

Case handler: Marcus Navin-Jones  
Tel: (+32) 2 286 18 11  
[Marcus.Navin-Jones@eftasurv.int](mailto:Marcus.Navin-Jones@eftasurv.int)

Brussels, 19 October 2021  
Case No: 81034  
Document No: 1179709

Dear Madam/Sir

**Subject: Complaint against the Norwegian Government in the area of the environment regarding the implementation of the Water Framework Directive and water bodies used for hydropower production**

## 1 Introduction

By a letter dated 30 June 2017,<sup>1</sup> a number of associations and other entities submitted a letter and certain information to the EFTA Surveillance Authority (“Authority”) raising concerns regarding Norway’s implementation of the Water Framework Directive 2000/60 (“WFD”).<sup>2</sup>

On 24 January 2019,<sup>3</sup> the complainants listed in the cover letter (“Complainants”) submitted a letter to the Authority (“Complaint”). The letter dated 24 January 2019 clarified the scope and nature of the concerns first brought to the Authority’s attention in June 2017.<sup>4</sup>

## 2 Factual background

The letter dated 30 June 2017<sup>5</sup> alleged, amongst other things, that Norway had not correctly implemented the WFD and that water courses used for hydropower production were being adversely impacted due to breaches, by Norway, of the WFD provisions.<sup>6</sup> The Authority opened a complaint case (Case 81034) and closed Case 69544 on the basis that “*the relevant provisions of Directive 2000/60 were not yet in force in Norway*” at the time the original complaint was submitted.<sup>7</sup> The objective of Case 81034 was to allow the Authority to further investigate alleged improper transposition and implementation of the WFD by Norway and to “...deal with the ongoing issues”<sup>8</sup> such as the publication of River Basin Management Plans (“RBMPs”).

The letter of 24 January 2019<sup>9</sup> set out the allegations and issues being raised by the Complainants which relate to the alleged improper implementation of the WFD in Norway,

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<sup>1</sup> Document No 867177.

<sup>2</sup> See 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*. Incorporated into the EEA Agreement at point 13ca of Annex XX by Joint Committee Decision 125/2007 of 28 September 2007.

<sup>3</sup> Document No 1048486.

<sup>4</sup> Document No 867177.

<sup>5</sup> Document No 867177.

<sup>6</sup> The complaint was preceded by an earlier complaint dated 10 March 2011 – Document No 590051.

<sup>7</sup> See Document Nos 870427, 870421, 901685, and 877157.

<sup>8</sup> See Document No 870427.

<sup>9</sup> Document No 1048486.

and its alleged resultant adverse impact on water courses used for hydropower production.

For the avoidance of doubt, this letter addresses the Complaint as expressed and set out in the letter of 24 January 2019. The Authority's Internal Market Affairs Directorate ("Directorate") has addressed the allegations and issues the Complainants have raised in the Complaint below.

### 3 Correspondence

On 18 August 2017, the Authority wrote to the Norwegian Government informing it that Case 81034 had been opened.<sup>10</sup> On the same date, the Authority sent a letter of acknowledgment to the Complainants<sup>11</sup> informing the Complainants that the Authority had decided to open a new complaint case.

By a letter dated 20 September 2017, the Authority asked the Norwegian Government to provide information, including information on RBMPs, in order for the Authority to examine and assess the complaint.<sup>12</sup>

On 20 October 2017, the Norwegian Government provided certain information relating to, for example, the water bodies affected by hydropower in Norway and subject to the Article 4 WFD requirements.<sup>13</sup>

On 24 January 2019 the Complainants submitted the Complaint setting out the scope and nature of their allegations.<sup>14</sup>

## 4 Legal framework

### 4.1 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.<sup>15</sup>

The WFD was incorporated into point 13ca of Annex XX to the Agreement on the European Economic Area ("EEA Agreement") by Decision of the EEA Joint Committee No 125/2007 of 28 September 2007.<sup>16</sup> It entered into force in the EEA EFTA States 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

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<sup>10</sup> Document No 870427.

<sup>11</sup> Document No 870421.

<sup>12</sup> Document No 873289.

<sup>13</sup> Document No 878989.

<sup>14</sup> Document No 1048486.

<sup>15</sup> See to that effect Recital 19 and 25 of the Preamble of the WFD; Judgment of the Court of Justice of the European Union ("CJEU") of 1 July 2015, *Bund für Umwelt und Naturschutz Deutschland eV v Bundesrepublik Deutschland*, Case C-461/13, EU:C:2015:433, paragraphs 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\\_paragraph\\_1.3](https://ec.europa.eu/environment/water/water-framework/facts_figures/guidance_docs_en.htm_paragraph_1.3) such as Common Implementation Strategy Guidance Document No. 36, *Exemptions to the Environmental Objectives according to Article 4(7)* ('CIS Guidance Document No 36').

<sup>16</sup> OJ L 047, 21.2.2008, p. 53; EEA Supp No 9, 21.2.2008, p. 41.

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.<sup>17</sup>

EEA EFTA State surface water bodies must adhere to “good ecological status” and “good chemical status” by 1 May 2024.<sup>18</sup> “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”).<sup>19</sup> 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.<sup>20</sup> The chemical status of water bodies is classified as being either “good” or “failing to achieve good”.<sup>21</sup>

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.*

*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<sup>22</sup> 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”).<sup>23</sup>

As regards the non-deterioration principle, it is settled case-law that the Article 4 WFD environmental objectives require<sup>24</sup>:

- (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

<sup>17</sup> 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 EEA Agreement*”.

<sup>18</sup> Article 4(1)(a)(ii) WFD and the adaptations cited above at footnote [17].

<sup>19</sup> Annex V WFD, and Judgment of the CJEU of 4 May 2016, *European Commission v Republic of Austria*, Case C-346/14, EU:C:2016:322, paragraph 58 (hereinafter referred to as ‘Case C-346/14, *Commission v Austria*’).

<sup>20</sup> 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 CIS Guidance Document No 36, page 17.

<sup>21</sup> See Annex V, 1.4.3, WFD.

<sup>22</sup> See Case C-461/13 *Bund für Umwelt und Naturschutz Deutschland*, paragraph 38.

<sup>23</sup> *Ibid*, paras 35-39.

<sup>24</sup> *Ibid*, paragraph 39.

- (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 (delayed), as explained in CIS Guidance Document.<sup>25</sup> 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*

<sup>25</sup> See, for example CIS Guidance Document No 36, pages 3-4.

- 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 RBMPs must be produced in accordance with Article 13, and a programme of measures must be established<sup>26</sup> and coordinated<sup>27</sup> in accordance with Article 11. As regards RBMPs the EEA States must identify individual river basins<sup>28</sup> and must, initially, complete an assessment according to Article 5 WFD – including a classification of the status of the relevant water body. EEA States must then ensure that a RBMPs is produced for each river basin district.<sup>29</sup>

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.<sup>30</sup>

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,<sup>31</sup> 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*”.<sup>32</sup> The deadline for the production and publication of river basin management plans “*cannot call into question the time-limit laid down for the transposition of [the WFD]*”.<sup>33</sup>

## 4.2 National Law

In Norway, the WFD is transposed into national law primarily by Regulation of 15 December 2006 No 1446 on a Framework for Water Management (“Water Regulation”).<sup>34</sup> 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.

<sup>26</sup> Article 11(1) WFD.

<sup>27</sup> Article 3(4) WFD.

<sup>28</sup> Article 3(1) WFD.

<sup>29</sup> Article 13(1) WFD.

<sup>30</sup> Article 13(6) WFD and the adaptations cited above at footnote [17].

<sup>31</sup> Judgment of the CJEU of 11 September 2012, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others v Ipourgou Perivallontos, Chorotaxias kai Dimosion ergon and Others*, Case C-43/10, EU:C:2012:560 (hereinafter referred to as ‘Case C-43/10, *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*’), paragraphs 42-47.

<sup>32</sup> *Ibid*, paragraph 45.

<sup>33</sup> *Ibid*, paragraph 45.

<sup>34</sup> FOR 2006-12-15 nr 1446: *Forskrift om rammer for vannforvaltningen*.

Section 12 paragraphs 1 and 2 of the Water Regulation are reflective of Article 4(7) WFD and read:<sup>35</sup>

*“New activity or new interventions in a water body can be carried out even though the environmental objective in section 4 to 7 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 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, and the related provisions in 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.<sup>36</sup>

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:

*“§ 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*

<sup>35</sup> Authority translation, as amended by FOR 2009-12-23 (entry into force 1 January 2010) nr 1814 and FOR 2018-12-20 nr 2231 (entry into force 1 January 2019).

<sup>36</sup> 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.

*pollution-related nuisance arising from the project as compared with any other advantages and disadvantages so arising.*<sup>37</sup>

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.

## 5 Assessment

In the Complaint of 24 January 2019, the Complainants raise a number of allegations and concerns. For clarity, the Directorate has addressed each relevant point or concern raised by the Complainants in the same order as they appear in the Complaint, as far as possible. Before addressing these points, the Directorate makes some preliminary remarks.

### 5.1 Preliminary remarks

In the Complaint, the Complainants have expressed a number of concerns,<sup>38</sup> relating to Norway's interpretation and transposition of EEA law, particular the WFD. Information and complaints, such as those expressed by the Complainants in the Complaint, play a crucial role in detecting infringement of EEA law.<sup>39</sup>

In the Complaint, the Complainants express their views and beliefs on the correct interpretation of the WFD and related EEA law.<sup>40</sup> In this regard it is to be recalled that, for EEA EFTA States, according to the institutional framework set up by both the EEA Agreement and the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice ("SCA"), the EFTA Court has competency as regards the interpretation of EEA law.<sup>41,42</sup> The competence of the Authority is generally limited to monitoring the correct implementation and application of EEA law in the EEA EFTA States.<sup>43</sup> Insofar as the Complainants believe there is a breach of EEA law, and seek to ascertain whether their interpretation of EEA law is correct, the Authority directs the Complainants to the legal mechanisms in place, including the Courts of Law and other legal and administrative bodies, at the national and at the EEA level, which allows the Complainants to assert their rights, and ensures the effective enforcement and application of the WFD.

### 5.2 Complaint 1: The Complainants state that they "fear" that Norway has designated water bodies as Heavily Modified Water Bodies ("HMWB") "systematically", "en

<sup>37</sup> Based on the 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.

<sup>38</sup> See for example, Document No 1048486 (Complaint), page 2, 3, 4 and 6..

<sup>39</sup> As acknowledged, for example, in public announcements from the Authority and the European Commission, such as, for example, Communication from the Commission EU 'Better results through better application' COM 2017/C 18/02, OJ C 18, 19.1.2017, p. 10–20 which states "The Commission acknowledges the crucial role of complaints in detecting infringement of EU law" Paragraph 1(3).

<sup>40</sup> See for example, Document No 1048486 (Complaint), pages 3, 4, 6 and 8.

<sup>41</sup> According to Article 108(2) of the EEA Agreement and Article 34 SCA, the EFTA Court has jurisdiction to rule on interpretation of the EEA Agreement applicable in the EEA EFTA States.

<sup>42</sup> The EFTA Court is able to clarify the scope and application of EEA law after, for example, receiving requests from national Courts (Article 34(2) SCA) and via direct action cases brought before the EFTA Court itself (see, for example, Article 36 SCA).

<sup>43</sup> See, for example, Articles 4, 5 and 22 SCA.

*bloc*”, without “individual assessments” and “without any real assessment of realistic restoration measures”.<sup>44</sup>

By its first complaint, the Complainants essentially raise concerns that Norway will not, and is not, ensuring that each water body complies with the Article 4 WFD environmental objectives on a case-by-case basis. Instead, the Complainants raise concerns that: Norway has classified water bodies *en masse* (or “*en bloc*”) as HMWBs; that Norway has improperly designated water bodies as HMWBs in breach of the WFD, and in an attempt to circumvent the WFD requirements; and/or there is no documentation of any individual assessments in accordance with CIS Guidance Document No 4.

The WFD is a Directive which has been incorporated into the EEA Agreement.<sup>45</sup> Article 7(b) of the EEA Agreement provides that: “Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order as follows [...] (b) an act corresponding to an EEC directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation ...”. EEA EFTA States are therefore legally bound by the content of the WFD Directive and, more precisely, to the result to be achieved by the WFD Directive,<sup>46</sup> but have discretion as to the form and method of implementation.

Moreover, 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 practice. The WFD does not seek to achieve complete harmonisation of the rules concerning water.<sup>47</sup>

It therefore follows that how Norway chooses to assess and designate water bodies used for hydropower production under the WFD is an issue which would, generally speaking, fall within Norway’s discretion. In this regard, the Directorate notes that there is nothing to prevent Norway from designating a specific water body as a HMWB in accordance with a list of criteria whereby water bodies with certain features in common may, in practice, have a higher likelihood of being designated as HMWBs.

At the same time, EEA States are only able to designate water bodies as heavily modified in accordance with the WFD, and in accordance with relevant EEA law including the principle of scientific excellence which means they must comply with the “best current scientific standards”.<sup>48</sup> This includes WFD Guidance and, in particular, CIS Guidance Document No. 4 which sets out a decision-tree and guidance on the designation of water bodies as heavily modified.<sup>49</sup> As stated in the Guidance Document No 4: “The designation [of a water body as a HMWB] will not be an opportunity to avoid achieving ecological and chemical objectives...”.<sup>50</sup> EEA States therefore cannot act in breach of the WFD, or misuse their discretionary powers, and designate a water body as a HMWB in an attempt

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<sup>44</sup> See for example, Document No 1048486 (Complaint), pages 1-2.

<sup>45</sup> Decision of the EEA Joint Committee No 125/2007 of 28 September 2007

<sup>46</sup> Judgment of the EFTA Court of 22 July 2013, *Jan Anfinn Wahl v the Icelandic State*, Case E-15/12, paragraph 49. See also to that effect Article 288(3) TFEU and the relevant case-law of the CJEU such as Judgment of the CJEU of 14 May 2020, *A.m.a. - Azienda Municipale Ambiente SpA v Consorzio Laziale Rifiuti – Co.La.Ri.*, Case C-15/19, EU:C:2020:371, paragraph 44. The EFTA Court has consistently maintained that EEA law must be interpreted in conformity with CJEU case-law. See to that effect Judgment of the EFTA Court of 8 July 2008, *L’Oréal Norge AS v Per Aarskog AS and Others*, Case E-9/07, paragraph 29.

<sup>47</sup> Case C-346/14 *Commission v Austria*, paragraph 70 and the case-law cited therein.

<sup>48</sup> See Judgment of the Court of Justice of 20 September 2019, *PlasticsEurope v European Chemicals Agency*, Case T-636/17, EU:T:2019:639, (herein after ‘Case T-636/17 *PlasticsEurope v ECHA*’) paragraph 94.

<sup>49</sup> CIS Guidance Document No. 4, page 20.

<sup>50</sup> CIS Guidance Document No. 4, page 12.

to avoid or circumvent achieving compliance with the Article 4 WFD environmental objectives.

A ‘heavily modified water body’ is defined as: “...*a body of surface water which as a result of physical alterations by human activity is substantially changed in character, as designated by the Member State in accordance with the provisions of Annex II.*”<sup>51</sup> EEA States may designate a body of surface water as heavily modified if certain conditions apply specifically, the water body must, inter alia, be: physically changed by human activity; be “*substantially changed in character*”; and designated under Article 4(3) WFD. By designating a water body as a HMWB in compliance with the WFD, less stringent objectives and an extension of timing to achieve certain objectives is possible; namely the achievement of “*good ecological potential and good surface water chemical status*”.<sup>52</sup> The onus is on EEA States to prove that a particular water body legally constitutes a HMWB under the WFD. Article 4(3)(a)(iii) WFD makes clear that water bodies which are used for hydropower generation may, in principle, legally constitute a HMWB. However this does not mean that all such water bodies automatically constitute HMWBs in every case. One of the core issues is whether the water body has been “*substantially changed in character*”. The Guidance clarifies that a water body “...*could be described as substantially changed in character if both its morphology [i.e. its form or structure] and hydrology [i.e. a change to the water circulation etc] were subject to substantial changes*”.<sup>53</sup> This question therefore depends on the specific facts and circumstances concerning the water body in question, and the change made in each case. The Directorate notes that in many cases hydropower installations are intended to have the most minimal impact possible on the aquatic environment.

The Directorate notes that EEA EFTA States must comply with the WFD and, at the same time, comply with the principle of sound administration. It therefore follows that EEA EFTA States must ensure that compliance with the WFD is transparent and clearly documented in all respects, including, for example, when invoking and relying on relevant exemptions.<sup>54</sup>

Given these points, the Directorate concludes that Norway must designate water bodies as HMWBs in strict compliance with the WFD, and transparently document designation and compliance. At the same time, the Directorate also concludes that, on the basis of the information presently available to the Directorate, the Directorate 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 and have, for example, improperly designated certain water bodies *en masse* as HMWBs in breach of the WFD.

### 5.3 *Complaint 2: The Complainants state that they “worry” that there will not be a real, individual review of each single water body designated as a HMWB and/or the “establishment of less stringent objectives”.*<sup>55</sup>

On the basis of the information presently available to the Directorate, the Directorate concludes that it is unable to identify sufficient evidence to conclusively determine that, the Norwegian authorities have acted in breach of the WFD provisions and have, for

<sup>51</sup> Article 2(9) WFD.

<sup>52</sup> As stated in CIS Guidance Document No. 4, page 11: “*HMWB are bodies of water which, as a result of physical alterations by human activity, are substantially changed in character and cannot, therefore, meet “good ecological status” (GES) [...] Instead of “good ecological status”, the environmental objective for HMWB...is good ecological potential (GEP)...*”. Also see Article 4(1)(a)(iii) WFD.

<sup>53</sup> See CIS Guidance Document No. 4, Identification and Designation of Heavily Modified and Artificial Water Bodies, page 13.

<sup>54</sup> As stated in CIS Guidance Document No. 36, Exemptions to the Environmental Objectives according to Article 4(7), page 60 compliance must be “*transparent and clearly documented*”.

<sup>55</sup> See Document No 1048486 (Complaint), pages 2.

example, failed to review the status of water bodies every 6 years, and have designated water bodies as HMWBs while failing to consider all the information which must be taken into account in order to assess a complex situation, and/or failing to ensure that the evidence is capable of substantiating the conclusions drawn from it.<sup>56</sup>

5.4 *Complaint 3: The Complainants express concerns that they cannot find evidence that Norway has taken steps to ensure that all licences granted to operators of hydropower installations include “[modern] standard environmental terms”.*<sup>57</sup>

On the basis of the information presently available to the Directorate, the Directorate concludes that it is unable to identify sufficient evidence to conclusively determine that, the Norwegian authorities have acted in breach of the WFD provisions and have, for example, failed to ensure that water bodies where hydropower installations operate, are insufficiently regulated, assessed, or monitored in accordance with the WFD.

5.5 *Complaint 4: The Complainants express fears that Norway is not taking sufficient action to ensure that older hydropower installations – which, according to the Complainants, were established before the Norwegian licensing system came into operation and are therefore are not required to obtain or retain licences – comply with legal requirements to ensure water bodies are not negatively impacted.*<sup>58</sup>

On the basis of the information presently available to the Directorate, the Directorate concludes that it is unable to identify sufficient evidence to conclusively determine that, the Norwegian authorities have acted in breach of the WFD provisions and have, for example, failed to ensure that water bodies where older hydropower installations operate, are insufficiently regulated, assessed, or monitored in accordance with the WFD.

5.6 *Complaint 5: The Complainants express concerns that Norway, amongst other things: applies a “very simplistic approach” in its hydromorphological assessment methods of water bodies; which fails to take into account real hydromorphological pressures on the ecological status; and misinterpret the term “new modifications to the physical characteristics”. The Complainants express concerns that Norway takes this approach not merely in RBMPs but also in Programmes of Measures (“PoMs”) and when granting new and existing licences and when invoking Article 4(7) WFD.*<sup>59</sup>

On the basis of the information presently available to the Directorate, the Directorate concludes that it is unable to identify sufficient evidence to conclusively determine that, the Norwegian authorities have acted in breach of the WFD provisions and have, for example, erred in law and/or manifestly erred in the appraisal of the facts.<sup>60</sup>

5.7 *Complaint 6: The Complainants express “fears” that Norway is relying on outdated national guidance when assessing and designating water bodies as HMWBs, and not taking into account the latest EU CIS Guidance – particularly the*

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<sup>56</sup> See Judgment of the Court of Justice of 11 September 2002, *Pfizer Animal Health SA v Council of the European Union*, Case T-13/99, EU:T:2002:209, (hereinafter referred to as ‘Case T-13/99, Pfizer’), paragraph 169. Also see Judgment of the CJEU of 15 February 2005, *Commission of the European Communities v Tetra Laval BV*, Case C-12/03 P, EU:C:2005:87, (hereinafter “Case C-12/03 P *Commission v Tetra Laval*”), paragraph 39 setting out the degree and intensity of review to be applied by the Courts, and therefore the base level of review to be applied by EU/EEA Institutions and Authorities, to be applied when assessing complex situations such as the one in this case.

<sup>57</sup> See Document No 1048486 (Complaint), pages 2-3.

<sup>58</sup> See Document No 1048486 (Complaint), page 3.

<sup>59</sup> See Document No 1048486 (Complaint), page 3.

<sup>60</sup> Case T-13/99, *Pfizer*, paragraph 169.

*guidance set out in CIS Guidance No 4 (Identification and Designation of Heavily Modified and Artificial Water Bodies).*<sup>61</sup>

The Complainants' principal concern in issue 6 is that Norway is not assessing or designating water bodies as HMWB, in accordance with the latest European Guidance but, instead, and according to the Complainants, Norway is relying on older, and out-dated, Norwegian guidance.

The Directorate notes that the designation of a water body is, in part, a scientific assessment. A scientific assessment must be conducted in accordance with the "*principle of scientific excellence*" which means that they must comply with "*best current scientific standards*".<sup>62</sup> The Directorate notes that in this case, the state-of-the-art Guidance should be the CIS Guidance Documents, including Guidance Document 4 relating to HMWBs.

Uniform interpretation and application of EU and EEA law is of importance to the good functioning of the internal market and a core tenet of EEA law, *inter alia* in light of the principle of homogeneity. EEA States cannot seek to rely on national law guidance as a means of derogating, or acting in non-compliance, with EEA law.

In any event, on the basis of the information presently available to the Directorate, the Directorate concludes that it is unable to identify sufficient evidence to conclusively determine that, the Norwegian authorities have acted in breach of the WFD provisions and have, for example, sought to rely on out-dated national law guidance as a means of inappropriately designating water bodies as HMWBs in breach of the WFD.

*5.8 Complaint 7: The Complainants express concerns that certain information is not taken into account by Norway in the compilation of RBMPs and PoMs.*<sup>63</sup>

By this complaint, the Complainants essentially assert that certain information is missing from the RBMPs and PoMs. The Complainants allege that RBMPs drafted by Norway are too narrow in scope and do not "*take into account issues of significant interest and concern to the public and stakeholders that are part of the national water management*". The Complainants also allege that assessments carried out by Norway under the WFD contrast with the assessments carried out by Norway in relation to Environmental Impact Assessment Directive ("EIA Directive")<sup>64</sup> and the Strategic Environmental Assessment Directive ("SEA Directive").<sup>65</sup> According to the Complainants, assessments under the EIA and SEA Directives are wider in scope, and integrate a number of relevant issues including, for example "*societal issues*". According to the Complainants, this leads to a two-tier approach whereby WFD/RBMP assessments by Norway are restricted and narrow in their scope, and whereby EIA/SEA assessments are wider and integrate all relevant environmental and other objectives.

The Directorate notes the following points. Firstly, as regards the general scope and objectives of, on the one hand, the SEA and EIA Directives and, on the other, the WFD – the Directorate notes that these cannot be construed or regarded as in conflict. At the same time, the Directorate also notes that the scope and objectives cannot be regarded or construed as necessarily being the same. It therefore follows that the assessments carried out under these different legislative instruments should not be construed as being essentially the same, or as covering the same issues, or as necessarily having the same

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<sup>61</sup> See Document No 1048486 (Complaint), page 4.

<sup>62</sup> See Case T-636/17 *PlasticsEurope v ECHA*, paragraph 94 (under appeal).

<sup>63</sup> See Document No 1048486 (Complaint), pages 4-5.

<sup>64</sup> Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2014/52/EU.

<sup>65</sup> Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment.

approach. Secondly, the Directorate also notes that, the EIA Directive specifically requires integration of assessments carried out under the EIA Directive with similar and/or related assessments.<sup>66</sup>

In any event, on the basis of the information presently available to the Directorate, the Directorate concludes that it is unable to identify sufficient evidence to conclusively determine that, the Norwegian authorities have acted in breach of the WFD provisions and have, for example, failed to consider all the information which must be taken into account in order to assess a complex situation, and/or failing to ensure that the evidence is capable of substantiating the conclusions drawn from it.<sup>67</sup>

5.9 *Complaint 8: The Complainants express concerns that as, according to the Complainants, Norway has “abandoned” a “Master Plan” setting out an overall Norwegian national strategy for hydropower whereby certain areas would be designated “no-go” areas for new hydropower projects – water bodies will be adversely affected by newly established hydropower installations.*<sup>68</sup>

In this regard, the Directorate notes the limited and specific legal competences afforded to the Authority. In particular, the Directorate notes that the Authority is tasked with ensuring that Norway complies with EEA law,<sup>69</sup> and that the Authority cannot interfere or direct Norway to pursue specific economic or environmental policies. The Authority cannot therefore direct or influence Norwegian policy regarding hydropower or the installation of hydropower installations that would be outside the Authority’s mandate.

In any event the Directorate concludes that, on the basis of the information presently available to the Directorate, it is unable to identify sufficient evidence to conclusively determine that, the Norwegian authorities have acted in breach of the WFD provisions.

5.10 *Complaints regarding Article 4.(7) WFD and “new modifications or activities”*<sup>70</sup>

By these complaints, the Complainants essentially assert that Norway is not implementing Article 4(7) WFD in accordance with EEA law. In particular, the Complainants allege that Norway is failing to sufficiently consider whether specific projects fall within the scope of Article 4(7) WFD and/or whether the legal conditions set out in Article 4(7) WFD are met. The Complainants allege that, in practice, this means that Norway is systematically acting in breach of the Article 4 WFD environmental objectives and in breach of non-deterioration principle.

The Directorate notes the following points.

Firstly, Article 4(7) WFD is a derogation and exception from the general, binding legal requirements on EEA States to implement measures to ensure amongst other things that: natural surface water bodies adhere to “good ecological status” and “good chemical status”, and the prevention of deterioration of the status of all water bodies is prevented. A provision that limits the scope of a measure,<sup>71</sup> goes against one of the objectives of the measure,<sup>72</sup> or constitutes an obstacle to the attainment of a fundamental objective of the

<sup>66</sup> See Article 2(3) EIA Directive.

<sup>67</sup> Judgment of the CJEU of 15 February 2005, *Commission of the European Communities v Tetra Laval BV*, Case C-12/03 P, EU:C:2005:87, (hereinafter ‘Case C-12/03 P *Commission v Tetra Laval*’), paragraph 39.

<sup>68</sup> See Document No 1048486 (Complaint), pages 5-6.

<sup>69</sup> Article 109 of the EEA Agreement, and Article 5(1) of the SCA.

<sup>70</sup> See Document No 1048486 (Complaint), page 6.

<sup>71</sup> Judgment of the Court of Justice of 19 September 2000, *Grand Duchy of Luxemburg v Berthe Linster, Aloyse Linster and Yvonne Linster*, Case C-287/98, EU:C:2000:468, paragraph 49.

<sup>72</sup> Judgment of the Court of Justice of 11 May 2000, *Régie nationale des usines Renault SA v Maxicar SpA and Orazio Formento*, Case C-38/98, EU:C:2000:225, paragraph 26.

measure<sup>73</sup> 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”),<sup>74</sup> and that derogations, under EEA law, must be interpreted strictly and narrowly in line with case-law and in order for an exemption to apply, the competent national authorities have the burden of proving that the measure in question is justified.<sup>75</sup>

Secondly, Article 4(7) must be interpreted in light of the CIS Guidance documents which clarify the meaning and scope Article 4(7) WFD and the legal conditions which must be met in order for an EEA State to invoke and rely upon Article 4(7) WFD.<sup>76</sup> CIS Guidance Document No 36, titled “*Exemptions to the Environmental Objectives according to Article 4(7)*”, sets out a clarification of the definition of the term “*new modification*”<sup>77</sup> and an overview on the modifications and activities covered by Article 4(7) WFD.

Thirdly, and as the Complainants point out, Section 12 of the Norwegian Water Regulation is reflective of Article 4(7) WFD. However, Section 12 of the Norwegian Water Regulation is not identical in its wording to Article 4(7) WFD. In this regard, the Directorate notes, for example, that Article 4(7)(c) WFD is not the same as Section 12 of the Norwegian Water Regulation.<sup>78</sup> As regards the term “*overriding public interest*” in Article 4(7)(c) WFD, the Directorate notes that this term is not specifically defined in the WFD,<sup>79</sup> however, it is settled case-law that where a specific project has, as its aim, “*the promotion of renewable energy sources [such as hydroelectric power]*” and/or “*the security and diversification of energy supply*”<sup>80</sup> – the reasons for the project<sup>81</sup> “*may*” legally constitute an “*overriding public interest*”<sup>82</sup> and may therefore come within the scope of Article 4(7)(c) WFD. At the same time, it is also settled case-law that even in those situations where the reasons for the project may, in principle, constitute an ‘*overriding public interest*’ – it is legally necessary to assess, on a case-by-case basis, whether the specific project in question actually does fall within the scope of Article 4(7)(c) WFD in practice. Therefore, in short, merely because a specific project or

<sup>73</sup> See Judgment of the Court of Justice of 28 March 2000, *Dieter Krombach v André Bamberski*, Case C-7/98, EU:C:2000:164, paragraph 21.

<sup>74</sup> See Judgment of the EFTA Court of 8 July 2008, *L’Oréal Norge AS v Per Aarskog AS and Others*, Case E-9/07, paragraph 29.

<sup>75</sup> See Judgment of the EFTA Court of 14 May 1997, *Ullensaker kommune and Others vs Nille AS*, Case E-5/96 *Ullensaker*, paragraph 33 and 35.

<sup>76</sup> See in particular Common Implementation Strategy - Guidance Document No.36 Exemptions to the Environmental Objectives according to Article 4(7)).

<sup>77</sup> Guidance Document No.36 page 19-20: “*New modifications: Modifications to the physical characteristics of surface water bodies mean modifications to their hydro-morphological characteristics (hydrological regime, river continuity, morphological conditions, tidal regime). [...] Non exhaustive examples can include hydropower plants, flood protection schemes, future navigation projects or abstractions which are covered by this provision. Also the hydro-morphological characteristics of impoundment created for hydropower and water supply can dictate the oxygen and temperature conditions resulting in a deterioration of ecological status in the impounded water and in the downstream river (see also chapter 3.5). These may be different from those in an unmodified water body.*”

<sup>78</sup> As an example: Under Article 4(7)(c) of the WFD, an EEA State can only rely on Article 4(7) WFD, and authorise a relevant project on the basis of Article 4(7) WFD, if either, or both, of the following tests, set out in Article 4(7)(c) WFD, are met: (1) the reasons for the project are of “*overriding public interest*”; or (2) the benefits of achieving the WFD objectives for environment/society are out-weighted by the benefits to human health/human safety/sustainable development. See *Austrian National High Administrative Court Decision (VwGH 24.11.2016, Ro 2014/07/0101)*. In contrast to Article 4(7)(c) WFD, Article 12 of the Norwegian Water Regulation does not explicitly refer to a derogation concerning “*overriding public interest*”.

<sup>79</sup> Although, Recital (32) of the Preamble of the WFD should be noted.

<sup>80</sup> Case C-346/14 cited above, *European Commission v Austria*, paragraph 73.

<sup>81</sup> Article 4(7)(c) WFD.

<sup>82</sup> Case C-346/14, cited above, *European Commission v Austria*, paragraphs 69, 71.

installation relates to the production of hydropower generation, this does not mean the project can automatically be authorised under Article 4(7)(c) WFD. Instead, an assessment of whether the particular hydropower generation plant in question does actually fall within the scope of Article 4(7) WFD is still required.

In any event the Directorate concludes that, on the basis of the information presently available to the Directorate, it is unable to identify sufficient evidence to conclusively determine that, the Norwegian authorities have acted in breach of the WFD provisions and have for example, improperly implemented Article 4(7) WFD.

*5.11 Information concerning the impact of human activity (fish farms) on water bodies and consideration of these issues in RBMPs.<sup>83</sup>*

In this part of the complaint, the Complainants have drawn attention to their concerns regarding the Norwegian authorities approach to assessing the impact of human activities (fish farms) on water bodies. More specifically, the Complainants draw attention to the Norwegian authorities' position vis-à-vis consideration of pressures from salmon lice and escaped farm fish, in the context of RBMPs and the approval of projects impacting water bodies. The Directorate expresses its gratitude to the Complainants for passing on this information.

*5.12 The Complainants express concerns regarding PoMs and a failure to limit eutrophication and the adverse impacts on water bodies*

The Directorate notes that Norway was required to establish PoMs by 1 May 2018, and was required to ensure that PoMs are operational by 1 May 2021<sup>84</sup>. Achievement of good chemical status of water bodies is one of the core binding legal requirements set out under the WFD. River Basin Specific Pollutants must be adequately identified and addressed under the WFD.

In the event that there is evidence of agricultural fertilizers or similar products are being discharged into water bodies and of an EEA State failing to identify and/or adequately manage these risks resulting in chemical deterioration of water bodies in breach of the WFD requirements – that evidence should be provided to the Authority for consideration.

In any event, the Directorate concludes that, on the basis of the information presently available to the Directorate, it is unable to identify sufficient evidence to conclusively determine that, the Norwegian authorities have acted in breach of the WFD provisions including Article 11 WFD.

*5.13 The Complainants allege that Norway has failed to completely or correctly implement the WFD in Norway as, according to the Complainants, the Norwegian Water Regulation neither: sufficiently transposes Annex VI Part B of the WFD, nor requires Norway to adopt an integrated approach to flood and water management.<sup>85</sup>*

The Directorate notes that, as stated above (Section 4.2), the WFD is a Directive as opposed to a Regulation, consequently Norway has discretion as to the form and method of its implementation. Moreover, the Norwegian Water Regulation should not be interpreted in isolation of other legal requirements applicable under Norwegian law which seek to reflect and transpose the WFD, including Annex VI. The Directorate also notes that the Norwegian Water Regulation (FOR-2006-12-15-1446 Forskrift om rammer for

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<sup>83</sup> See Document No 1048486 (Complaint), page 7.

<sup>84</sup> See, inter alia, Articles 4(1)(a)(ii) and 13(6) WFD and the adaptations as cited at footnote [17] of this document.

<sup>85</sup> See Document No 1048486 (Complaint), page 7-8.

vannforvaltningen) was amended to include Annex VI Part B of WFD (FOR-2019-12-12-1760 Forskrift om endring i forskrift om rammer for vannforvaltningen). This amendment also included the new structure of Norwegian river basin districts. The Directorate therefore concludes that, on the basis of the information presently available to the Directorate, it is unable to identify sufficient evidence to conclusively determine that, the Norwegian authorities have failed to completely or correctly implement the WFD in Norway.

## 6 Conclusion

On the basis of the information presently available to the Directorate, the Directorate 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.

Article 5(1)(a) of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice confers on the Authority a mandate to ensure the fulfilment by the EEA EFTA States of their obligations under the EEA Agreement. To this end, Article 5(2)(a) of the SCA empowers the Authority to take decisions in cases provided for in that Agreement and in the EEA Agreement.

According to the settled case law of the EFTA Court,<sup>86</sup> the Authority enjoys a wide discretion in deciding how, and whether to, pursue proceedings against an EEA EFTA State. The Authority alone is competent to decide whether it is appropriate to bring proceedings under Article 31 SCA for failure to fulfil the obligations under the EEA Agreement.

Furthermore, any infringement proceedings brought by the Authority under Article 31 SCA should be concentrated so as to ensure the greatest impact for the functioning of the EEA Agreement, bearing in mind the available resources of the Authority.

The Complainants should note that the Authority has recently opened an own initiative case<sup>87</sup> to further examine Norway's potential non-compliance with the WFD requirements, including the application and implementation of Article 4(7) WFD by Norway.

Before the Internal Market Affairs Directorate proposes to proceed with closing this case you are invited to submit your observations on the above assessment and to present any new information by 19 November 2021.

Yours faithfully

Jónína S. Lárusdóttir  
Director  
Internal Market Affairs Directorate

*This document has been electronically authenticated by Jonina S. Larusdottir.*

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<sup>86</sup> See, for example, Order of the EFTA Court of 23 October 2013, *Bentzen Transport v EFTA Surveillance Authority*, Case E-2/13, EFTA Ct. Rep [2013] p. 802, point 40.

<sup>87</sup> Case 86194.