

EFTA SURVEILLANCE AUTHORITY DECISION

of 8 December 2021

closing a complaint case arising from an alleged failure by Norway to comply with 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 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 22 December 2015, the EFTA Surveillance Authority (“the Authority”) received a complaint¹ (“the complaint”) from several organisations (“the complainants”) against Norway alleging that that Norway has acted in breach of EEA law, in particular in breach of the provisions contained within the Water Framework Directive (“WFD”)² by issuing, renewing and/or failing to withdraw permits allowing mining companies to dispose of tailings (i.e. mining waste including chemicals of concern) directly into Norwegian fjords, particularly:

- (1) Repparfjord (Nussir AS) and
- (2) Førdefjorden (Nordic Mining AS).

For efficiency, the Authority has addressed this complaint by focusing its analysis on the permit allowing disposal of mining waste into Repparfjord (Nussir AS). The legal conclusions set out in this closure decision shall apply *mutatis mutandis* to the permits granted in relation to Førdefjorden (Nordic Mining AS).

As regards the Repparfjord marine site (Nussir AS), the complaint states, amongst other things, that Norway has failed to comply with the provisions of the WFD by permitting the disposal of 1-2 million tonnes of mining waste including chemicals of concern, each year from the Nussir copper mine into Repparfjord.

However, as regards to the argument raised by the complainants that the complaint provides new information that proves that past environmental impact assessments were flawed and underestimated the damage to the aquatic environment resulting from the disposal of mining waste into Førdefjorden, that is addressed separately.³

¹ Document No 873634.

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 (OJ L 327, 22.12.2000, p.1).

³ See Section 5 of this closure decision.

1 Factual background

On 17 October 2011, Nussir AS applied for a permit under the Norwegian Pollution Control Act⁴ to carry out extraction of copper from the Nussir and Ulveryggen mountains in the municipality of Kvalsund, Finnmark. On 20 March 2014, the zoning plan concerning the mining project in Nussir and Ulveryggen was approved by the Ministry of Local Government and Modernisation. On 8 December 2015, the Norwegian Environment Agency issued a draft decision to permit Nussir AS to carry out mining activities for the extraction of copper from Nusser and Ulveryggen mountains. The draft decision included a permit to deposit mining tailings in Repparfjord.

The formal decision granting the permit was issued by the Norwegian Environment Agency on 15 January 2016 (“Contested Act”).⁵ Complaints were filed by Norske lakseelver on 28 December 2015, by Sametinget on 8 January 2016 and by Naturvernforbundet and Natur og Ungdom (joint complaint) on 5 February 2016. By letter of 9 June 2016, the Environment Agency sent the complaints to the Ministry of Climate and Environment (“the Ministry”) for consideration and final decision, as the Environment Agency found that the complaints did not provide grounds for amending the permit.⁶ By a decision dated 19 December 2016, the Ministry upheld the Environment Agency’s decision to grant the permit, upon appeal.⁷

2 Correspondence

On 22 December 2015, the Authority wrote to the Norwegian Government informing it of the receipt of the complaint,⁸ and on the same date, the Authority sent a letter of acknowledgement to the complainants.⁹

By letter of 6 January 2016, the Authority asked the Norwegian Government to provide information regarding the mining project to allow the Authority to assess the case in more detail.¹⁰ Norway responded to the Authority’s request for information by letter dated 5 February 2016 and submitted relevant documents.¹¹

By email dated 19 April 2016, the complainants provided additional information and documents in support of the complaint.¹² By email dated 24 June 2016, the Norwegian Government provided the Authority with a copy of the Norwegian Environment Agency’s letter of 9 June 2016, sending the complaints to the Ministry of Climate and Environment for appeal.¹³

The case was discussed with the Norwegian Government at the package meeting which took place in Oslo on 27-28 October 2016, but at that time the matter was still under appeal to the Ministry. By email dated 21 December 2016, the Norwegian Government sent the Authority a copy of the Ministry’s final decision of 19 December 2016.¹⁴

⁴ LOV-1981-03-13-6: Lov om vern mot forurensninger og om avfall (forurensningsloven).

⁵ Ref. 2016/398. Document 792125, Document 792128 and Document 847610.

⁶ Ref. 2016/398.

⁷ Ref. 12/5816.

⁸ Document No 786199.

⁹ Document No 786193.

¹⁰ Document No 786743.

¹¹ Document No 792125.

¹² Document No 801140.

¹³ Document No 809991.

¹⁴ Document No 835477.

3 Legal framework

3.1 EEA law: The Water Framework Directive (“WFD”)

The WFD is a framework directive which aims to achieve a high level of protection of the aquatic environment by establishing a long-term sustainable water management framework.¹⁵

The WFD was incorporated into point 13ca of Annex XX to the EEA Agreement by Decision of the EEA Joint Committee No 125/2007 of 28 September 2007.¹⁶ It applied in the EEA on 1 May 2009. The Decision of the EEA Joint Committee contains a number of adaptations, in particular with regard to the time limits mentioned in the WFD, meaning that, in respect of the EEA EFTA States, the time limits prescribed in the relevant provisions of the WFD started to run from the compliance date, i.e. 1 May 2009.¹⁷

EEA EFTA States’ surface water bodies must adhere to “good ecological status” and “good chemical status” by 1 May 2024.¹⁸ “Good ecological status” is established on the basis of specific criteria and boundaries in accordance with Annex V of the WFD, and through biological quality elements (“BQEs”) as well as the hydro-morphological, chemical and physico-chemical elements supporting the biological elements. According to the terminology of the WFD, the ecological status or potential status of a body of water is expressed in terms of classes (e.g. “high”, “good”, “moderate”, “poor” or “bad”).¹⁹ As regards “good chemical status”, chemical status is determined taking into account, amongst other things, priority substances and certain other pollutants, and the environmental quality standards (“EQSs”) for chemicals.²⁰ The chemical status of water bodies is classified as being either “good” or “failing to achieve good”.²¹

Article 2 WFD defines “good ecological status” and “good surface water chemical status” as:

“22. ‘Good ecological status’ is the status of a body of surface water, so classified in accordance with Annex V.

¹⁵ See to that effect Recital 19 and 25 of the Preamble of the WFD; Case C-461/13, *Bund für Umwelt und Naturschutz Deutschland eV v Bundesrepublik Deutschland*, EU:C:2015:433, para 34-35 (hereinafter referred to as “Case C-461/13, *Bund für Umwelt und Naturschutz Deutschland*”); relevant Common Implementation Strategy Guidance for the Water Framework Directive and the Floods Directive (“CIS Guidance Documents”), https://ec.europa.eu/environment/water/water-framework/facts_figures/guidance_docs_en.htm (such as Common Implementation Strategy Guidance Document No. 36, *Exemptions to the Environmental Objectives according to Article 4(7)* (“CIS Guidance Document No 36”), https://ec.europa.eu/environment/water/water-framework/facts_figures/guidance_docs_en.htm, para 1.3).

¹⁶ OJ L 047, 21.2.2008, p. 53; EEA Supplement No 9, 21.2.2008, p. 41.

¹⁷ According to Article 1(1)(b) of the Joint Committee Decision “*The time limits mentioned in Articles 4(1)(a)(ii) and (iii), 4(1)(b)(ii), 4(1)(c), 5(1) and 5(2), 6(1), 8(2), 10(2), 11(7) and 11(8), 13(6) and 13(7) as well as 17(4) of the Directive, which run from the date of entry into force of the Directive shall be understood to run from the date of entry into force of the Decision of the EEA Joint Committee No 125/2007 incorporating this Directive into the Agreement*”.

¹⁸ 1 May 2015 for EU Member States.

¹⁹ Annex V WFD, and Case C-346/14, *European Commission v Republic of Austria*, EU:C:2016:322, para 58 (hereinafter referred to as “Case C-346/14, *Commission v Austria*”).

²⁰ Article 16 WFD. The concentrations of these substances should only be taken into account in the classification of surface water chemical status and not in the classification of ecological status/potential. However, if any of the biological quality elements are found, from biomonitoring, to be showing adverse effects from exposure to these substances (e.g. direct ecotoxicological effects), these effects must be taken into account when classifying ecological status/potential – See Common Implementation Strategy Guidance Document No.36, page 17.

²¹ See Annex V, 1.4.3, WFD.

[...]

24. ‘Good surface water chemical status’ means the chemical status required to meet the environmental objectives for surface waters established in Article 4(1)(a), that is the chemical status achieved by a body of surface water in which concentrations of pollutants do not exceed the environmental quality standards established in Annex IX and under Article 16(7), and under other relevant Community legislation setting environmental quality standards at Community level.”

The environmental objectives that EEA States are required to achieve under the WFD are set out in Article 4 of the WFD and include requirements for EEA States to implement measures to ensure that the natural surface water bodies adhere to “good ecological status” and “good chemical status” and that the deterioration of the status of water bodies is prevented (“non-deterioration principle”).²²

As regards the non-deterioration principle, it is settled case-law that the Article 4 WFD environmental objectives require:²³

- (1) EEA States to implement the necessary measures to prevent deterioration of the status of all bodies of surface waters (“obligation to prevent deterioration”); and
- (2) EEA States to protect, enhance and restore all bodies of surface water (“obligation to enhance”).

In line with the non-deterioration principle, the WFD aims at the “progressive reduction” of emissions of hazardous substances into water, the cessation or phasing-out of pollution through discharge, emissions, or loss of priority substances and the understanding that EEA States should adopt measures “to eliminate” pollution from priority substances.

Article 4 WFD states that:

“1. In making operational the programmes of measures specified in the river basin management plans:

(a) for surface waters

- (i) Member States shall implement the necessary measures to prevent deterioration of the status of all bodies of surface water, subject to the application of paragraphs 6 and 7 and without prejudice to paragraph 8;*
- (ii) Member States shall protect, enhance and restore all bodies of surface water, subject to the application of subparagraph (iii) for artificial and heavily modified bodies of water, with the aim of achieving good surface water 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;*
- (iii) Member States shall protect and enhance all artificial and heavily modified bodies of water, with the aim of achieving good ecological potential and good surface water chemical status at the latest 15 years from 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;”*

Under certain conditions, EEA States are able to rely on exemptions and exclusions, so that achievement of the Article 4 environmental objectives is, for example, phased-in

²² Case C-461/13, *Bund für Umwelt und Naturschutz Deutschland*, paras 35-39.

²³ *Ibid.*, para 39.

(delayed), as explained in CIS Guidance Document.²⁴ Article 4(7) WFD provides for the derogations and stipulates that:

- “7. Member States will not be in breach of this Directive when:*
- failure to achieve good groundwater status, good ecological status or, where relevant, good ecological potential or to prevent deterioration in the status of a body of surface water or groundwater is the result of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, or*
 - failure to prevent deterioration from high status to good status of a body of surface water is the result of new sustainable human development activities and all the following conditions are met:*
 - (a) all practicable steps are taken to mitigate the adverse impact on the status of the body of water;*
 - (b) the reasons for those modifications or alterations are specifically set out and explained in the river basin management plan required under Article 13 and the objectives are reviewed every six years;*
 - (c) the reasons for those modifications or alterations are of overriding public interest and/or the benefits to the environment and to society of achieving the objectives set out in paragraph 1 are outweighed by the benefits of the new modifications or alterations to human health, to the maintenance of human safety or to sustainable development, and*
 - (d) the beneficial objectives served by those modifications or alterations of the water body cannot for reasons of technical feasibility or disproportionate cost be achieved by other means, which are a significantly better environmental option.*

To realise the stated objectives, the WFD establishes a legal framework under which river basin management plans (“RBMP”) must be produced in accordance with Article 13, and a programme of measures must be established²⁵ and coordinated²⁶ in accordance with Article 11. As regards RBMP the EEA States must identify individual river basins²⁷ and must, initially, complete an assessment according to Article 5 WFD – including a classification of the relevant water body. EEA States must then ensure that a RBMP is produced for each river basin district.²⁸

According to Article 11(7) WFD the programmes of measures shall be established at the latest nine years after the date of entry into force and according to Article 13(6) WFD, *“River basin management plans shall be published at the latest nine years after the date of entry into force”* of the WFD. With respect to the EEA EFTA States, this deadline was 1 May 2018.

The deadline to produce and publish river basin management plans does not establish a *“special transposition time-limit”* in respect of the Article 4 WFD environmental objectives,²⁹ the deadline for the production and publication of river basin management plans set out in Article 13(6) WFD *“merely fixes a final date for the implementation of one of the measures which Member States must take”*.³⁰ The deadline for the production and

²⁴ See, for example CIS Guidance Document No 36, pages 3-4 .

²⁵ Article 11(1) WFD.

²⁶ Article 3(4) WFD.

²⁷ Article 3(1) WFD.

²⁸ Article 13(1) WFD.

²⁹ Case C-43/10, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*, EU:C:2012:560 (hereinafter referred to as *“C-43/10, Nomarchiaki Aftodioikisi Aitoloakarnanias and Others”*) paras 42-47.

³⁰ *Ibid*, para 45.

publication of river basin management plans “cannot call into question the time-limit laid down for the transposition of [the WFD]”.³¹

3.2 National Law

In Norway, the WFD is primarily transposed into national law by Regulation of 15 December 2006 No 1446 on a Framework for Water Management (“Water Regulation”).³² Sections 4 to 6 of the Water Regulation establish the obligations to prevent deterioration of water quality, as well as the objective that all water bodies shall have good ecological status and a good chemical condition.

Where a proposed activity might affect the status of a water body, Section 12 of the Water Regulation requires the relevant authorities to consider whether the activity in question will lead to a deterioration or a failure to achieve the environmental objectives. Under such circumstances, the authorities may consider whether the conditions for an exemption as set out in Section 12 of the Water Regulation are met.

Section 12 paragraph 1 and 2 of the Water Regulation are reflective of Article 4(7) WFD and read:³³

“New activity or new interventions in a water body can be carried out even though the environmental objective in section 4 to 6 will not be obtained or that the status is deteriorated if the cause is;

- a) New modifications to the physical characteristics of a surface water body or alterations to the levels of bodies of groundwater, or*
- b) New sustainable activity causes deterioration in a water body from very good status status to good status*

In addition these requirements have to be fulfilled:

- a) All practicable steps have to be taken to limit an adverse development in the status of the water body*
- b) The benefits for society of the new intervention or activities shall be greater than the loss of environmental quality*
- c) The beneficial objectives served by those modifications or alterations of the water body cannot for reasons of technical feasibility or disproportionate cost be achieved by other means, which are a significantly better environmental option.”*

Section 12 paragraph 3 and Annex VII of the Norwegian Water Regulation provide for an obligation to set out and explain the reasons for the modifications or alterations in the RBMPs. Where new modifications or alterations are implemented during a plan period, the reason for this shall be included in the next management plan.³⁴

It is unlawful, under Section 7 of the Norwegian Pollution Control Act to do or initiate anything that may entail a risk of pollution unless this is lawful pursuant to Section 8 or 9 of the Pollution Control Act or permitted by a decision made pursuant to Section 11 of the Pollution Control Act. Section 11 of the Pollution Control Act reads:³⁵

³¹ Ibid, para 45.

³² FOR 2006-12-15 nr 1446: *Forskrift om rammer for vannforvaltningen*.

³³ Authority translation, as amended by FOR 2018-12-20 nr 2231 (entry into force 1 January 2019).

³⁴ Norwegian Water Regulation, Section 12 paragraph 3, as amended by FOR 2018-12-20 nr 2231 (entry into force 1 January 2019), previously Section 14.

³⁵ Working translation by the Norwegian Government, available at:

<https://www.regjeringen.no/en/dokumenter/pollution-control-act/id171893/>. This working translation does not include the introduction of a new Section 11 paragraph 2 from 1 January 2005 (LOV-2004-12-17-99), which was amended by LOV-2007-06-29-93. Section 11 paragraph 2 is not of relevance to the case.

*“§ 11 Special permit for any activity that may cause pollution
The pollution control authority may on application issue a permit for any activity that may lead to pollution. In special cases, the pollution control authority may issue such a permit without the submission of an application, and may in such a permit make orders that replace conditions pursuant to section 16.*

[...]

The pollution control authority may issue regulations requiring that any person wishing to engage in certain types of activities that by their nature may lead to pollution shall apply for a permit pursuant to this section.

If possible, pollution problems shall be solved for larger areas as a whole on the basis of general plans and local development plans. If an activity will conflict with final plans drawn up pursuant to the Planning and Building Act, the pollution control authority shall only grant a permit pursuant to the Planning and Building Act with the consent of the planning authorities.

When the pollution control authority decides whether a permit is to be granted and lays down conditions pursuant to section 16, it shall pay particular attention to any pollution-related nuisance arising from the project as compared with any other advantages and disadvantages so arising.”

It is a pre-requisite for the granting of a permit under the Pollution Control Act, in relation to a water body, that the conditions set out in Section 12 of the Water Regulation are met.

Under Section 16 of the Pollution Control Act, it is possible to impose conditions in a permit in order to counter-act or limit damage caused by the activity in question. These conditions are binding on the permit holder.

4 Assessment - Repparfjord

4.1 WFD coverage, scope, and applicability of the Article 4 WFD environmental objectives

It is settled case-law that the Article 4 WFD environmental objectives do not merely concern “basic obligations” but also, in addition, concern “individual projects”.³⁶ EEA States must ensure that the environmental objectives set out in Article 4 of the WFD are met before approving individual projects³⁷ and are legally required to refuse to authorise an individual project where:

- (i) no derogation applies; and
- (ii) the project may cause a deterioration of the status of a body of water or where it jeopardises the attainment of good water status or of good ecological potential and good surface water chemical status.³⁸

The Contested Act constitutes an individual act or project concerning a relevant water body which is, amongst other things, liable to be incompatible with the environmental objectives as laid down in the WFD.³⁹

The Authority therefore concludes that the Norwegian Environment Agency was correct to determine that the Contested Act falls within the scope of the WFD.

³⁶ Case C-461/13, *Bund für Umwelt und Naturschutz Deutschland*, para 47.

³⁷ *Ibid*, para 33.

³⁸ *Ibid*, para 51.

³⁹ Case C-43/10, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*, para 49.

In this case the applicability of the Article 4 WFD environmental objectives, whether directly or indirectly, is not in doubt. That is because, even in the event the Article 4 WFD environmental objectives are regarded as not directly applicable due to a possible absence of a relevant RBMP, it is settled case-law that the Article 4 WFD environmental objectives apply “*by analogy*”⁴⁰ and that the Contested Act will only be legally permissible to the extent that it does not constitute a breach of the requirement to refrain from adopting measures liable seriously to compromise the attainment of the results of the WFD.⁴¹

The Article 4 WFD environmental objectives constitute the results the WFD intends to achieve. It follows that the Contested Act must not constitute a measure liable to seriously compromise the Article 4 WFD environmental objectives. The Article 4 WFD environmental objectives are therefore considered in this context.

As a result, and in strict accordance with the case-law, the Authority has assessed conformity with the Article 4 WFD environmental objectives – particularly the prohibition on deterioration – below.

4.2 Non-deterioration principle

At the time the Contested Act was adopted, there was no finalised published River Basin Management Plan in place for the Finnmark River Basin District *per se*. As such, the assessment as regards the status of the water body was made on the basis of information on the status of the water bodies available on ‘*vann-nett*’⁴² as well as information provided in the developers’ application, the impact study and supplementary studies that were carried out. At the time the Norwegian Environment Agency’s decision to grant the permit was taken, the ecological status of Repperfjorden Inner was classified as moderate and the chemical status as good. Repperfjorden Outer was considered to have good ecological and chemical status.

In the Contested Act, the Norwegian Environment Agency found that the disposal of mining tailings would lead to a change in the seabed conditions in Repperfjorden Inner and Outer, and then assessed whether the change would lead to a deterioration of the ecological status of the water bodies. It noted that the benthic fauna was the quality element most sensitive to the disposal of tailings. The Agency found that the benthic fauna in the disposal site would disappear while the disposal took place and determined that the project would therefore cause the ecological status of the water bodies to deteriorate to poor. The Agency further found that the water bodies’ status would be presumed to remain poor as long as the disposal took place and for a long period of time thereafter.

It is settled case-law that individual projects are covered by and must comply with, amongst other obligations, the obligation to prevent deterioration of the status of bodies of water.⁴³ Therefore, EEA States must ensure that the environmental objectives set out in Article 4 of the WFD are met before approving individual projects.⁴⁴ EEA States are legally required to refuse to authorise an individual project where:

- (i) no derogation is applicable, and

⁴⁰ Ibid, para 65.

⁴¹ The Authority further concludes that the complainant is correct to state that the Article 4 WFD environmental objectives include requirements concerning, for example: good ecological status; biodiversity; and the preservation of ecosystems.

⁴² See <https://vann-nett.no/portal/>

⁴³ Case C-461/13, *Bund für Umwelt und Naturschutz Deutschland*, para 48.

⁴⁴ Ibid, para 33.

- (ii) the project may cause a deterioration of the status of a body of water or where it jeopardises the attainment of good water status or of good ecological potential and good surface water chemical status.⁴⁵

The obligation to prevent deterioration of the status of bodies of surface water is independent and autonomous of the obligation to enhance the status of bodies of water.⁴⁶ The concept of “deterioration of the status” of a body of surface water also covers deterioration which does not result in the classification of that body of water in a lower class⁴⁷ and prevents deterioration, amongst other things “as soon as the status of at least one of the quality elements, within the meaning of Annex V to the WFD, falls by one class”.⁴⁸

On the basis of the information the Authority has at its disposal, the Authority finds that the Contested Act may, at first glance, appear to constitute a breach of the general principle of non-deterioration. However, as stated in Article 4(7) WFD, EEA States will not be in breach of the WFD if a project is covered by Article 4(7) WFD, and the conditions in Article 4(7) WFD are met.⁴⁹

4.3 Article 4(7) WFD derogation

As is clear from Article 4(7) WFD itself, the provision is a derogation and exception from the general, binding legal requirements on EEA States to implement measures to ensure amongst other things that:

- (1) natural surface water bodies adhere to “good ecological status” and “good chemical status”, and
- (2) the deterioration of the status of all water bodies is prevented.

It is settled case-law that a provision that limits the scope of a measure,⁵⁰ goes against one of the objectives of the measure,⁵¹ or constitutes an obstacle to the attainment of a fundamental objective of the measure⁵² must be interpreted restrictively. The EFTA Court has consistently maintained that EEA law must be interpreted in conformity with the case-law of the Court of Justice of the European Union (“CJEU”),⁵³ and that derogations, under EEA law, must be interpreted strictly and narrowly in line with CJEU case-law.⁵⁴

Article 4(7) WFD provision constitutes a limitation on the scope, derogation and/or exception to the Article 4 WFD environmental objectives and/or the principle set out in Article 73 of the EEA Agreement regarding achievement of a high level of protection of the aquatic environment. According to settled case-law, Article 4(7) WFD must therefore be interpreted restrictively.

Where an EEA State invokes and relies on the Article 4(7) WFD derogation, it must clearly and transparently document the reliance⁵⁵ and state the reasons at the time the decision is made taking into account the specific facts of the case.

⁴⁵ Ibid, para 51.

⁴⁶ Ibid, para 49.

⁴⁷ Case C-461/13, *Bund für Umwelt und Naturschutz Deutschland*, para 40, 55, 61.

⁴⁸ Ibid, para 69-70.

⁴⁹ See Section 5.3 of this closure decision.

⁵⁰ Case C-287/98, *Grand Duchy of Luxembourg v Berthe Linster, Aloyse Linster and Yvonne Linster*, EU:C:2000:468, para 49.

⁵¹ Case C-38/98, *Régie nationale des usines Renault SA v Maxicar SpA and Orazio Formento*, EU:C:2000:225, para 26.

⁵² Case C-7/98, *Dieter Krombach v André Bamberski*, EU:C:2000:164, para 27.

⁵³ Joined Cases E-9/07 and E-10/07, *L’Oréal Norge AS; L’Oréal SA and Per Aarskog AS; Nille AS; Smart Club AS*, [2008] EFTA Ct. Rep. 259, para 29.

⁵⁴ Case E-5/96, *Ullensaker kommune and Others v Nille AS*, [1997] EFTA Ct. Rep. 30, para 33.

⁵⁵ CIS Guidance Document No 36, page 60.

4.3.1 *Complainants' assertion that the disposal of mining waste can never fall within the scope of the Article 4(7) WFD derogation*

The complainants essentially assert that disposal of mining waste including certain chemicals into a water body automatically constitutes a breach of the Article 4 WFD environmental objectives.⁵⁶ In addition, the complainants assert that it is never legally possible for an EEA State to grant permission to dispose of mining waste into a water body pursuant to the requirements set out in the WFD, in particular the Article 4 WFD environmental objectives. It is concluded that Norway is therefore legally unable to invoke and rely on the Article 4(7) WFD exemption in order to permit the disposal of mining waste, including certain chemicals, into water bodies.

According to the complaint, that is because “[t]he tailings smother large areas of the bottom and prevent new life to be established during the whole lifetime of the mine, and several years thereafter” and because “tailings disposal in a fjord, regardless of the contents, would make it impossible to achieve good status due to the smothering of the bottom”.⁵⁷ As a result, “the continued disposal of mine waste into a fjord would make it impossible to achieve the quality requirements of the WFD”⁵⁸ and “[any] water body [within which mining waste is disposed] must be classified as having bad ecological status”.⁵⁹ Furthermore, the complaint argues that disposal of mining waste into fjords “would lead to bad chemical status in addition” in some cases.⁶⁰

The Authority notes that there is no specific legal provision in the WFD which expressly prohibits any EEA State from ever allowing the disposal of mining waste into fjords or other relevant water bodies. The WFD is a framework directive which sets out legally binding environmental objectives, and provisions designed to provide flexibility regarding their implementation and application.

In order to achieve the Article 4 WFD environmental objectives, the WFD sets out requirements for EEA States to assess, on a case-by-case basis, specific water bodies and their status and improvement. It therefore follows that the WFD itself is intended to be implemented and applied with regard to the unique physical and other attributes which characterise each individual water body.

The Authority therefore concludes that the WFD legal text does not support the view that WFD must be interpreted as constituting a *de facto* or automatic legal prohibition on EEA States approving any requests to dispose of mining waste into fjords or other water bodies regardless of the facts of each case. Pursuant to the WFD and other relevant EEA law, when invoking and relying on Article 4(7) WFD, EEA States are required to assess, on a case-by-case basis, whether the act in question falls within the scope of Article 4(7) WFD exemption taking into account the specific facts of the case and the requirement to interpret Article 4(7) WFD restrictively. Where an act falls within the scope of the Article 4(7) WFD exemption, EEA States must ensure that all the conditions in Article 4(7) WFD, as well as other relevant legal requirements, are fully met. In order to invoke and rely on Article 4(7) WFD, EEA States must clearly and transparently document such reliance at the time of the decision and state the reasons.

⁵⁶ See Document entitled “*Submarine Tailings Disposal violates the Water Framework Directive*” p.6 which states: ““disposal of tailings into a fjord, with the sole purpose to get rid of industrial waste / mine tailings, will always be in breach of the WFD...””

⁵⁷ Document entitled “*Submarine Tailings Disposal violates the Water Framework Directive*” p.6.

⁵⁸ *Ibid*, p.5.

⁵⁹ *Ibid*, p.6.

⁶⁰ *Ibid*, p.6.

4.3.2 *Complainants' assertion that the disposal of mining waste in this case fell outside the scope of the Article 4(7) WFD derogation*

EEA States may authorise individual projects pursuant to the system of derogations provided for in Article 4 WFD⁶¹ only if the project is covered by one of the derogations set out in the WFD, and the conditions relating to the exemption are met.⁶²

Article 4(7) of the WFD (first indent) provides that:

Member States will not be in breach of this Directive when:

— failure to achieve good groundwater status, good ecological status or, where relevant, good ecological potential or to prevent deterioration in the status of a body of surface water or groundwater is the result of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, [...] (emphasis added)

CIS Guidance Document No 36 sets out a clarification of the definition of the term “new modification”⁶³ and an overview on the modifications and activities covered by Article 4(7) WFD. As regards “*new modifications to the physical characteristics of a surface water body*”, the CIS Guidance Document No 36 points out that these involve “*hydromorphological alterations*”,⁶⁴ and that “*Article 4(7) does not provide an exemption if deterioration caused by inputs of pollutants from point or diffuse sources drives the water body to a status below good.*”⁶⁵

The CIS Guidance Document No 36 also provides that any decision regarding the applicability of Article 4(7) WFD must be documented, and taken before a new project is authorised.⁶⁶

The complainants essentially assert that the Contested Act, and the disposal of mining waste, falls outside the scope of the Article 4(7) WFD exemption. That is because, according to the complainants, disposal of mining waste does not merely impact the “*physical characteristics*” of the surface water. Furthermore, it is stated, that the Contested Act, and disposal of mining waste, also inevitably results in an alteration of the chemical characteristics of the water body. The complaint states that: (1) “*the tailings [from the Nussir Copper Mine in Repparfjord] have high contents of toxic metals*”^{67,68}; (2) “*the tailings from Nussir, to be dumped in Repparfjord have a strongly elevated content of Nickel, Chromium and Copper, and several types of nano-sized particles (SiO₂) that are known to give similar problems as the TiO₂ particles...*”^{69,70}; and (3) “*The concentration of*

⁶¹ Case C-461/13, *Bund für Umwelt und Naturschutz Deutschland*, para 48.

⁶² Case C-346/14, *Commission v Austria*, para 64.

⁶³ See for example CIS Guidance Document No 36, page 19.

⁶⁴ I.e. hydromorphological alterations which may have potential direct and indirect effects on the biological quality elements and relevant supporting quality elements of surface water bodies, as well as potential indirect effects on groundwater quantitative status (e.g. changes in surface water hydrology or morphology might lead to alterations to the levels of groundwater). There are also potential indirect effects on the chemical status of surface or groundwater bodies (e.g. abstraction might reduce dilution capacity and therefore increase concentrations).

⁶⁵ This because the first limb of Article 4(7) WFD only addresses new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, but not point or diffuse sources of pollution. Input of pollutants is therefore potentially only covered under the second limb of Article 4(7) - new sustainable human development activities - which only relates to deterioration of surface water bodies from high status to good status.

⁶⁶ CIS Guidance Document No 36, page 19.

⁶⁷ Page 1 of the complaint.

⁶⁸ The Authority notes that this statement was not accompanied by relevant, substantive, scientific evidence.

⁶⁹ Page 6 of the complaint.

⁷⁰ The Authority notes that this statement was not accompanied by relevant, substantive, scientific evidence.

Nickel is very high in the planned STD in Repparfjord from Nussir (mining company). A permit for STD would therefore be in breach of WFD, article 4.1 and §7 in the Norwegian Water regulations⁷¹.

In support of their assertions, the complainants have provided the following:

- (1) extracts from a “Note” from the Norwegian National Institute of Nutrition and Seafood Research (NIFES) of 29 December 2012 which states that:

“When the fjords are used as disposal areas, there is a risk of concentrating containments and process chemicals throughout the food chain.” ... “One example is the planned mine Nussir in Repparfjorden. These tailings contain amounts of copper (an average of 500 mg/kg) that far exceeds the limit for quality class V (very bad – our comment) for marine sediments (> 220 mg Cu/kg sediment, that gives acute toxic conditions) both for the Cu content of the waste (sediment) and what is leached into the pore water. Planned pollution at such levels should be totally unacceptable, both for the Norwegian Climate and Pollution Agency and other authorities.” (emphasis added)

- (2) an extract from a report dated 27 March 2013, issued by a consultancy⁷² setting out the content of toxic metals in the tailings as follows:

High content of toxic metals in the tailings

Tilstand/ Metall	Bakgrunn	God	Moderat	Dårlig	Svært dårlig	Nussir avgang
Arsen	< 20	20-52	52-76	76 - 580	>580	< 0,2
Bly	<30	30 - 83	83 - 100	100 - 720	>720	1,67
Kadmium	<0,25	0,25 - 2,6	2,6 - 15	15 - 140	>140	< 0,1
Kvikksølv	<0,15	0,15 - 0,63	0,63 - 0,86	0,86 - 1,6	>1,	< 0,3 -0,3
Kobber	<35	35 - 51	51 - 55	55 - 220	>220	>500<1000
Sink	<150	150 - 360	360 - 590	590 - 4500	>450	19-59
Krom	<70	70 - 560	560 - 5900	5900 - 59000	>59000	< 40 - 823
Nikkel	<30	30 - 46	46 - 120	120 - 840	>840	37-355

This table shows the standard classification table of polluted marine sediments, with the Nussir mine tailings to the far right⁵. The concentrations are given in mg/kg.

The columns are as follows: “Background”, “Good”, “Moderate”, “Bad”, “Very bad”, “Nussir tailings”. The table shows a high content of Nickel, a priority substance of WFD. The contents of Cu, and Cr are also very high, especially Cu.

In the Contested Act, the Norwegian Environment Agency 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 bodies. This covered a consideration of whether there was a potential for leaching in connection with metals contained in the tailings, any potential discharges of flocculants and flotation chemicals, the possible dispersion of particles outside the zoning area and whether the threshold values for priority substances in sediments would be exceeded outside of the area zoned as the disposal site.

The Norwegian Environment Agency reached the conclusion that the deterioration in the water bodies would occur as a result of the physical changes brought about by the submarine deposit of mining tailings. The Authority notes the Norwegian Environment Agency’s conclusion that the chemical status of the water bodies will not deteriorate as a consequence of the disposal of mining tailings. In particular, the Norwegian Environment Agency found that based on modelling, it was unlikely that the particle dispersion would have a negative impact outside the disposal site and that the status of the water bodies would not deteriorate as a result of leaching from tailings. Moreover, the Norwegian

⁷¹ Document entitled “Submarine Tailings Disposal violates the Water Framework Directive”, p.7.

⁷² Bergfald Environment Consultants.

Environment Agency noted that calculations demonstrated that seawater concentrations of priority substances, such as nickel, would be well below the threshold in the Water Regulation and concluded that the deposit of mining tailings would not impede the achievement of environmental objectives for priority and priority hazardous substances.

Having considered the Norwegian Environment Agency's detailed reasoning as set out in its the Contested Act, the Authority concludes that these grounds have not been sufficiently called into question by the complainants and that the evidence provided by the complainants is not sufficient to substantiate their allegations. The Norwegian authorities stated the reasons, and documented, how the Contested Act fell within the scope of Article 4(7) WFD by, amongst other things, setting out how the Contested Act falls within the scope of Section 12 Paragraph 1(a) of the Norwegian Water Regulation which is reflective of with Article 4(7) WFD. The complaint alleges that there have been modifications, other than mere modifications to the "*physical characteristics*" of the water body, which means that the conditions in Article 4(7) WFD first indent are not satisfied and, as a result, Norway cannot, or could not, invoke or rely on the derogation set out in Article 4(7) WFD as the Contested Act was outside the scope of Article 4(7) WFD. However, as explained, these allegations have not been sufficiently substantiated and the Authority has not been able to identify sufficient evidence to support that finding.

5 Førdefjorden

5.1 New information

As stated above, the complaint has provided certain "*new information*"⁷³ regarding the disposal of mining waste in Førdefjorden. The complaint essentially asserts that the new information provided proves that past environmental impact assessments were flawed and underestimated the damage to the aquatic environment resulting from the disposal of mining waste into Førdefjorden. More specifically, the complaint alleges that: (1) the technical and scientific models and calculations used to assess and determine chemical dispersion and spread set out in the environmental impact assessments ("EIAs") were flawed and "*seriously underestimated...the harmful effects of suspended particles on marine life in Førdefjorden*",⁷⁴ and (2) the technical and scientific models failed to take into account certain sea current phenomena (such as a 'hydraulic jump') and were flawed in that they were based on the "*average current*" rather than the "*strongest occurring current*".⁷⁵

It is settled case-law that: the lawfulness of an EU/EEA measure "*...must be assessed on the basis of the facts and the law as they stood at the time when those measures were adopted*".⁷⁶ The complainants have provided new information which was not available to the Norwegian authorities at the time the Norwegian authorities adopted the decision to permit the disposal of mining waste into Førdefjorden. As stated, the compliance of that decision with EEA law must be assessed on the basis of the facts and the law as they stood at the time when the Norwegian authorities adopted the decision. It therefore follows that the new information which the complaint has provided and which became available after the decision was adopted cannot, on its own, call into question the compliance of that decision *per se*. The Authority therefore concludes that, on the basis of the new information provided by the complainants, there is currently insufficient evidence that, at the time the decision to permit the disposal of mining waste into Førdefjorden was adopted, the Norwegian authorities acted in breach of EEA law.

⁷³ Document No 873634, p.1.

⁷⁴ *Ibid*, p.1.

⁷⁵ *Ibid*, p.9.

⁷⁶ See Case T-636/17, paragraph 217 and Case T-201/13, *Rubinum v Commission*, EU:T:2015:311, paragraph 84 and the case-law cited.

Due to, amongst other things, the gravity of the allegations made in this Case 78448 and the current lack of evidence to substantiate the allegations made, the Authority has decided to open an own-initiative case.⁷⁷ The own-initiative case will, amongst other things, assess whether allegations of non-compliance with the WFD requirements can be substantiated with technical and scientific information which has not been accessible to the Authority during the course of its assessment of Case 78448. It is the Authority's view that the general subject matter of the complaints as to whether Norway has acted in breach of EEA law, in particular in breach of the provisions contained within the WFD, by issuing, renewing and/or failing to withdraw permits allowing mining companies to dispose of tailings (i.e. mining waste including chemicals of concern) directly into Norwegian fjords will be covered by the own-initiative case. As the Authority's resources will be directed to the own-initiative case and the general assessment of Norway's compliance with the WFD when it comes to the disposal of mining waste into fjords, it is therefore appropriate to close the current complaint case.

6 Conclusion

On the basis of the information presently available to the Authority, the Authority is unable to identify sufficient evidence to conclusively determine that the Norwegian authorities have acted in breach of the provisions set out above relating to the WFD.

By letter of 16 July 2021 ("Pre-Closure Letter"),⁷⁸ the Authority's Internal Market Affairs Directorate informed the complainants of its intention to propose to the Authority that the case be closed. The complainants were invited to submit any observations on the Internal Market Affairs Directorate's assessment of the complaint or present any new information by 17 August 2021.

By correspondence received on 17 August 2021,⁷⁹ the complainants replied to the Pre-Closure Letter. In their reply, the complainants expressed their acceptance that Case 78448 be closed, but stated that they disagreed with "...several of [the] conclusions" set out in the Pre-Closure Letter. The complainants also expressed their desire to assist, and provide information to the Authority, as regards Case 86194 which is currently ongoing. The Authority concludes that the statements contained in the complainants' reply do not alter the conclusions set out in the Pre-Closure Letter of 16 July 2021.

Based on the above, there are no grounds for pursuing this case further.

HAS ADOPTED THIS DECISION:

The complaint case arising from an alleged failure by Norway to comply with 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

⁷⁷ Case No 86194.

⁷⁸ Document No 1206134.

⁷⁹ Document No 1222262.

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This document has been electronically authenticated by Bente Angell-Hansen, Mel-po-Menie Josephides.