, projects and other activities that adversely affect the sites can be identified and prevented. (25)

3. *Application*

48. Accordingly, the plea in law at issue is well founded if the Commission proves the probability that the abstraction of groundwater has a significant effect on protected habitats or species in the three abovementioned protected areas.

49. I will therefore examine below the effect on protected habitats (see under a), the applicability *ratione temporis* of the prohibition of deterioration since 19 July 2006 (see under b) and the Kingdom of Spain's attempt to rebut the Commission's arguments (see under c).

(a) *Effect on protected habitats*

50. Because the Habitats Directive does not protect groundwater as such, the abstraction of groundwater does not directly infringe Article 6(2) of the Habitats Directive.

51. Instead, the Commission criticises the Kingdom of Spain on the ground that abstraction results in a lowering of the groundwater level, which leads in particular to the deterioration of priority habitat type 3170*, Mediterranean temporary ponds, as well as other habitat types associated with surface waters.

These are habitat types 92A0, *Salix alba* and *Populus alba* galleries; 92D0, Southern riparian galleries and thickets (*Nerio-Tamaricetea* and *Securinegion tinctoriae*); and 91B0, *Thermophilous Fraxinus angustifolia* woods. The Commission also refers to habitat type 9330, *Quercus suber* forests. Except for the last two habitat types, which are not present in the site ES6150012 'Dehesa del Estero y Montes de Moguer', these habitat types occur in all the sites at issue. (26)

52. The Kingdom of Spain contends that many of the dune waters do not correspond to the habitat type temporary ponds. Therefore, the deterioration of that habitat type is in fact ruled out. However, that argument is confined to mere assertions which are inconsistent with the scientific works submitted by the Commission and with information from the Kingdom of Spain in the standard data forms for the protected areas, but are not based on separate evidence. That habitat type must therefore be considered to be present.

53. Two of the studies submitted by the Commission (27) and other studies cited by it (28) advocate the hypothesis that because of the lowering of the groundwater level caused by excessive abstraction, the ponds contain water increasingly rarely and are now reliant primarily on precipitation. They are therefore more severely affected by dry periods. This is confirmed by a communication from the Consejo Superior de Investigaciones Científicas (Spanish National Research Council) to the Defensor del Pueblo Andaluz (Andalusian Ombudsman). (29) In addition, a study submitted by the Kingdom of Spain considers it possible that declines in a permanent water body and a temporary pond in the vicinity of the tourist resort of Matalascañas can be traced to groundwater abstraction taking place there. (30)

54. Furthermore, the Commission asserts that groundwater abstraction adversely affects the other abovementioned habitats in the protected areas which are dependent on surface waters. It relies on various studies which show that those habitats experience detrimental changes because groundwater levels are lowered as a result of excessive abstraction, for example through the displacement of humidity-dependent vegetation. (31)

55. Lastly, the Commission mentions references to adverse effects on habitat type 9330, *Quercus suber* forests. (32)

56. The Commission has therefore presented sound scientific evidence that groundwater abstraction has lowered the groundwater level, resulting in the probability of adverse effects on the abovementioned habitat types in the protected areas.

57. The Kingdom of Spain objects that groundwater is of little importance for the conservation of temporary ponds in particular, because they are fed primarily by rainwater. Even if this argument is correct, it does not follow that the groundwater level plays no role. That role is vitally important in periods of low rainfall because in such times only groundwater can refill those water bodies.

58. The Kingdom of Spain has not therefore rebutted the Commission's arguments concerning the probability that groundwater abstraction practised in the Doñana natural area has adverse effects on the abovementioned protected habitats in the protected areas.

(b) *Applicability ratione temporis of the prohibition of deterioration*

59. In response to the Commission's arguments, the Kingdom of Spain also contends, however, that the problems relating to groundwater in the Doñana natural area date from the time before Article 6(2) of the Habitats Directive became applicable.

60. This argument gives voice to a very serious objection, namely that the prohibition of deterioration in Article 6(2) of the Habitats Directive can cover only adverse effects occurring after that provision became applicable, in this case after 19 July 2006. By contrast, it is immaterial for the purposes of that provision, first of all, whether habitats in the protected areas were destroyed or adversely affected before that date. This applies in particular to the lowering of the groundwater level as a result of groundwater abstraction, which indisputably occurred in this case before the prohibition of deterioration became applicable.

61. The prohibition of deterioration also does not necessarily require any groundwater abstraction previously practised to be reduced or ended. It is true that the groundwater level would rise through such a measure and the situation would therefore improve. Nevertheless, the prohibition of deterioration is not a requirement for improvement. As a result, it does not impose an obligation to improve the status of protected habitats.

62. Consequently, the Commission's argument must be rejected in so far as it requires measures to restore or improve habitats which, as the Kingdom of Spain repeatedly explains, were adversely affected long before Article 6(2) of the Habitats Directive became applicable.

63. If, however, continuing activity such as groundwater abstraction contributes to the additional deterioration of the condition of protected habitat types or species, Article 6(2) of the Habitats Directive is applicable. Although the protected area has in some ways already been affected as a result of that activity, that previous impact is limited to the adverse effects arising before the protected area was established. On the other hand, new adverse effects on protected areas infringe the prohibition of deterioration.

64. This is not affected by considerations relating to legal certainty and legitimate expectations in the continuation of a certain activity. These can justify a derogation from Article 6(2) of the Habitats Directive on the basis of Article 6(4) under certain circumstances, (33) but cannot alter the interpretation of the notion of deterioration. (34)

65. Most of the studies submitted or cited by the Commission either relate to the period prior to 19 July 2006, before Article 6(2) of the Habitats Directive became applicable, or do not contain precise information on when the various adverse effects occurred. They do not therefore demonstrate that the adverse effects identified in them are to be considered an infringement of that provision.

66. Nevertheless, one article from 2016, according to which groundwater abstraction for more than two decades has led to a progressive lowering of the groundwater level, actually offers evidence of deteriorations since 19 July 2006. (35) The communication to the Andalusian Ombudsman, according to which the Doñana aquifer and the surrounding area experienced a negative trend between 1994 and 2015, with a significant decline of 1.13% per year, far above the level that could be attributed to changes in the precipitation recorded in the region, points in a similar direction. (36) For the last nine years of this trend at least, Article 6(2) of the Habitats Directive was applicable to the three protected areas.

67. Furthermore, the management plan developed by the Spanish authorities for the protected area Doñana Norte y Oeste, which is evaluated by the Commission in the reply, describes the conservation status of riverine habitats as 'unfavourable-bad' on account of the lowering of the groundwater level. (37) This means, according to the definition of favourable conservation status in Article 1(e) of the Habitats Directive, that the areas those habitats cover within that range are declining and that their long-term maintenance is doubtful. The Spanish authorities themselves thus consider that the status of those habitats will continue to deteriorate on account of the evolution of the groundwater level.

68. The Commission has thus adequately demonstrated the probability that groundwater abstraction currently practised in the Doñana natural area has caused deteriorations of protected habitats in the three protected areas since 19 July 2006.

(c) No rebuttal by the Kingdom of Spain

69. It is now, in principle, for the Kingdom of Spain to rebut the evidence of that probability. Because paragraphs 2 and 3 of Article 6 of the Habitats Directive guarantee the same level of protection, the applicable criterion must be an assessment of the implications for the site pursuant to Article 6(3) of that directive. (38) Under that provision, an activity is permissible only on condition that the competent authorities have made certain that the plan or the project will not have lasting adverse effects on the integrity of the site concerned. That is the case where no reasonable scientific doubt remains as to the absence of such effects. (39)

70. The Kingdom of Spain must therefore rule out any reasonable scientific doubt that the continuation of the current practice of groundwater abstraction does not harm protected habitats in the protected areas.

71. To that end, the Kingdom of Spain relies on two other studies in particular, only one of which has been submitted to the Court, however. That study confirms, moreover, that many ponds are associated with the groundwater body and are adversely affected by the lowering of the groundwater level. (40)

72. The other work (41) unfortunately has not been submitted but, according to the Kingdom of Spain in the pre-litigation procedure, only shows that for several centuries there has been a long-term natural trend of desiccation and disappearance of lagoons in the Doñana dune region. Such a trend does not, however, preclude the groundwater abstraction still practised from causing additional adverse effects on the abovementioned habitats.

73. Consequently, the Kingdom of Spain has not rebutted the Commission's arguments. In fact, this would require a comprehensive scientific assessment which determines where the habitat types mentioned by the Commission have occurred in the three protected areas since 19 July 2006 and rules out the possibility that, contrary to the evidence submitted by the Commission, they have been adversely affected by groundwater abstraction. (42)

74. The Kingdom of Spain relies, lastly, on socioeconomic interests in the continuation of groundwater abstraction. Such interests can in fact justify adverse effects on protected areas in accordance with the criteria laid down in Article 6(4) of the Habitats Directive. (43) However, such justification first requires an appropriate assessment of the effects of groundwater abstraction on the protected areas concerned and the satisfaction of the other conditions under that provision. (44) At present, an appropriate assessment has not been carried out with the result that the Kingdom of Spain also cannot be successful with this argument. Furthermore, in the case of adverse effects on priority habitat type 3170*, Mediterranean temporary ponds, the Kingdom of Spain should also have obtained an opinion from the Commission pursuant to the second subparagraph of Article 6(4) of the Habitats Directive.

4. *Interim conclusion*

75. It must therefore be stated that the Kingdom of Spain has infringed Article 6(2) of the Habitats Directive because the Commission has proved a probability of significant adverse effects on protected habitat types in the protected areas ZEP/LIC ES0000024 Doñana, ZEP/LIC ES6150009 Doñana Norte y Oeste and ZEP/LIC ES6150012 Dehesa del Estero y Montes de Moguer as a result of the abstraction of groundwater since 19 July 2006.

C. The obligation to carry out further characterisation of groundwater bodies under Article 5 of the Water Framework Directive, in conjunction with point 2.2 of Annex II thereto

76. By the second plea in law, the Commission alleges that the Kingdom of Spain has misapplied Article 5(1) of the Water Framework Directive, in conjunction with point 2.2 of Annex II thereto, because it has not carried out further characterisation of the groundwater bodies in the Doñana region which are at risk of failing to meet the quality objectives set out in Article 4 of that directive.

77. Under Article 5(1) of the Water Framework Directive, each Member State must ensure that for each river basin district in particular a review of the impact of human activity on the status of groundwater is undertaken according to the technical specifications set out in Annexes II and III and that it is completed at the latest four years after the date of entry into force of that directive (22 December 2004). Article 5(2) provides that the analyses and reviews mentioned under paragraph 1 must be reviewed, and if necessary updated, at the latest 13 years after the date of entry into force of the directive (22 December 2013) and every six years thereafter.

78. Point 2.1 of Annex II to the Water Framework Directive lays down the details of that initial characterisation. Point 2.2 provides that, following the initial characterisation, Member States must carry

out further characterisation of those groundwater bodies which have been identified as being at risk. They are thus intended to establish a more precise assessment of the significance of such risk and identification of any measures to be required under Article 11.

1. Characterisation in the management plans

79. The Commission bases this plea in law, first, on the ground that the Kingdom of Spain wrongly appraised the risk of an infringement of Article 4 of the Water Framework Directive in connection with the first management plan because it indicated in that document that the status of the Almonte-Marismas groundwater body was favourable. Those deficiencies were not rectified by the second management plan. The Commission acknowledges that the division into five groundwater bodies, three of which are of bad quantitative status, allows a better assessment of the situation. Nevertheless, there are still shortcomings.

80. It is surprising that the Commission focuses its criticism of the characterisation of the groundwater bodies on the content of the management plans. The characterisation and the management plan are different documents, which are regulated in different provisions, namely Article 5 and Article 13 of the Water Framework Directive, and are subject to different requirements. In particular, the characterisation must be produced several years before the management plan, for the content of which it then serves as a basis. Accordingly, the first management plan also refers to earlier documents which contained a first diagnosis of water status (45) and in the rejoinder the Kingdom of Spain mentions a first report pursuant to Article 5 of the Water Framework Directive, which was published in 2004 and 2005.

81. The Kingdom of Spain does not claim, however, that the Commission takes issue with the wrong documents but argues that it complied with Article 5 of the Water Framework Directive in the two management plans criticised by the Commission.

82. This approach would be scarcely compatible with Article 5 of the Water Framework Directive as the respective characterisations are intended to be carried out several years before the publication of the management plans. However, the Commission, for its part, does not object to this failure to respect the prescribed periods.

83. It is therefore necessary to consider in detail the objections raised by the Commission and, if need be, to examine whether they are rebutted by the management plans.

2. Deficient risk assessment in the first management plan for 2009 to 2015

84. The accepted facts show that in the first management plan the Kingdom of Spain wrongly appraised the risk of failing to meet the objectives of Article 4 of the Water Framework Directive.

85. According to the second management plan, three groundwater body sub-units were of quantitatively bad status even though, according to the first management plan, in 2015, the Almonte-Marismas composite groundwater body was deemed to be of good status.

86. The Kingdom of Spain was also aware of the risk of this conclusion since, as early as 2004, the Plan de Ordenación del Territorio del Ámbito de Doñana (Land Use Plan for the Doñana Area) recommended that the excessive abstraction of groundwater from the aquifer should be identified. In the reply, the Commission cites two other Spanish reports from 2008 and 2009 in support of that view. (46) In addition, the Kingdom of Spain itself explains that the risk of failing to meet the objectives was raised in the first report from 2004 and 2005, which was required by Article 5 of the Water Framework Directive. (47) Ultimately, this risk is also consistent with the Kingdom of Spain's repeated submission that this status stems from the long-term practice of groundwater abstraction in the Doñana area.

87. The Kingdom of Spain argues that in producing the first management plan it was concluded that there was no risk on the basis of general criteria and in comparison with the situation in other areas of Spain. In the light of the undisputed earlier statements, however, that argument is not sufficient to

demonstrate that the Kingdom of Spain was entitled to rule out the risk of failing to meet the objectives in the first management plan. In particular, the statement that the Almonte-Marismas groundwater body was of good quantitative status overall is not sufficient in this regard. As the Commission rightly states in the reply, further characterisation is necessary where there is a risk of bad status. Such a risk already existed on the basis of the knowledge regarding the sub-units of the groundwater body which were subsequently attested to be of bad status.

88. It must therefore be stated that in the first management plan the Kingdom of Spain infringed Article 5 of the Water Framework Directive because it did not identify the risk of failing to meet the objectives pursuant to point 2.1 of Annex II to the directive and did not carry out further characterisation under point 2.2 of Annex II.

3. *The second management plan*

89. However, upon the expiry of the time limit of 29 June 2016 set out in the reasoned opinion, the second management plan, dated 8 January 2016, was already applicable.

90. It follows from the very terms of the second paragraph of Article 258 TFEU that the Commission may bring an action for failure to fulfil obligations before the Court only if the Member State concerned has failed to comply with the reasoned opinion within the period laid down by the Commission for that purpose. (48) In addition, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion. (49)

91. It may be possible, exceptionally, to plead the unlawfulness of infringements which have ended but have a profound effect. (50) In the present case, however, the infringement of Article 5 of the Water Framework Directive continues to have effect only until the Kingdom of Spain has taken the necessary measures.

92. The Court can therefore find an infringement of Article 5 of the Water Framework Directive only if the second management plan is also incompatible with that provision.

93. The Commission asserts in this regard that the Kingdom of Spain has recognised deficiencies in the second management plan, that the territorial division of the groundwater bodies is deficient, that there are too few measurement points and that the estimate of groundwater abstraction is incomplete. However, only the last of these objections is well founded.

(a) *Recognition of the infringement by the Kingdom of Spain*

94. In the reply, the Commission maintains that the Kingdom of Spain has recognised the infringement. In this regard, it asserts that the Confederación Hidrográfica del Guadalquivir (Guadalquivir Hydrographic Confederation) brought an action for a declaration of 'the risk of not achieving good quantitative status' in respect of the three groundwater bodies at issue which are of bad quantitative status. It is not clear, however, if that declaration provided for in national law corresponds to further characterisation under point 2.2 of Annex II to the Water Framework Directive or if such characterisation would be absent without the declaration.

(b) *The territorial division of the groundwater bodies*

95. In substance, the Commission objects, first of all, to the territorial division of the groundwater bodies. The Commission does not, however, explain to what extent that division constitutes an infringement of the Water Framework Directive or why it prevented an appropriate assessment of groundwater status. This argument is not therefore convincing.

(c) *The number of measurement points*

96. The Commission further maintains that the characterisation of the groundwater bodies was based on inadequate scientific information, namely on an insufficient number of measurement points.

97. The Commission nevertheless fails to explain the requirements laid down in Article 5 of and Annex II to the Water Framework Directive which the Kingdom of Spain's monitoring measures fail to satisfy. There is no mention at all of the specific provisions relating to monitoring of water status in Article 8 and point 2.2 of Annex V.

98. Moreover, the evidence cited in support of the alleged infringement is also unconvincing.

99. The Commission relies on statements allegedly made in the second management plan and a study for 2012 to 2013. It asserts that these show in particular that there is not a single groundwater level measurement point for the La Rocina and Marismas de Doñana groundwater bodies and there are only around 20 measurement points for all five groundwater bodies together. Only four of these date back to the period before 2015.

100. However, the Commission does not submit those documents, contrary to Article 57(4) of the Rules of Procedure, nor does it specify where in the documents those statements were made. It also refers in abstract terms to a Spanish Government Internet portal that offers access to geographical information, without explaining how the information in question can be obtained from that portal.

101. The Commission does not therefore satisfy the burden of proof to which it is subject in an action brought pursuant to Article 258 TFEU. (51)

102. Furthermore, the argument also contradicts the study mentioned by the Commission which the Kingdom of Spain submitted with the defence. In that study, it is stated that the Almonte-Marismas composite groundwater body which existed at the time was monitored at 174 measurement points. That is significantly more measurement points than in other areas of Spain. (52)

103. The Kingdom of Spain contests this complaint and argues that as many as 290 groundwater level measurement points are used in the entire area of Doñana, many more than in the rest of the Guadalquivir river basin district taken together. Of those measurement points, 170 have time series going back to 1994.

104. The Commission does not respond to this argument.

105. The Commission's objections regarding measurement points must therefore be rejected in their entirety.

(d) Gaps in the estimate of abstraction

106. The Commission complains, lastly, that the information on groundwater abstraction was based on estimates in a study from 2008 which ignores illegal abstraction and abstraction for drinking water, in particular for tourism on the coast.

107. The Kingdom of Spain, on the other hand, emphasises the quality of that study and explains in the rejoinder that the scale of abstraction for drinking water, at 5 hm³/year, is low compared with agricultural abstraction of 107 hm³/year. The Kingdom of Spain does not, however, address the specific objections raised by the Commission concerning the estimation of illegal abstraction but confines itself, in connection with the third plea in law, to estimating for the Court the extent of the illegally irrigated land (1 100 hectares) and, on that basis, the number of illegal wells (500).

108. This argument put forward by the Kingdom of Spain is not sufficient to rebut the complaint raised by the Commission. The characterisation of a groundwater body, the assessment of the risk that its quantitative status will be bad and the development of the necessary measures for achieving good status require a full, accurate estimate of groundwater abstraction. Account must therefore also be taken of

abstraction of drinking water, which, after all, corresponds to 4 to 5% of legal abstraction for agricultural purposes. Above all, illegal abstraction must at least be estimated and duly taken into account. Without these factors, the status of the groundwater body cannot be correctly assessed, nor can it be foreseen whether measures to establish good quantitative status of groundwater and to combat illegal abstraction are adequate.

4. *Interim conclusion*

109. The Kingdom of Spain has therefore infringed Article 5(1) of the Water Framework Directive, in conjunction with point 2.2 of Annex II thereto, because, in estimating groundwater abstraction, it did not take account of abstraction of drinking water and illegal abstraction.

D. *The prohibition of deterioration under Article 4(1)(b)(i) of the Water Framework Directive*

110. By the first plea in law, the Commission objects that the Kingdom of Spain did not take the measures necessary to prevent the deterioration of the status of the bodies of groundwater in the Doñana natural area.

1. *Subject matter of the plea in law*

111. Article 4(1)(b)(i) of the Water Framework Directive provides that, for groundwater, Member States must implement the measures necessary to prevent the deterioration of the status of all bodies of groundwater (prohibition of deterioration). Furthermore, under Article 4(1)(b)(ii), Member States must protect, enhance and restore all bodies of groundwater with the aim of achieving 'good status' at the latest by the end of 2015 (requirement for improvement).

112. This plea in law relates solely to the prohibition of deterioration, which is binding at each stage of the procedure prescribed by the Water Framework Directive (53) and, contrary to the view taken by the Commission, was not applicable as from the expiry of the time limit for the implementation of the Water Framework Directive on 22 December 2003. Rather, it has been binding upon the Member States only since 22 December 2009, the date on which Member States were required under the directive to prepare and apply the management plans. (54)

113. It must also be made clear that the Commission's complaint relates solely to the deterioration of the quantitative status of the bodies of water concerned, which the Commission attributes to groundwater abstraction. Although, according to the available documents, there are also problems with the chemical status of groundwater, in particular on account of pollution caused by nitrates, the Commission does not raise any objections in this regard.

114. Lastly, it should be noted that the gaps identified in the characterisation of groundwater status in the Doñana natural area give rise to doubts that the Kingdom of Spain took the measures necessary to prevent deterioration. Both the generally deficient assessment in the first management plan and the failure to take account of illegal groundwater abstraction appear to be significant in this regard. This latter gap in particular makes it difficult to give a full assessment of the evolution of groundwater status. However, the Commission fails to make this link in respect of the allegation of deterioration and it does not therefore fall within the subject matter of the present case.

2. *Deterioration*

115. As proof of deterioration, the Commission relies, first, on the changes in the evaluation of quantitative groundwater status in the first two management plans and, second, on arguments regarding groundwater abstraction.

(a) *Change from good to bad status*

116. The Commission's first line of argument is, in essence, that, in the second management plan, the Kingdom of Spain recognised a quantitative deterioration of three groundwater bodies compared with the first management plan, as the plan for the first period documented good quantitative status of groundwater in the Doñana area, while the plan for the second period showed bad status for three relevant groundwater bodies in that area.

117. It must be conceded, in that regard, that the change from good status to bad status constitutes deterioration.

118. The evolution in question does not, however, prove any deterioration of the groundwater body. The different assessment of quantitative status stems from the fact that the Almonte-Marismas composite groundwater body was assessed for the first period, while for the second period it was divided into five groundwater body sub-units, three of which are of bad status.

119. There are no indications that the status of those groundwater bodies was better before that division. Rather, the factual submissions of both parties suggest that bad status was present during the first period and prior to that, but it was concealed or 'diluted' because they were amalgamated with two other groundwater bodies into a single large groundwater body. (55)

120. The Commission maintains in the reply that even before the first management plan was adopted, consideration was given to classifying the status of the Almonte-Marismas composite groundwater body as bad. This is consistent with the Kingdom of Spain's submission that the status of those groundwater bodies is based on land use taking place before the Water Framework Directive became applicable.

121. Consequently, this argument made by the Commission cannot prove the deterioration of the body of groundwater.

(b) *Deterioration of bad status*

122. It must therefore be examined whether the Commission has showed that the bad status of the three groundwater bodies has further deteriorated.

(i) *Notion of deterioration*

123. To that end, it must be clarified, first of all, under what conditions there is deterioration of bad quantitative status of a body of groundwater within the meaning of Article 4(1)(b)(i) of the Water Framework Directive.

124. The Court has thus far only ruled that groundwater bodies of bad status can also further deteriorate (56) 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 as low as possible. (57)

125. It should also be borne in mind that the object of protection of this prohibition of deterioration is different from the prohibition of deterioration under the Habitats Directive. Article 6(2) of the Habitats Directive protects certain habitats and species, while the prohibition of deterioration at issue under Article 4(1)(b)(i) of the Water Framework Directive protects the quantitative status of a body of groundwater. An infringement of Article 4(1)(b)(i) of the Water Framework Directive does not therefore follow from the already established infringement of Article 6(2) of the Habitats Directive.

126. As the Commission suggests, the deterioration of the quantitative status of a body of groundwater could intuitively be predicated on the evolution of the quantity of groundwater, that is to say, the groundwater level in the earth. Accordingly, its lowering, or the reduction of the quantity of groundwater, would be a deterioration of quantitative status. On this understanding, the prohibition of deterioration would prohibit more groundwater being abstracted than is recharged. According to the second management plan, this occurs in at least two of the groundwater bodies concerned. (58)

127. However, an end to excessive groundwater abstraction is the aim of the *requirement for improvement* under Article 4(1)(b)(ii) of the Water Framework Directive, the infringement of which is not alleged by the Commission. Under that provision, it is necessary to establish a balance between groundwater abstraction and recharge. That balance is consistent, moreover, with the definition of good quantitative status in the first sentence of point 2.1.2 of Annex V, which is to be established in accordance with the requirement for improvement.

128. It would however be inconsistent if, in the prohibition of deterioration and the requirement for improvement, the legislature had created two obligations which both prohibited groundwater abstraction in excess of groundwater recharge.

129. This inconsistency is made clear by the periods for complying with these two obligations. In contrast with the prohibition of deterioration, which had to be complied with by the end of 2009, the requirement for improvement did not have to be met until 2015. In addition, Article 4(4) permits the extension of this transitional period until 2027 under certain conditions and the Kingdom of Spain has availed itself of that extension.

130. Consequently, the prohibition of deterioration of groundwater that is of bad quantitative status cannot require groundwater abstraction to be reduced such that a balance is achieved between groundwater abstraction and recharge, that is to say, less water is abstracted than is recharged. It can only require that even more water not be abstracted than previously so as not to worsen the causes of bad status further.

131. Conversely, simply lowering the groundwater level, that is to say, reducing groundwater reserves, is not to be regarded as deterioration per se. Such lowering or reduction is the inevitable consequence if abstraction exceeds recharge.

132. That conclusion is confirmed if one considers how an *improvement* of continued bad status would look. Such improvement cannot be limited to the case where abstraction is reduced to the quantity of newly added groundwater, as this would already achieve good quantitative status. Rather, any reduction in abstraction is to be acknowledged as an improvement, even if more water continues to be abstracted than is newly added. Nevertheless, it is highly likely that the groundwater level will also continue to fall in this case. Incidentally, the Kingdom of Spain explains that such improvements have been made because of the closure of a large farm.

133. Accordingly, both the definition of good quantitative status and the relationship between the prohibition of deterioration and the requirement for improvement lead to the unintuitive conclusion that neither lowering the groundwater level nor excessive groundwater abstraction from a groundwater body that is not of good quantitative status in itself constitutes deterioration of the body of groundwater.

134. A further deterioration within the scope of bad status would require an increase in the current deficit, that is, *increasing* overexploitation.

135. The present case shows that in all likelihood this restrictive interpretation of the prohibition of deterioration stems from economic considerations made by the legislature. As the Kingdom of Spain feared, an immediate end to excessive abstraction in 2009 would have caused significant harm to agriculture in particular. The transitional periods, on the other hand, allow efforts to be made to find solutions that take into account the interests of agriculture, for example supplying surface water from other areas or technical water-saving measures. In this context, the prohibition of deterioration has the function of preventing the spread of harmful practices, such as intensified groundwater abstraction to irrigate additional land.

136. The expansion of the definition of good quantitative status in the second sentence of point 2.1.2 of Annex V to the Water Framework Directive does not affect this restrictive interpretation of the prohibition of deterioration. Under that provision, a groundwater body of good status is not subject to anthropogenic alterations, that is to say, those caused by human beings, such as would result, in particular, in:

- failure to achieve the environmental objectives specified under Article 4 for associated surface waters,
- any significant diminution in the status of such waters, or
- any significant damage to terrestrial ecosystems which depend directly on the groundwater body.

137. This part of the definition also refers to alterations to flow direction in the groundwater, but such alterations are not at issue in the present case.

138. These characteristics are qualitative in nature and thus supplement the quantitative consideration under the first sentence of point 2.1.2 of Annex V to the Water Framework Directive. A groundwater body which gives rise to the infringement of one of those criteria is of bad status irrespective of any quantitative consideration.

139. However, the deteriorations of surface waters and terrestrial ecosystems mentioned in the second and third indents of the second sentence of point 2.1.2 of Annex V to the Water Framework Directive should not be equated with the deterioration of the quantitative status of the body of groundwater. They may well infringe other prohibitions of deterioration under EU law, such as the prohibition of deterioration of surface waters under Article 4(1)(a)(i) of the Water Framework Directive or the prohibition of deterioration for protected areas under Article 6(2) of the Habitats Directive. In connection with groundwater body status, however, such deteriorations are merely indications that the groundwater body is of bad status.

140. Furthermore, such indications can, in certain cases, be evidence that the quantitative status of a groundwater body is deteriorating by changing from good status to bad status. It is also conceivable that in some cases they can show a further deterioration of a groundwater body that is already of bad quantitative status. Nevertheless, mere deteriorations of surface waters and terrestrial ecosystems are not sufficient indications, as they are to be expected where there is a further lowering of the groundwater level. This applies not only in the case of unchanged abstraction, but also where the groundwater level falls more slowly because abstraction has already been reduced. Deteriorations of surface waters and terrestrial ecosystems indicate the deterioration of the quantitative status of groundwater only where they advance at such a pace that an increase in excessive groundwater abstraction must be assumed.

(ii) Arguments concerning the abstraction balance

141. As regards excessive groundwater abstraction, there is evidence of continued overexploitation, but it has not been demonstrated that overexploitation is increasing. Only such an increase would give rise to an infringement of the prohibition of deterioration. (59)

142. The Commission relies on various documents from Spanish authorities, such as a report by the Guadalquivir Hydrographic Confederation on the status of the aquifer in the Doñana region for the 2015 to 2016 hydrological year. In the conclusions, the Confederation warned that ‘maintaining the current level and nature of use of the groundwater resource ... would jeopardise the good status of that aquifer and the terrestrial ecosystems dependent on it, as is shown by the fact that three of the five groundwater bodies that compose the system do not achieve good quantitative status’. (60) The Andalusian Ombudsman also proposed, in a decision of 10 August 2018, that the Confederation should declare that the Almonte, Marismas and Rocina groundwater bodies are an overexploited aquifer and coordinate the river basins, the different planning instruments for water resources, agricultural activity and the protection of natural areas in an action programme in order to ensure sustainable use of resources. (61) In response to that proposal, according to the submissions of both parties, the Confederation brought an action for a declaration of ‘the risk of not achieving good quantitative status’ for the three groundwater bodies identified.

143. In the defence, the Kingdom of Spain did not counter this specific argument made by the Commission but asserted extensively that existing problems arose from the period before the Water Framework

Directive became applicable and that the competent authorities had already made significant efforts to improve the situation.

144. The Kingdom of Spain nevertheless states that, for the Rocina and Marismas groundwater bodies at least, abstraction exceeds the available groundwater resource, namely by 34% and 7%. In its reply, the Commission asserts that the reports on the status of the aquifer in 2013 to 2017 which the Kingdom of Spain submitted in the defence show its excessive exploitation. In the rejoinder, the Kingdom of Spain concedes that groundwater in the three groundwater bodies of bad status would decline to a greater extent than would be expected on account of lower precipitation levels alone.

145. This argument, like many references to the prohibition of deterioration under the Habitats Directive, (62) effectively claims that the status of at least three groundwater bodies is bad. As with the prohibition of deterioration under the Habitats Directive, this bad status does not mean per se that the status has deteriorated during the relevant period. (63) The Kingdom of Spain instead takes the view that there have already been improvements in many respects.

146. Accordingly, the Commission has not proven that the scale of excessive groundwater abstraction is increasing.

(iii) Arguments concerning surface waters and terrestrial ecosystems

147. The Commission further maintains that there are deteriorations of surface waters and terrestrial ecosystems, which are evidence of the deterioration of the quantitative status of the body of groundwater.

148. It refers in particular in this regard to deteriorations of habitat types, which give rise to an infringement of the prohibition of deterioration under Article 6(2) of the Habitats Directive. (64)

149. However, the Commission shows only that there are indications that the groundwater bodies concerned are of bad status, not that that status has been subject to additional deteriorations.

150. Therefore, this line of argument presented by the Commission must also be rejected and, with it, the allegation of deterioration in its entirety.

(c) Justification of deterioration

151. In case the Court nevertheless finds a deterioration of the quantitative status of the bodies of the groundwater at issue, it is necessary to consider justification.

152. The Kingdom of Spain submits that in the second management plan it availed itself of a derogation pursuant to Article 4(4) of the Water Framework Directive and, on that basis, deferred achieving the quality objectives in Article 4(1)(b) to 2022 or 2027. This was necessary because Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ 1991 L 375, p. 1) had not been complied with adequately and because the area of land used for agricultural purposes could not be reduced. (65)

153. As the Commission rightly explained at the hearing, this argument is irrelevant to the plea in law at issue because Article 4(4) of the Water Framework Directive cannot justify the deterioration of groundwater. This is clear from the prohibition of deterioration in Article 4(1)(b)(i). Under that provision, the prohibition applies subject to the application of Article 4(6) and (7) and without prejudice to Article 4(8) and subject to the application of Article 11(3)(j). In contrast with the requirement for improvement under Article 4(1)(b)(ii), however, Article 4(4) is not mentioned there. Furthermore, Article 4(4) also prescribes that an extension of the transitional period is permissible only provided that no further deterioration occurs in the status of the affected body of water.

154. Deterioration may therefore be justified only under Article 4(7) of the Water Framework Directive. (66) In statements made at the hearing, the Kingdom of Spain expressly confirmed that it is not invoking that justification. There is therefore no need for a further examination of its conditions.

155. Consequently, if the Court were to find a deterioration of groundwater, that deterioration would not be justified.

3. *Interim conclusion*

156. On the basis of the considerations regarding the application of the prohibition of deterioration, however, the complaint of its infringement must be rejected.

E. The programmes of measures under Article 11 of the Water Framework Directive

157. By its third plea in law, the Commission maintains, lastly, that the Kingdom of Spain did not include the appropriate basic and supplementary measures in the management plan for the Guadalquivir river basin district and has thereby failed to fulfil its obligations under Article 11(1), Article 11(3)(a), (c) and (e) and Article 11(4) of the Water Framework Directive.

158. Under Article 11(1) of the Water Framework Directive, each Member State must ensure the establishment for each river basin district, or for the part of an international river basin district within its territory, of a programme of measures, taking account of the results of the analyses required under Article 5, in order to achieve the objectives established under Article 4.

159. In Article 11(3)(a), (c) and (e) of the Water Framework Directive mention is made of some of the basic measures which must be included in such programmes of measures. Article 11(4) refers to the supplementary measures designed and implemented in addition to the basic measures.

160. Just like the objectives of Article 4 of the Water Framework Directive, the criticisms summarised under this plea in law concern various issues.

161. The Commission focuses its criticism on specific measures for establishing good quantitative status for the groundwater bodies concerned and for implementing the requirement for improvement under Article 4(1)(b)(ii) of the Water Framework Directive. However, those objections are not convincing (see under 1).

162. Nevertheless, Article 4(1)(c) of the Water Framework Directive also establishes obligations in respect of the relevant protected areas under the Habitats Directive, which likewise must be taken into consideration in the context of Article 11 of the Water Framework Directive. One objection raised by the Commission falls within this category. It is well founded (see under 2).

1. Specific measures for implementing the requirement for improvement and the prohibition of deterioration under the Water Framework Directive

163. The parties are in dispute over various proposed measures to improve the quantitative status of groundwater, although this discussion is not useful.

164. The programme of measures must be capable of establishing good status within the prescribed time limits. It lies within the discretion of the Member State how it achieves that result provided that it does not breach any specific obligations under EU law. If the Commission considers such a programme to be unsatisfactory, it must therefore show that the measures taken as a whole are insufficient. One starting point for such an objection would be, for example, the already established infringement of Article 5 of the Water Framework Directive, since it is scarcely possible to develop appropriate measures on the basis of incomplete information about the groundwater body. However, this is not the thrust of the Commission's objections.

165. Instead, the Commission objects to specific measures without arguing that those deficiencies make it impossible, overall, to achieve the objectives of Article 4 of the Water Framework Directive. However, the Commission may, in principle, find fault with specific measures in isolation only by reason of infringement of other rules. The Commission's objections are not along these lines, nor are they based on any specific requirements arising from Article 11(3)(a), (c) and (e) and Article 11(4) of the Water Framework Directive.

166. For that reason, this plea in law is unfounded.

167. It is only in case the Court does not concur with this view and nevertheless examines the objections to the specific measures unattached to protected areas that I will discuss them below. However, the arguments relating to the period after the expiry of the time limit of 29 June 2016 set out in the reasoned opinion are irrelevant. (67)

(a) *Legalisation*

168. The Commission objects to the fact that the Kingdom of Spain approved the irrigation of land for the first time when it had already been irrigated in 2004. The abstraction at that time had already been too extensive and could not now be endorsed.

169. In this, however, the Commission confuses the question of the extent to which national law recognises a legitimate interest in the general continuation of irrigation with the question whether and how irrigation as a whole must be reduced. If, by the abovementioned first approval, the Kingdom of Spain regularises existing practices, that does not mean that the necessary reduction is not made. Thus, the Kingdom of Spain can still reduce abstraction, for example by acquiring and setting aside agricultural land, as happened in at least one case. On the other hand, it does not seem to be obligatory to make the necessary reduction specifically at the expense of farmers, who still do not have any formal approval but may claim a legitimate expectation under national law in the continuation of irrigation.

(b) *Allocation of finances*

170. The Commission also criticises the allocation of finances. Of the available budget, 50% was given over to improving and consolidating irrigation plans, but only 0.34% to shutting down illegal wells and 1.12% to monitoring. The Commission does not, however, explain the criteria on the basis of which an appropriate distribution of finances should be reviewed, let alone evidence that those criteria have not been met.

171. The Kingdom of Spain's arguments regarding control measures and penalty measures after the expiry of the time limit set out in the reasoned opinion also show that controls were carried out and infringements were penalised to a considerable extent.

(c) *Supply of surface water for irrigation purposes*

172. Furthermore, the Commission complains that, with a view to reducing groundwater abstraction, the Kingdom of Spain proposes the supply of surface water from neighbouring areas. However, the various objections to this measure raised by the Commission are, in essence, unfounded.

173. In so far as the Commission maintains that adverse effects are merely displaced by such a measure, it cannot be ruled out that this criticism is justified. However, the Commission does not allege or demonstrate a deterioration of the surface waters concerned.

174. The Commission also asserts that the chemical status of groundwater is not improved by this measure. It is not apparent, however, that an infringement related to chemical status forms part of the subject matter of the present case. Moreover, that submission would not preclude the Kingdom of Spain from adopting other appropriate measures to improve the chemical status of groundwater.

175. The Commission's argument that the status of groundwater-dependent ecosystems is not improved by water transfers is unconvincing. If the transfer of surface water decreases consumption of groundwater and perhaps even contributes to groundwater formation through seepage, this benefits those ecosystems.

176. The Commission also asserts that even more groundwater was abstracted in expectation of that supply and, in support of this claim, invokes the temporary approval of the irrigation of 504 hectares of agricultural land. According to unrefuted claims made by the Kingdom of Spain, however, this is previously irrigated land, which was simply regularised.

177. Lastly, the Commission objects that the infrastructure necessary for a water transfer is not yet available. However, by its nature, a programme of measures must be realised progressively with a view to achieving the desired result by a certain date.

2. *Prevention of adverse effects on a protected area – water abstraction at Matalascañas*

178. In addition, the Commission complains that there are no measures to resolve the problems stemming from water abstraction to cover demand from Matalascañas.

179. This town lies on the coast in the immediate vicinity of the protected area ZEPA/LIC ES0000024 Doñana and has a pronounced tourism focus. Water abstraction there, amounting to 2.5 hm³/year, is not particularly extensive compared with overall abstraction, but is cited in various scientific articles as a possible cause of the deterioration of priority habitat type 3170*, Mediterranean temporary ponds, in the surrounding area. (68)

180. Such adverse effects on habitat types protected by the Habitats Directive are significant for the programme of measures under Article 11 of the Water Framework Directive because, under Article 4(1)(c) and Article 6 of, and Annex IV to, the Water Framework Directive, in addition to the general water quality objectives, Member States were also to achieve compliance with any standards and objectives for the protected areas concerned by 2015. Accordingly, the programme of measures must also seek to bring to an end the already established deterioration of protected habitat types such as temporary ponds. (69)

181. This specific obligation is distinct from the obligation to adopt measures to achieve good water status in general, as it requires certain habitats to be protected within the designated protected areas. The Commission's failure to explain why the measures are collectively not sufficient for achieving good quantitative status for groundwater in the Doñana natural area does not therefore affect this specific obligation.

182. Rather, it is sufficient that the Commission has already proved the probability of significant adverse effects on protected habitats in protected areas under the Habitats Directive. That probability relates in particular to the priority habitat type 3170*, Mediterranean temporary ponds, in the vicinity of Matalascañas.

183. In response to this argument, the Kingdom of Spain cites a study which showed that water abstraction at Matalascañas did not adversely affect a certain pond, the Laguna Santa Olalla. However, this finding does not preclude adverse effects on other temporary ponds which are closer to the town or are dependent on other groundwater flows.

184. Consequently, the Kingdom of Spain should have made provision in the programme for appropriate measures to prevent the deterioration of protected habitat types as a result of groundwater abstraction.

185. In contrast, doubts as to deterioration do not justify a complete failure to adopt measures. Rather, an assessment whether protected habitat types have been adversely affected, which has already been addressed in connection with the infringement of the prohibition of deterioration under the Habitats Directive, (70) would at least have been an initial appropriate measure. It could show whether further measures are necessary.

3. *Interim conclusion*

186. The Kingdom of Spain has thus infringed Article 11 of the Water Framework Directive, in conjunction with Article 4(1)(c) thereof, because the programme of measures under the second management plan makes no provision for measures to prevent adverse effects on protected habitat types in the protected area ZEPA/LIC ES0000024 Doñana resulting from water abstraction to cover demand from Matalascañas.

VI. Costs

187. The fact that the Commission has applied for costs and the Kingdom of Spain has not applied for costs has no practical implications, as under Article 138(3) of the Rules of Procedure the parties are to bear their own costs where, as in this case, each party succeeds on some and fails on other heads.

VII. Conclusion

188. I therefore propose that the Court should rule as follows:

- ‘1. The Kingdom of Spain has infringed Article 6(2) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora because the European Commission has proved a probability of significant adverse effects on protected habitat types in the protected areas ZEPA/LIC ES0000024 Doñana, ZEPA/LIC ES6150009 Doñana Norte y Oeste and ZEPA ES6150012 Dehesa del Estero y Montes de Moguer as a result of the abstraction of groundwater since 19 July 2006.
2. The Kingdom of Spain has infringed Article 5(1) of 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, in conjunction with point 2.2 of Annex II thereto, because, in estimating groundwater abstraction, it did not take account of abstraction of drinking water and illegal abstraction.
3. The Kingdom of Spain has infringed Article 11 of Directive 2000/60, in conjunction with Article 4(1)(c) thereof, because the programme of measures under the Plan Hidrológico del Guadalquivir 2016-2021 (Guadalquivir Basin Hydrological Plan 2016 to 2021) makes no provision for measures to prevent adverse effects on protected habitat types in the protected area ZEPA/LIC ES0000024 Doñana resulting from water abstraction to cover demand from Matalascañas.
4. The action is dismissed as to the remainder.
5. The European Commission and the Kingdom of Spain are ordered to bear their own costs.’

¹ Original language: German.

² Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), as amended by Council Directive 2013/17/EU of 13 May 2013 (OJ 2013 L 158, p. 193) (‘the Habitats Directive’).

³ Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 2010 L 20, p. 7), as amended by Council Directive 2013/17/EU of 13 May 2013 (OJ 2013 L 158, p. 193) (‘the Birds Directive’).

[4](#) 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 (OJ 2000 L 327, p. 1), as amended by Commission Directive 2014/101/EU of 30 October 2014 (OJ 2014 L 311, p. 32) ('the Water Framework Directive').

[5](#) <https://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=ES0000024&release=10>.

[6](#) <https://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=ES6150009&release=10>.

[7](#) <https://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=ES6150012&release=10>.

[8](#) Commission Decision 2006/613/EC of 19 July 2006 adopting, pursuant to Council Directive 92/43/EEC, the list of sites of Community importance for the Mediterranean biogeographical region (notified under document number C(2006) 3261) (OJ 2006 L 259, p. 1).

[9](#) <https://natura2000.eea.europa.eu/Natura2000/SDF.aspx?site=ES0000024&release=10>, point 1.7.

[10](#) Real Decreto 355/2013, de 17 de mayo, por el que se aprueba el Plan Hidrológico de la Demarcación Hidrográfica del Guadalquivir (*Boletín Oficial del Estado* No 121 of 21 May 2013, Sec. I, p. 38229) ('the first management plan').

[11](#) TABLA T.II.1. – No 0551.

[12](#) TABLA T.VI.5.

[13](#) Real Decreto 1/2016, de 8 de enero, por el que se aprueba la revisión de los Planes Hidrológicos de las demarcaciones hidrográficas del Cantábrico Occidental, Guadalquivir, Ceuta, Melilla, Segura y Júcar, y de la parte española de las demarcaciones hidrográficas del Cantábrico Oriental, Miño-Sil, Duero, Tajo, Guadiana y Ebro (*Boletín Oficial del Estado* No 16 of 19 January 2016, Sec. I, p. 2972) ('the second management plan').

[14](#) Annex VII to the second management plan, p. 68, and Annex 3.

[15](#) Annex VII to the second management plan, p. 60 (La Rocina does not appear in that table, but this is also clear from the table on p. 68 and from Annex 3).

[16](#) Annex VII to the second management plan, p. 56.

[17](#) See, for example, points 79 and 83 of the invitation to submit observations (Annex A.1 to the action, pp. 72 and 73) and points 58 and 62 of the reasoned opinion (Annex A.3 to the action, pp. 187 and 188).

[18](#) Judgments of 4 March 2020, *Commission v France* (C-241/08, EU:C:2010:114, paragraph 30), and of 24 November 2011, *Commission v Spain* (C-404/09, EU:C:2011:768, paragraph 142).

[19](#) See my Opinions in *Commission v Bulgaria* (C-141/14, EU:C:2015:528, point 86), and *Commission v Greece* (C-504/14, EU:C:2016:105, point 40).

[20](#) Judgments of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraph 59); of 8 November 2016, *Lesoochránárske zoskupenie VLK* (C-243/15, EU:C:2016:838, paragraph 42); and of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* (C-411/17, EU:C:2019:622, paragraph 120).

[21](#) Judgments of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraph 43); of 17 April 2018, *Commission v Poland (Białowieża Forest)* (C-441/17, EU:C:2018:255, paragraph 111); and of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* (C-411/17, EU:C:2019:622, paragraph 134).

[22](#) Judgments of 17 April 2018, *Commission v Poland (Białowieża Forest)* (C-441/17, EU:C:2018:255, paragraph 114), and of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* (C-411/17, EU:C:2019:622, paragraph 120).

[23](#) Judgments of 24 November 2011, *Commission v Spain* (C-404/09, EU:C:2011:768, paragraph 142); of 14 January 2016, *Commission v Bulgaria* (C-141/14, EU:C:2016:8, paragraph 58); and of 10 November 2016, *Commission v Greece* (C-504/14, EU:C:2016:847, paragraph 29). See also judgments of 14 January 2016, *Grüne Liga Sachsen and Others* (C-399/14, EU:C:2016:10, paragraph 42), and of 7 November 2018, *Coöperatie Mobilisation for the Environment and Others* (C-293/17 and C-294/17, EU:C:2018:882, paragraph 85).

[24](#) See my Opinions in *Commission v Bulgaria* (C-141/14, EU:C:2015:528, point 86), and *Commission v Greece* (C-504/14, EU:C:2016:105, point 40), and, with regard to Article 6(4), judgments of 24 November 2011, *Commission v Spain* (C-404/09, EU:C:2011:768, paragraphs 156 and 192), and of 10 November 2016, *Commission v Greece* (C-504/14, EU:C:2016:847, paragraph 30).

[25](#) See judgments of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraph 58), and of 17 April 2018, *Commission v Poland (Białowieża Forest)* (C-441/17, EU:C:2018:255, paragraph 118).

[26](#) See above, point 20.

[27](#) Díaz Paniagua, C., ‘Funcionalidad de los sistemas acuáticos temporales de Doñana en la conservación de flora y fauna’, *Resultados de la Investigación en el Espacio Natural De Doñana*, Oficina de Coordinación de la Investigación, Estación Biológica de Doñana, Consejo Superior de Investigaciones Científicas, 2009, pp. 42-48 (Annex A.14 to the action, p. 528), and Manzano, M. and Custodio, E., ‘El acuífero de Doñana y su relación con el medio natural’, in García-Novo, F. and Marín, C. (eds), *Doñana, Agua y Biosfera*, Confederación hidrográfica del Guadalquivir, Ministerio de Medio Ambiente, Madrid, 2016, pp. 133-142 (Annex A.21 to the action, p. 932).

[28](#) Díaz-Paniagua, C. and Aragonés, D., ‘Permanent and temporary ponds in Doñana National Park (SW Spain) are threatened by desiccation’, *Limnetica*, 34(2), 2015, pp. 407-424, and Bustamante, J., Aragonés, D.

and Afán, I., 'Effect of Protection Level in the Hydroperiod of Water Bodies on Doñana's Aeolian Sands', *Remote Sensing*, 8, 2016, p. 867.

[29](#) Annex A.26 to the action, p. 1259.

[30](#) Tragsatec, *Seguimiento por teledetección de la superficie inundada de las lagunas de los mantos eólicos de Doñana y de la masa vegetal de su entorno* (May 2016), p. 53 (Annex B.9 to the defence, p. 1195 (1247)).

[31](#) Trick, T. and Custodio, E., 'Hydrodynamic characteristics of the western Doñana Region (area of El Abalario), Huelva, Spain', *Hydrogeology Journal*, 12, 2004, pp. 321-335; Custodio, E., Manzano, M. and Montes, C., 'Perspectiva general del papel y gestión de las aguas subterráneas en el Área de Doñana, Sudoeste de España', *Boletín Geológico y Minero*, 119(1), 2008, pp. 81-92 (Annex A.22 to the action, p. 943); and Custodio, E., Manzano, M. and Montes, C., *Las aguas subterráneas en Doñana: Aspectos ecológicos y sociales*, Agencia Andaluza del Agua, Consejería de Medio Ambiente, 2009 (Annex A.23 to the action, p. 956).

[32](#) Custodio et al., 2009 (cited in footnote 31, p. 192 (p. 1147)).

[33](#) See above, point 45, and my Opinion in *Commission v Bulgaria* (C-141/14, EU:C:2015:528, point 134).

[34](#) See judgment of 9 July 2020, *Naturschutzbund Deutschland – Landesverband Schleswig-Holstein* (C-297/19, EU:C:2020:533, paragraph 48), and Opinion of Advocate General Sharpston in *Stadt Papenburg* (C-226/08, EU:C:2009:440, point 59 et seq., in particular point 65).

[35](#) Cited in footnote 27, p. 142 (p. 943 of the annexes to the action).

[36](#) Cited in footnote 29, p. 1261 of the annexes to the action.

[37](#) Plan de Gestión de la Zona Especial de Conservación Doñana Norte y Oeste (ES6150009) (*Boletín Oficial de la Junta de Andalucía*, No 103 – Friday, 31 May 2019, p. 85 (p. 219)).

[38](#) See above, points 42 and 44.

[39](#) Judgments of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraph 59); of 8 November 2016, *Lesoochranárske zoskupenie VLK* (C-243/15, EU:C:2016:838, paragraph 42); and of 17 April 2018, *Commission v Poland (Białowieża Forest)* (C-441/17, EU:C:2018:255, paragraph 117).

[40](#) Cited in footnote 30, pp. 7 and 13.

[41](#) Sousa Martín, A. and García Murillo, P., *Historia ecológica y evolución de las lagunas peridunales del Parque Nacional de Doñana*, Organismo Autónomo Parques Nacionales, Ministerio de Medio Ambiente, Serie Técnica 'Naturaleza y Parques Nacionales'.

[42](#) See, with regard to the requirements for such an assessment, judgment of 7 November 2018, *Holohan and Others* (C-461/17, EU:C:2018:883, paragraphs 37 to 40).

[43](#) See judgments of 24 November 2011, *Commission v Spain* (C-404/09, EU:C:2011:768, paragraphs 156 and 192), and of 10 November 2016, *Commission v Greece* (C-504/14, EU:C:2016:847, paragraph 30); and my Opinions in *Commission v Bulgaria* (C-141/14, EU:C:2015:528, point 134), and *Commission v Greece* (C-504/14, EU:C:2016:105, point 58).

[44](#) Judgments of 20 September 2007, *Commission v Italy* (C-304/05, EU:C:2007:532, paragraph 83); of 17 April 2018, *Commission v Poland (Białowieża Forest)* (C-441/17, EU:C:2018:255, paragraph 191); and of 29 July 2019, *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen* (C-411/17, EU:C:2019:622, paragraph 150).

[45](#) Memoria of May 2013, section 1.2.4.1. (p. 3).

[46](#) Instituto Geológico y Minero de España, *Evaluación de impactos de las extracciones en el acuífero de Almonte Marismas en la zona del Plan Especial de ordenación de los regadíos de la Corona Forestal de Doñana*, 2009 (Annex A.5 to the action) and communication from the Spanish National Research Council to the Andalusian Ombudsman (Annex A.26).

[47](#) Paragraph 70 of the rejoinder.

[48](#) Judgments of 31 March 1992, *Commission v Italy* (C-362/90, EU:C:1992:158, paragraph 9); of 27 October 2005, *Commission v Italy* (C-525/03, EU:C:2005:648, paragraph 13); and of 18 May 2006, *Commission v Spain* (C-221/04, EU:C:2006:329, paragraphs 22 and 23).

[49](#) Judgments of 16 December 1997, *Commission v Italy* (C-316/96, EU:C:1997:614, paragraph 14); of 6 December 2007, *Commission v Germany* (C-456/05, EU:C:2007:755); and of 29 July 2019, *Commission v Austria (Civil engineers, patent agents and veterinary surgeons)* (C-209/18, EU:C:2019:632, paragraph 48).

[50](#) Judgment of 27 March 2019, *Commission v Germany* (C-620/16, EU:C:2019:256, paragraphs 43 to 52).

[51](#) See judgment of 10 November 2016, *Commission v Greece* (C-504/14, EU:C:2016:847, paragraph 112).

[52](#) Confederación Hidrográfica del Guadalquivir, *Informe del estado de la Masa de agua subterránea Almonte-Marismas – Año hidrológico 2012-2013*, March 2014, p. 5 (Annex B.2 to the defence, p. 89).

[53](#) Judgment of 28 May 2020, *Land Nordrhein-Westfalen* (C-535/18, EU:C:2020:391, paragraphs 72 and 73).

[54](#) Judgments of 11 September 2012, *Nomarchiaki Aftodioikisi Aitolokarnanias and Others* (C-43/10, EU:C:2012:560, paragraphs 53 and 56), and of 4 May 2016, *Commission v Austria* (C-346/14, EU:C:2016:322,

paragraph 49).

[55](#) See above, points 21 and 22.

[56](#) Judgments of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland* (C-461/13, EU:C:2015:433, paragraph 69), and of 28 May 2020, *Land Nordrhein-Westfalen* (C-535/18, EU:C:2020:391, paragraphs 97, 98 and 110).

[57](#) Judgments of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland* (C-461/13, EU:C:2015:433, paragraph 67), and of 28 May 2020, *Land Nordrhein-Westfalen* (C-535/18, EU:C:2020:391, paragraph 101).

[58](#) See above, point 22.

[59](#) See above, point 134.

[60](#) Confederación Hidrográfica del Guadalquivir, Informe de estado de los acuíferos del entorno de Doñana – Año hidrológico 2015-2016, April 2017 (Annex A.15 to the action (p. 674 of the annexes)).

[61](#) Sugerencia del Defensor del Pueblo Andaluz: Protección del agua subterránea de Almonte, Marismas y Rocina, en Doñana. Declaración de acuífero sobre explotado y aprobar un programa de actuación que garantice su uso sostenible, queja número 17012981, 10 August 2018 (Annex A.16 to the action (p. 870 of the annexes)).

[62](#) See above, points 50 to 57.

[63](#) See above, points 59 to 62.

[64](#) See above, points 50 to 57.

[65](#) P. 19 of Annex VIII to the second management plan.

[66](#) Judgments of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland* (C-461/13, EU:C:2015:433, paragraph 50); of 4 May 2016, *Commission v Austria* (C-346/14, EU:C:2016:322, paragraph 64); and of 28 May 2020, *Land Nordrhein-Westfalen* (C-535/18, EU:C:2020:391, paragraph 75).

[67](#) See above, point 90.

[68](#) Manzano, M. and Custodio, E., ‘El acuífero de Doñana y su relación con el medio natural’, in García-Novo, F. and Marín, C. (eds), *Doñana, Agua y Biosfera*, Confederación hidrográfica del Guadalquivir, Ministerio de Medio Ambiente, Madrid, 2016, p. 133 (137) (Annex A.21 to the action, p. 932); communication from the Spanish National Research Council to the Andalusian Ombudsman (Annex A.26 to the action, p. 1259 (1262));

Tragsatec, *Seguimiento por teledetección de la superficie inundada de las lagunas de los mantos eólicos de Doñana y de la masa vegetal de su entorno* (May 2016), p. 53 (Annex B.9 to the defence, p. 1195 (1247)).

[69](#) See above, point 48 et seq.

[70](#) See above, points 73 and 74.