

Case No:76709
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Decision No: 008/17/COL

EFTA SURVEILLANCE
AUTHORITY

EFTA SURVEILLANCE AUTHORITY DECISION

of 18 January 2017

closing a complaint case arising from an alleged failure by Norway to comply with *Directive 2000/60/EC of the European Parliament and the Council establishing a framework for Community action in the field of water policy* by approving a mining project and a proposal to dispose of mining tailings in the Førde Fjord

THE EFTA SURVEILLANCE AUTHORITY

Having regard to the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, in particular Article 31 thereof,

Whereas:

On 13 January 2015¹, the EFTA Surveillance Authority (“the Authority”) received a complaint against Norway alleging that the application process relating to the proposed mining project to extract rutile from the Engebø mountain, in conjunction with a proposal to dispose of mining tailings in the Førde Fjord, had not respected the requirements of the Water Framework Directive² (“WFD”) and that the project would have negative environmental effects for Atlantic salmon. On 17 April 2015, the complainant informed the Authority by email that the Norwegian Government had granted approval for the mining project at Engebø mountain³. The Authority has examined the complaint as it relates to the granting of the permit to carry out mining activities and the disposal of mining tailings in the Førde Fjord.

According to the complaint, the decision to grant permission for mining activities to take place, in particular the dumping of mining tailings in the Førde Fjord would result in a significant deterioration of environmental conditions in the fjord, the relevant water courses and the surrounding coastal area resulting in direct, negative consequences for Atlantic salmon and other anadromous fish of the salmon family including sea trout.

¹ Documents No. 734709, 734763-734765.

² 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. The Act is incorporated into point 13ca of Chapter II of Annex XX to the EEA Agreement by Joint Committee Decision 125/2007 of 28 September 2007.

³ Document No. 770770.

1 Correspondence

On 23 January 2015, the Authority wrote to the Norwegian Government informing it of the receipt of the complaint⁴. The letter also asked the Norwegian Government to provide information regarding the mining project to allow the Authority to assess the case in more detail. Norway responded by letter dated 27 February 2015⁵. By email dated 17 April 2015⁶, the complainant informed the Authority that the Norwegian Government had given its approval for mining activities in Engebø mountain to begin⁷. Following this, the Authority sent a further request for information to Norway on 28 April 2015⁸. The Norwegian Government responded to that request by letter dated 12 June 2015⁹.

The case was discussed with the Norwegian Government at the package meeting which took place in Oslo on 12-13 November 2015. Pursuant to those discussions, the Norwegian Government provided further information by emails dated 8 January 2016¹⁰. By email dated 19 February 2016, the Norwegian Government provided the Authority with a copy of the decision from the King in Council, dismissing the appeal against the decision to grant a permit under the Norwegian Pollution Control Act¹¹.

2 The Water Framework Directive – the Authority’s assessment

The WFD establishes a framework for action in the field of water policy. Specifically, it commits States to achieving good qualitative and quantitative status of all water bodies. Article 4(7) WFD provides for an exemption from the general obligation both to achieve good groundwater status and to prevent deterioration from high status to good status where certain conditions are met. This has been implemented in Norway through Article 12 of the Water Regulation.

The Authority’s review of the Norwegian Government’s decision is limited to determining whether there has been a manifest error in its assessment. Any review by the Authority of the decision of the Norwegian Government to grant a permit to carry out mining activities is therefore limited. In carrying out its review, the role of the Authority is not to evaluate the merits of Norway’s decision, nor can it re-assess the evidence relied upon by it in the decision. The scope of the Authority’s review is limited to reviewing the process by which the Norwegian Government’s decision was reached and to assess whether the decision making was in line with the requirements of the WFD and whether there was any manifest error of assessment on the part of Norway.

2.1 Decision to grant a permit on the basis of Article 4(7) WFD

Article 4(7) WFD provides that an exemption is possible for either i) new modifications or ii) new sustainable human development activities. The Authority notes that the deterioration of water status, as assessed by the Norwegian Ministry of Climate and

⁴ Document No. 742749.

⁵ Document No. 748008.

⁶ Document No. 770770.

⁷ On 17 April 2015, the zoning plan concerning the mining project at Engebø mountain was approved by the Ministry of Local Government and Modernisation. On the same day the Ministry of Climate and the Environment decided to grant permission for the project under the Pollution Control Act.

⁸ Document No. 755435.

⁹ Document No. 760523.

¹⁰ Documents No. 794560, 794566.

¹¹ Document No. 795516.

Environment (“the Ministry”) will result from hydro-morphological changes to the seabed, i.e. changes to the physical characteristics of the shape, boundaries and content of the water body.

In its decision, which was based on the assessment work carried out by the Norwegian Environment Agency, the Ministry considered whether other elements, in particular chemical and physico-chemical elements, could have a negative impact on the quality elements relevant to the status of the water body. The Authority notes the Ministry’s conclusion that the chemical status of the water body will not deteriorate as a consequence of the disposal of mining tailings. In particular, the Ministry found that based on modelling, it was unlikely that the particle dispersion would have a negative impact outside the disposal site area¹².

Having considered the Ministry’s detailed reasoning as set out in its decision to grant a permit of 5 June 2015, the Authority is satisfied that the Ministry was entitled to consider that, were the project to go ahead, the deterioration in the water status would be as a result of hydro-morphological changes and to proceed with its assessment on that basis.

The Authority notes that the Court of Justice of the European Union (“CJEU”) has held that a State is “*required to refuse authorisation for a project where it is such as to result in deterioration of the status of the body of water concerned or to jeopardise the attainment of good surface water status, unless the view is taken that the project is covered by a derogation under Article 4(7) of the [WFD]*”¹³.

In its decision to grant the permit, the Ministry found that the disposal of mining tailing would lead to a change in the seabed conditions in the outer Førde Fjord, and then assessed whether the change would lead to a deterioration of the ecological status of the water body. It noted that the benthic fauna was the quality element most sensitive to the disposal of tailings¹⁴. The Ministry found that the benthic fauna in the disposal area would disappear while the disposal took place and determined that the project would therefore cause the ecological status of the water body to deteriorate to poor. The Ministry further found that the water body’s status would be presumed to remain very poor as long as the disposal took place and for a very long period of time thereafter. As such, an exemption pursuant to Section 12 of the Water Regulation was considered necessary in order to permit the disposal.

The Ministry determined that, according to section 12 of the Water Regulation, the physical changes to the body of water that would result from the disposal of mining tailings would be permissible if i) all practicable mitigation measures were taken to limit the negative development of the water body’s status; ii) the benefits to society of the mining operation exceeded the loss of environmental quality; and iii) the purpose of the mining activity could not reasonably be achieved by other means that are significantly better for the environment because of a lack of technical feasibility or disproportionate costs.

2.1.1 Mitigation measures

¹² Decision 13/4417 to grant a permit for mining activities at Engebø mountain, of 5 June 2015, Royal Norwegian Ministry of Climate and Environment, at section 4.6.1. Document No. 761885.

¹³ Case C-346/14, *Commission v Austria*, EU:C:2016:322 at paragraph 64.

¹⁴ See page 19-20 of Decision 13/4417.

The Authority understands the concept of mitigation, in the context of Article 4(7) WFD, to mean those measures which aim to minimise or even cancel out the adverse impact on the status of the body of water. The Authority notes that the wording of Article 4(7) makes it clear that “mitigation measures” do not refer to all possible measures being taken. According to guidance drawn up by the Commission, “*all practicable steps*” is to be understood as meaning that the mitigation measures should be technically feasible, should not lead to disproportionate costs and that the measures are compatible with the foreseen modifications¹⁵. The Authority notes that the appropriateness of specific mitigation measures will depend on the adverse ecological effects of the physical modifications in question; on the effectiveness of the measures regarding, in particular, the improvements of the ecological condition and on the technical feasibility and the cost-effective analysis of implementing the measures at the site.

In its assessment of whether the mining project met the requirements as regards mitigation, the Ministry noted that the negative impacts as regards the effects on the benthic fauna disposal site could not be mitigated. However, they did require that measures be taken to ensure that otherwise the water status at the disposal site was at the highest level it could be. This includes monitoring measures being established, mitigating measures being put in place, e.g. mitigation measures linked to the discharge system to limit particle dispersion from the disposal site and, if necessary, the Ministry required that activities should be discontinued to avoid deterioration in the environmental status of the water body¹⁶. The terms of these measures can be found on page 28 of the Ministry’s decision¹⁷.

In its decision to grant a permit to carry out mining activities, the Ministry specifically considered the possible impacts of the project on wild salmon. It considered in particular the impacts on smolts’ outward migration, the effects on smolts in the case of an accidental discharge of particles, the concentration of particles in the upper water layers where salmon are mainly found, and the effects of blasting from the mine during periods of migration, in particular in relation to salmon from the national salmon watercourse Nausta. Having assessed all the evidence presented to it, the Ministry concluded that concerns with regards to smolts were primarily linked to blasting at the mine. Overall, the Ministry assessed that the risk of significant damage to salmon was small. They did however require that monitoring be established to avoid the occurrence of negative impacts on salmon.

In its ruling upholding the decision of the Ministry, Norway found that there was a degree of uncertainty regarding the smolts’ outward migration period, and the effects from the blasting in the mountain. As a result, it ruled that the conditions detailed in Section 12 of the permit should be changed and provisions inserted which required that the smolt be continuously surveilled, and that the information gathered as a result of this surveillance should form the basis for determining those periods when blasting should be avoided.

¹⁵ Common Implementation Strategy for the Water Framework Directive, Guidance Document No. 20 ‘*Guidance on Exemption to the Environmental Objectives*’, published by the European Commission available at: http://ec.europa.eu/environment/water/water-framework/economics/pdf/Guidance_document%2020.pdf

¹⁶ See section 4.6.7 of the Ministry of Climate and Environment’s Decision 13/4417 to grant a permit for mining activities, 5 June 2015.

¹⁷ For the detailed terms of these conditions see the Ministry’s Decision 13/4417 Section 7.1, 7.2, 9.2, 9.3, 11 and 12.

The Authority notes that having identified a number of uncertainties in relation to the environmental effects of the project, Norway has put in place a number of mitigation and monitoring measures designed to limit and reduce negative impacts.

It is clear from the case law of the CJEU that, when assessing whether a State has complied with its obligations under a directive, the burden of proof lies with the Authority¹⁸. Having reviewed the assessment of mitigation measures carried out by the Ministry, the Authority cannot conclude that Norway has failed to demonstrate that the condition set out in Article 4(7)(a) WFD has been fulfilled.

2.1.2 *Assessment of benefits and losses*

The Authority notes that, in relation to the condition set out in Article 4(7)(c) of the WFD, the CJEU has found that States enjoy a certain margin of discretion for determining whether a project is of overriding public interest¹⁹. This is because the WFD establishes common principles and an overall framework for action in relation to water protection and coordinates, integrates and, from a longer perspective, develops the overall principles and the structures for protection and sustainable use of water. The CJEU has noted that as those principles and that framework are to be developed subsequently by States by means of the adoption of individual measures the WFD does not seek to achieve complete harmonisation of the rules concerning water²⁰.

In its decision to issue a permit, the Ministry carried out an exercise balancing on the one hand the environmental damage and negative impacts of the project against the benefits to society. The Ministry identified the future income from mining operations as the main benefit to Norwegian society²¹. In addition, it noted that the construction and operation of the mine would create employment, both directly and indirectly. The Ministry also set out the negative environmental impacts of the mining project, noting that these mainly concerned the consequences of the sub-marine disposal of tailings in the fjord. The Ministry recognised that there is a degree of uncertainty related to potential environmental damage caused due to particle dispersion from mining tailings. However, it concluded, on the basis of a number of studies and calculations, that there was a low risk associated with the tailings²². As far as heavy metals were concerned, the Ministry found that while the tailings will contain heavy metals, these correspond with the natural background values in the relevant area.

The Authority notes that the Ministry's decision sets out in a detailed manner the reasons for the project, its impact on the environment, as well as considering the balance between the advantages and disadvantages. Moreover, the Ministry's decision is based on a detailed assessment carried out by the Norwegian Environment Agency. The Authority observes that, according to the findings of the Ministry, the project will lead to the creation of employment and the generation of income in the long term and that the project overall will produce large revenues for society. It is to be reiterated that it is not within the scope of the Authority's review to assess the merits of such a policy choice on the part of the Norwegian Government.

¹⁸ Case C-306/08 *Commission v Spain* EU:C:2011:347, at paragraph 94.

¹⁹ Case C-346/14, *op. cit.*, at paragraph 70.

²⁰ Case C-346/14, *op. cit.*, at paragraph 70.

²¹ See Section 6 of the Ministry's Decision 13/4417 to grant a permit for a full discussion of advantages and distributional effects.

²² As noted previously, the Ministry has also imposed a condition related to the monitoring of particle dispersion as well as measures to prevent the dispersion of particles from the sub marine disposal site.

As set out above, the Authority's review of the Ministry's assessment is limited to determining whether there has been a manifest error in its assessment of whether the condition set out in Article 4(7)(c) WFD has been met. Having reviewed the Ministry's assessment of the benefits and disadvantages of the mining project, the Authority considers that the Norwegian authorities have not committed a manifest error of assessment. Accordingly, the Authority finds that the Ministry was entitled to conclude that the project would give rise to benefits which were of overriding public interest.

2.1.3 Alternatives to sub-marine disposal

In its decision to grant a permit, the Ministry carried out a detailed analysis of whether, having regards to cost and technical feasibility, the mining activities and disposal could be performed in a way that was substantially environmentally better than the one for which the permit application was made. The Ministry discounted disposal on land on the basis that there was no feasible site and so moved to a consideration of 3 alternative sub-marine sites for the disposal of tailings²³.

Having identified the best option among these alternatives, the Norwegian Environment Agency then carried out a comparison of the environmental impacts the project would have at both the Vassetvatnet and Førde fjord site²⁴. The Ministry noted that the project would bring about substantial environmental impacts whichever site was chosen but that the ecosystem and species that would be affected differ across the two sites. In its decision, based on the recommendation of the Norwegian Environmental Agency, the Ministry found that Vassetvatnet was not considered to be a significantly better environmental option than the disposal solution set out in the application for a permit.

Having reviewed the Ministry's assessment of the alternatives to the sub-marine disposal of mining tailings in the Førde fjord, the Authority has been unable to conclude that there was a manifest error and finds that the Ministry was entitled to conclude that there was no other significantly better environmental option than the disposal solution foreseen in the permit.

2.1.4 Compliance with Article 4(8) WFD

Article 4(8) WFD requires Norway to ensure that the granting of an exemption under Article 4(7) WFD will not permanently exclude or comprise the achievement of the Directive's objectives in other bodies of water within the same river basin district and is consistent with the implementation of other Community environmental legislation. The decision of the Ministry makes it clear that the negative environmental effects from the project will be linked largely to the area affected by the disposal of mining tailings in the fjord, i.e. the water body in the outer Førde fjord. In its view, it is only these physical changes that will lead to a deterioration in water status, and no other aspects of the project will result in a deterioration in ecological status. Specific monitoring requirements have been established to ensure that the status of the body of water and adjacent water bodies does not deteriorate more than expected, along with a condition that activities must be stopped if monitoring shows a deterioration in ecological status beyond that which is foreseen.

²³ These were disposal at the Redalen dam, at the Redalsvika bay and in the Vassetvatnet lake.

²⁴ Environment Agency document of 15 November 2012 entitled, 'Nordic Mining/Engebø - vurdering av miljøkonsekvenser ved deponi i Førdefjorden versus Vassetvatnet'.

In assessing whether a State has complied with its obligations under the WFD, the burden of proof lies with the Authority. The Authority's review of the Ministry's decision is limited to determining whether there has been a manifest error in its assessment. Having considered the Ministry's assessment and in particular in view of the monitoring conditions which impose a requirement to monitor adjacent water bodies, the Authority is satisfied that no manifest error has been committed in the application of Article 4(8) WFD.

2.1.5 Compliance with Article 4(9) WFD

A further condition for the granting of an exemption under Article 4(7) WFD is that it guarantees at least the same level of protection as existing Community legislation. The Commission has issued guidance on this to explain that an exemption granted under Article 4(7) WFD cannot be used to deviate from objectives and obligations set by other pieces of EEA legislation. In particular, the purpose of this provision is to ensure that by granting an exemption under the WFD, States do not circumvent the provisions of the so-called 'wildlife directives'²⁵.

The Authority observes that the EU legislation in relation to biodiversity as well as specific conservation measures for birds and habitats has not been incorporated into the EEA Agreement²⁶. As a result, there is a distinct difference between the way in which Article 4(9) WFD is to be interpreted as regards the EEA EFTA States compared with the EU Member States. The complainants have not identified, nor has the Authority been able to identify as relevant, any other piece of EU environmental legislation applicable to the present case.

3 Conclusion

On the basis of its review of the Ministry's decision to grant a permit to carry out mining activities, which is limited as described above, the Authority is satisfied that Norway was entitled to conclude that the project was justified on the basis of overriding public interest and that all practicable steps have been taken to mitigate its adverse impacts and that the objectives pursued could not, for reasons of technical feasibility or disproportionate cost, be achieved by other means which would have represented a significantly better environmental option. As such, the Authority finds that the conditions for exemption as set out in Article 4(7) WFD have been met and that accordingly, Norway is not in breach of its obligations under Article 4 WFD.

By letter of 14 June 2016, the Internal Market Affairs Directorate informed the complainant of its intention to propose to the Authority that the case be closed.²⁷ The complainant was invited to submit any observations on the Directorate's assessment of the complaint or present any new information by 29 July 2016. By email sent on 11 August

²⁵ Commission Document: 'Links between the Water Framework Directive and Nature Directives' – Frequently asked questions, December 2011. The document refers to *Council Directive 79/409/EEC on the conservation of wild birds* ("the Birds Directive") and *Directive 92/43/EEC on the conservation of natural habitats and of wild flora and fauna* ("the Habitats Directive"). It can be accessed under <http://ec.europa.eu/environment/nature/natura2000/management/docs/FAQ-WFD%20final.pdf>

²⁶ It is to be noted that specific reference is made to the relevant EU legislation not being applicable to EFTA States in Joint Committee Decision 125/2007 incorporating the WFD into the EEA Agreement.

²⁷ Document No. 794553.

2016²⁸, the complainant requested further time to respond to the Authority's letter. On the same day the Authority responded, extending the deadline to respond until 21 August 2016²⁹. By email sent on 22 August 2016, the complainant submitted a number of further observations for consideration³⁰. However, the Authority does not consider that this reply alters the conclusions set out in its letter of 14 June 2016.

There are, therefore, no grounds for pursuing this case further.

HAS ADOPTED THIS DECISION:

The complaint case arising from an alleged failure by Norway to comply with its obligations arising from Article 4 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*, is hereby closed.

For the EFTA Surveillance Authority

Sven Erik Svedman
President

Helga Jónsdóttir
College Member

This document has been electronically signed by Sven Erik Svedman, Helga Jonsdottir on 18/01/2017

²⁸ Document No. 817501.

²⁹ Document No. 817504.

³⁰ Document No. 820956.