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Ministry of Climate and Environment  
Postboks 8013 Dep  
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Norway

Dear Sir or Madam,

**Subject: Complaint against Norway in the area of management of waste from extractive industries**

## 1 Introduction

By letter of 6 April 2017 (Document No: 851380), the EFTA Surveillance Authority (“the Authority”) informed the Norwegian Ministry of Climate and Environment (“the Ministry”) that it had received a complaint from 11 organisations concerning the alleged breaches by Norway of *Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 on the management of waste from extractive industries and amending Directive 2004/35/EC*<sup>1</sup> (“the Mining Waste Directive”) in relation to permits granted for the disposal of mining waste in several Norwegian fjords.<sup>2</sup>

The complainants claim that Norway has infringed the Mining Waste Directive by granting permits for the disposal of mining waste in Norwegian fjords without requiring a waste management plan.<sup>3</sup>

The Authority’s investigation of the concerns raised by the complainants prompted a broader examination of the implementation of the Mining Waste Directive into the Norwegian legal order. The Norwegian Government has been invited to provide information on its management of waste from extractive industries (i.e. “mining waste”) as well as on the Norwegian legislation that implements the Mining Waste Directive.

Based on the information and documentation provided by the Norwegian Government, the Internal Market Affairs Directorate (“the Directorate”) is of the preliminary view that Norway has failed to ensure compliance with its obligations arising from the Mining Waste Directive in two respects. Firstly, several provisions of the Mining Waste Directive are not adequately implemented, or not transposed at all, into the Norwegian legal order.<sup>4</sup> Secondly, the Norwegian Government’s administrative practices for managing mining waste do not give comfort that the requirements and objectives of the Mining Waste Directive are met.<sup>5</sup>

<sup>1</sup> OJ L 102, 11.4.2006, p. 15–34. Incorporated into Annex XX of the EEA Agreement at point 32fe by Decision of the EEA Joint Committee No 18/2009 (OJ L 73, 19.3.2009, p. 57).

<sup>2</sup> Permits granted for the disposal of mining waste in Førde fjord and Ran fjord in 2015, and in Reppar fjord in 2016.

<sup>3</sup> With reference to Article 5 and Article 7 of the Mining Waste Directive, respectively.

<sup>4</sup> Articles 2(2), 3, 5(2) and (4), 7(1) and (4), 8(1), 11(3), 12(6), 14(1) and (3), and 17(1) of the Mining Waste Directive.

<sup>5</sup> Articles 5(2), 7(2)(c) and (4), 8(1), 11(3), 12(6), 14(1) and (3), and 17(1) of the Mining Waste Directive.

The Directorate also takes the preliminary view that Norway has breached Article 7 of the EEA Agreement, by failing to implement the Mining Waste Directive with the specificity, precision and clarity necessary to satisfy the requirements of legal certainty as to the result to be achieved.<sup>6</sup>

This letter sets out the reasoning that led the Directorate to take its preliminary views. The preliminary views of the Directorate set out in this letter are without prejudice to the Authority's assessments under the *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 Water Framework Directive").<sup>7</sup>

Section 2 of this letter provides an overview of the Authority's correspondence with the Norwegian Government in relation to this case. Sections 3 and 4 contain the provisions of relevant EEA law and Norwegian law, respectively. Section 5 presents the Directorate's preliminary assessment and views, in which Section 5.2 concerns Norway's implementation of the Mining Waste Directive and Section 5.3 the administrative practices for managing mining waste. Section 6 summarizes the Directorate's preliminary views, and Section 7 concludes.

## 2 Correspondence with the Norwegian Government

By letter of 25 September 2017 (Document No: 871583), the Directorate sent a request for information to the Norwegian Government, in which it invited the Norwegian Government to provide information on the implementation and enforcement of Articles 5 and 7 of the Mining Waste Directive.

The Norwegian Government submitted its reply on 16 October 2017 (Document No: 878329). The case was next discussed at the package meeting of 27 October 2017. The Norwegian Government subsequently submitted a letter dated 15 January 2018 (Document No: 893922) together with supporting documentation, endeavouring to clarify certain points raised at the package meeting.

The Directorate's assessment of the letter and supporting documentation raised further questions, thus it sent a second request for information by letter of 27 August 2018 (Document No: 902276). The Norwegian Government submitted its reply on 28 September 2018 (Documents No: 932890 and 932888).

The case was discussed at the package meeting of 25 October 2018.

The Norwegian Government submitted a letter dated 7 June 2019 (Document No: 1074134) in which it provided additional information.

The case was discussed at the package meeting of 25 October 2019. Following these discussions, the Directorate invited the Norwegian Government to submit a table of correspondence ("ToC") for the implementation of the Mining Waste Directive on 6 December 2019 (Document No: 1100612).

By letter of 31 January 2020 (Documents No: 1111564 and 1111566), the Norwegian Government submitted the requested ToC, together with supporting documentation.

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<sup>6</sup> Case E-15/12 *Jan Anfinn Wahl v. the Icelandic State* [2013] EFTA Ct. Rep. 534, paragraph 49-51.

<sup>7</sup> 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. 1–73). Incorporated into Annex XX of the EEA Agreement at point 13ca by Joint Committee Decision No 125/2007 of 28 September 2007.

The case was last discussed at the package meeting of 23 October 2020. Following the discussions, the Norwegian Government shared with the Directorate a link to the public consultation of a legislative proposal to implement the missing review procedure for the waste management plans foreseen by the Mining Waste Directive.<sup>8</sup>

### 3 Relevant EEA Law

#### 3.1 The EEA Agreement

Article 7 of the EEA Agreement provides the requirements for the transposition of acts incorporated into the EEA Agreement:

*“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:*

*(a) an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties;*

*(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.”*

#### 3.2 The Mining Waste Directive

The Mining Waste Directive sets out requirements for the management of mining waste. The following provisions of the Mining Waste Directive, listed in the numerical order of the Mining Waste Directive, are of relevance to the Directorate’s preliminary assessment and views set out in this letter.

##### 3.2.1 Scope of application

Article 2(1) defines the Mining Waste Directive’s scope of application. The Mining Waste Directive covers *“the management of waste resulting from the prospecting, extraction, treatment and storage of mineral resources and the working of quarries, hereinafter ‘extractive waste’.*”

Pursuant to Article 2(2) and (3), the following exceptions apply:

*“2. The following shall be excluded from the scope of this Directive:*

*(a) waste which is generated by the prospecting, extraction and treatment of mineral resources and the working of quarries, but which does not directly result from those operations;*

*(b) waste resulting from the offshore prospecting, extraction and treatment of mineral resources;*

*(c) injection of water and re-injection of pumped groundwater as defined in the first and second indents of Article 11(3)(j) of Directive 2000/60/EC, to the extent authorised by that Article.*

*3. Inert waste and unpolluted soil resulting from the prospecting, extraction, treatment and storage of mineral resources and the working of quarries and waste resulting from the extraction, treatment and storage of peat shall not be*

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<sup>8</sup> The Norwegian Environment Agency’s public consultation of its legislative proposal can be accessed (only in Norwegian) [here](#).

*subject to Articles 7, 8, 11(1) and (3), 12, 13(6), 14 and 16, unless deposited in a Category A waste facility.*

*The competent authority may reduce or waive the requirements for the deposit of non-hazardous waste generated from the prospecting of mineral resources, except oil and evaporites other than gypsum and anhydrite, as well as for the deposit of unpolluted soil and of waste resulting from the extraction, treatment and storage of peat as long as it is satisfied that the requirements of Article 4 are met. (...)*

### 3.2.2 Definitions

Article 3 lists the definitions which apply for the purposes of the Mining Waste Directive.

### 3.2.4 Waste management plan

Article 5(1) requires the operator of a waste facility to draw up a waste management plan *“for the minimisation, treatment, recovery and disposal of extractive waste, taking account of the principle of sustainable development.”*

Article 5(2) sets out the objectives of the waste management plan:

*“(a) to prevent or reduce waste production and its harmfulness, in particular by considering:*

- (i) waste management in the design phase and in the choice of the method used for mineral extraction and treatment;*
- (ii) the changes that the extractive waste may undergo in relation to an increase in surface area and exposure to conditions above ground;*
- (iii) placing extractive waste back into the excavation void after extraction of the mineral, as far as is technically and economically feasible and environmentally sound in accordance with existing environmental standards at Community level and with the requirements of this Directive where relevant;*
- (iv) putting topsoil back in place after the closure of the waste facility or, if this is not practically feasible, reusing topsoil elsewhere;*
- (v) using less dangerous substances for the treatment of mineral resources;*

*(b) to encourage the recovery of extractive waste by means of recycling, reusing or reclaiming such waste, where this is environmentally sound in accordance with existing environmental standards at Community level and with the requirements of this Directive where relevant;*

*(c) to ensure short and long-term safe disposal of the extractive waste, in particular by considering, during the design phase, management during the operation and after-closure of a waste facility and by choosing a design which:*

- (i) requires minimal and, if possible, ultimately no monitoring, control and management of the closed waste facility;*

- (ii) *prevents or at least minimises any long-term negative effects, for example attributable to migration of airborne or aquatic pollutants from the waste facility; and*
- (iii) *ensures the long-term geotechnical stability of any dams or heaps rising above the pre-existing ground surface.”*

Article 5(3) sets out specific minimum requirements for the content of the waste management plan. As a general requirement, the waste management plan *“shall provide sufficient information to enable the competent authority to evaluate the operator’s ability to meet the objectives of the waste management plan as set out in paragraph 2 and his obligations under this Directive. The plan shall explain, in particular, how the option and method chosen as mentioned in paragraph 2(a)(i) will fulfil the objectives of the waste management plan as laid down in paragraph 2(a).”*

Article 5(4) requires the waste management plan to be reviewed every five years and/or amended, as appropriate, *“in the event of substantial changes to the operation of the waste facility or to the waste deposited.”* Any amendments shall be notified to the competent authority.

Article 5(5) provides that: *“Plans produced pursuant to other national or Community legislation and containing the information specified in paragraph 3 may be used where this obviates the unnecessary duplication of information and the repetition of work by the operator, on condition that all requirements under paragraphs 1 to 4 are met.”*

### 3.2.5 Application and permit

Pursuant to Article 7(1), no waste facility shall be allowed to operate without a permit granted by the competent authority. The permit application shall contain at least the elements specified in Article 7(2), including: *“c) the waste management plan pursuant to Article 5.”*

Moreover, the competent authority shall only grant a permit if it is satisfied that the operator complies with the relevant requirements under the Mining Waste Directive, pursuant to Article 7(3).

Article 7(4) requires that necessary measure shall be taken to ensure that competent authorities periodically reconsider and, where necessary, update permit conditions:

- *“where there are substantial changes in the operation of the waste facility or the waste deposited;*
- *on the basis of monitoring results reported by the operator pursuant to Article 11(3) or inspections carried out pursuant to Article 17;*
- *in the light of information exchange on substantial changes in best available techniques under Article 21(3).”*

### 3.2.6 Public participation

Article 8(1) requires that the public shall be informed *“of the following matters early in the procedure for granting a permit or, at the latest, as soon as the information can reasonably be provided:*

- (a) *the application for a permit;*

*(b) where applicable, the fact that a decision concerning an application for a permit is subject to consultation between the Member States in accordance with Article 16;*

*(c) details of the competent authorities responsible for taking the decisions, those from which relevant information can be obtained, those to which comments or questions can be submitted, and details of the time schedule for transmitting comments or questions;*

*(d) the nature of possible decisions;*

*(e) where applicable, the details relating to a proposal for the updating of a permit or of permit conditions;*

*(f) an indication of the times and places where, or the means by which, the relevant information will be made available;*

*(g) details of the arrangements for public participation made pursuant to paragraph 7.”*

### 3.2.7 Construction and management of waste facilities

Article 11 concerns the construction and management of waste facilities. Article 11(3) lays down a duty of notification upon the operator:

*“The operator shall, without undue delay and in any event not later than 48 hours thereafter, notify the competent authority of any events likely to affect the stability of the waste facility and any significant adverse environmental effects revealed by the control and monitoring procedures of the waste facility. The operator shall implement the internal emergency plan, where applicable, and follow any other instruction from the competent authority as to the corrective measures to be taken.”*

Article 11(3) further lays down reporting requirements:

*“At a frequency to be determined by the competent authority, and in any event at least once a year, the operator shall report, on the basis of aggregated data, all monitoring results to the competent authorities for the purposes of demonstrating compliance with permit conditions and increasing knowledge of waste and waste facility behaviour. On the basis of this report the competent authority may decide that validation by an independent expert is necessary.”*

### 3.2.8 Closure and after-closure procedures for waste facilities

Article 12 concerns the closure and after-closure for waste facilities. Article 12(6) lays down a duty of notification and reporting obligations upon the operator:

*“Following closure of a waste facility, the operator shall, without delay, notify the competent authority of any events or developments likely to affect the stability of the waste facility, and any significant adverse environmental effects revealed by the relevant control and monitoring procedures. The operator shall implement the internal emergency plan, where applicable, and follow any other instruction from the competent authority as to the corrective measures to be taken. (...)*

*In cases and at a frequency to be determined by the competent authority, the operator shall report, on the basis of aggregated data, all monitoring results to the*

*competent authorities for the purposes of demonstrating compliance with permit conditions and increasing knowledge of waste and waste facility behaviour.”*

### 3.2.9 Financial guarantee

Article 14(1) requires that the competent authority “*prior to the commencement of any operations involving the accumulation or deposit of extractive waste in a waste facility, require a financial guarantee (...), so that:*

- *(a) all obligations under the permit issued pursuant to this Directive, including after-closure provisions, are discharged;*
- *(b) there are funds readily available at any given time for the rehabilitation of the land affected by the waste facility, as described in the waste management plan prepared by Article 5 and required by the Article 7 permit.”*

Article 14(3) requires that the size of the guarantee shall be “*periodically adjusted in accordance with any rehabilitation work needed to be carried out on the land affected by the waste facility, as described in the waste management plan prepared pursuant to Article 5 and required by the Article 7 permit.”*

### 3.2.10 Inspections by the competent authority

Article 17(1) requires the competent authority to inspect any waste facility covered by Article 7 “*prior to the commencement of deposit operations at regular intervals thereafter.”*

## 4 Relevant national law

The Mining Waste Directive entered into force in the EEA EFTA States on 1 August 2011. The Norwegian Government has mainly implemented the Mining Waste Directive into Chapter 17 of the Waste Regulation (the “Waste Regulation”).<sup>9</sup>

In addition, the Norwegian Government refers to several acts and regulations,<sup>10</sup> including guidance documents,<sup>11</sup> that fully or partially transpose the requirements of the Mining Waste Directive.

<sup>9</sup> FOR-2004-06-01-930, Forskrift om gjenvinning og behandling av avfall (avfallsforskriften).

<sup>10</sup> Including: the Pollution Control Act (LOV-1981-03-13-6, Lov om vern mot forurensninger og om avfall (forurensningsloven)), the Pollution Regulation (FOR-2004-06-01-931, Forskrift om begrenning av forurensning (forurensningsforskriften)), the Mineral Act (LOV-2009-06-19-101, Lov om erverv og utvinning av mineralressurser (mineralloven)), the Regulation to the Mineral Act (FOR-2009-12-23-1842, Forskrift til mineralloven), the Public Information Act (LOV-2006-05-19-16, Lov om rett til innsyn i dokument i offentlig verksemd (offentleglova)), the Public Administration Act (LOV-1967-02-10, Lov om behandlingsmåten i forvaltningssaker (forvaltningsloven)), the Regulation on impact assessments (FOR-2017-06-21-854, Forskrift om konsekvensutredninger), the Internal Control Regulation (FOR-1996-12-06-1127, Forskrift om systematisk helse-, miljø- og sikkerhetsarbeid i virksomheter (Internkontrollforskriften)), the Regulation on the safety of dams (FOR-2009-12-18-1600, Forskrift om sikkerhet ved vassdragsanlegg (damsikkerhetsforskriften)), and the Product Control Act (LOV-1976-06-11-79, Lov om kontroll med produkter og forbrukertjenester (produktkontrollloven)).

<sup>11</sup> Guidance document of 20 February 2018 ([Veileder - Krav og hensyn til fysiske omgivelser ved forvaltning og bruk av mineralressurser](#)) issued by the Norwegian Directorate for Mineral Management (Direktoratet for Mineralforvaltning) on the basis of Section 1-8 of the Regulation to the Mineral Act. Guidance document of 20 February 2018 ([Veileder Krav og hensyn til fysiske omgivelser ved forvaltning og bruk av mineralressurser](#)) issued by the Norwegian Directorate for Mineral Management (Direktoratet for Mineralforvaltning) on the basis of Section 2 of the Mineral Act.

The following national provisions are of relevance to the Directorate's preliminary assessment and views set out in this letter.<sup>12</sup>

#### 4.1 Waste Regulation

Chapter 17 of the Waste Regulation has been adopted by the Norwegian Government for the purpose of transposing the Mining Waste Directive. It is to note that Chapter 17 of the Waste Regulation uses the term "mineral waste". The Directorate understands that this term covers the definition of "extractive waste" used in the Mining Waste Directive.<sup>13</sup> In this letter, the Directorate uses the more common term "mining waste".

##### 4.1.1 Scope of application

Pursuant to Section 17-2, the provisions of Chapter 17 of the Waste Regulation apply to the handling of mining waste, except for, inter alia:

*"a. handling of waste from activities covered by Chapter 30 of the Regulation of 1 June 2004 no. 931 on the limitation of pollution (the Pollution Control Regulations) on pollutants from the production of crushed stone, gravel, sand and shingle," (...)*

*e. disposal of non-hazardous waste from the exploration of mineral resources, excluding oil and other evaporation products other than gypsum and anhydrite, as well as disposal of non-contaminated soil and waste from the extraction, treatment and storage of peat."*

##### 4.1.2 Definitions

Section 17-3 lists the following definitions: a. mineral waste, b. treatment of mineral resources, c. hazardous waste, d. inert waste, e. effluent, f. operator, g. pollution control authority, h. waste facility, and i. surface water.

##### 4.1.3 Application and permit

Section 17-4 first paragraph requires that: *"Anyone who is to operate a waste facility for mineral waste that may cause pollution or have an unsightly effect must have a permit from the Pollution Control Authority in accordance with this Chapter. This permit shall be an integral part of the permit issued in accordance with Section 11 of the Pollution Control Act."*

Pursuant to Section 17-4 second paragraph, a permit shall *"not be granted unless the operator meets all relevant requirements in Chapter 17 of the Waste Regulation and its annexes."*

Section 17-5 lists the content of the permit application and requires that it *"at least"* contains, inter alia: *"d. proposal for a waste management plan, pursuant to Section 17-7."*

Section 17-6 lists the content of the permit and requires that it *"at least"* contains, inter alia: *"c. approved waste management plan", and "d. reporting requirements"*.

##### 4.1.4 Waste management plan

Section 17-7 first paragraph requires the operator to prepare a waste management plan *"for minimization, treatment, recycling and disposal of mineral waste based on the principle of sustainable development."* Moreover, the purpose of the waste management

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<sup>12</sup> Unofficial translation of relevant provisions by the Directorate.

<sup>13</sup> The definition of "mineral waste" in Section 17-3 a. of the Waste Regulation covers the meaning of "extractive waste" as set out in Article 2(1) of the Mining Waste Directive.



plan is *“to prevent or reduce waste production and its negative environmental consequences, to promote the recovery of mineral waste if this is environmentally sound and to ensure the safe disposal of mineral waste in the short and long term.”*

Pursuant to Section 17-7 second paragraph, the waste management plan shall provide *“sufficient information so that it is possible for the Pollution Control Authority to assess the operator's ability to achieve the objectives of the waste management plan and the obligations under this Chapter.”* Moreover, the plan shall *“in particular explain how the chosen method used for mineral extraction and treatment reduces waste production and its environmental consequences.”*

Section 17-7 third paragraph sets out the minimum requirements for the content of the waste management plan.

#### 4.1.5 Financial guarantee

Pursuant to Section 17-8 first paragraph, the operator must *“at all times have a satisfactory financial guarantee (...), so that”*:

*a. all obligations arising from the permit or order issued pursuant to the Pollution Control Act Section 20 second paragraph first sentence, including requirements for re-enforcement, may be fulfilled*

*b. there are sufficient funds available for the closure of the waste facility, including the rehabilitation of the land affected by the waste facility, even if independent and qualified third parties are to plan and carry out the necessary work.”*

## 4.2 Pollution Control Act

The Pollution Control Act sets out requirements for protecting the environment from and preventing pollution, and seeks to reduce amounts of waste and to promote better treatment of waste, as set out in its Section 1.

Chapter 17 of the Waste Regulation has been adopted based on Section 9 of the Pollution Control Act. The Directorate understands that the Pollution Control Act provides overarching general requirements that are applicable to mining waste activities.

The following national provisions are of relevance to the Directorate's preliminary assessment and views set out in this letter.

#### 4.2.1 Duty to avoid pollution

Section 7 first paragraph sets out a general duty to avoid pollution by requiring that: *“No person must have, do or implement anything that may entail a risk of pollution without it being lawful pursuant to Sections 8 or 9, or permitted by decision pursuant to Section 11.”*

#### 4.2.2 Application and permit

Pursuant to Section 11 first paragraph: *“The Pollution Control Authority may, upon application, issue a permit for activity that may cause pollution. The Pollution Control Authority may in special cases grant a permit without an application, and in such a permit issue orders that replace conditions pursuant to Section 16.”*

#### 4.2.3 Permit conditions

Pursuant to Section 16 first paragraph, the Pollution Control Authority may set certain conditions in the permit: *“In a permit pursuant to this Act or regulations pursuant to the*

*Act, conditions may be set in more detail to counteract that pollution leads to damage or inconvenience, and to promote efficient utilization of energy that the company uses or produces. Conditions may be laid down regarding protection and cleaning measures, recycling and that the permit shall only be valid for a certain period of time.”*

#### 4.2.4 Alteration and reversal of permit

Pursuant to Section 18 first paragraph, the Pollution Control Authority may alter or reverse the conditions of a permit or set new conditions, and if necessary revoke the permit if:

- “1) it turns out that the damage or inconvenience of the pollution will be significantly greater or different than expected when permission was granted,*
- 2) the damage or inconvenience can be reduced without unreasonable cost to the polluter,*
- 3) new technology makes it possible to reduce pollution to a significant degree,*
- 4) the conditions of the permit are unnecessary to counteract pollution,*
- 5) the benefits to the polluter or others of being relaxed or repealed are significantly greater than the damage or inconvenience it will cause to the environment, or*
- 6) otherwise follows from otherwise applicable alteration rules.”*

#### 4.2.5 Duty to notify

Section 39 first paragraph sets out a duty to “*immediately*” notify the police authorities in the event or danger of acute pollution. Pursuant to the second paragraph: “*The duty to notify pursuant to the first paragraph is the responsibility of the person responsible for the pollution. Others also have a duty to notify unless it is clearly unnecessary.*”

#### 4.2.6 Supervision

Pursuant to Section 48, the Pollution Control Authority shall “*supervise the general pollution situation and with pollutants from the individual sources.*” The Pollution Control Authority shall “*also supervise the handling of waste.*”

#### 4.2.7 Duty to provide information

Section 49 first paragraph sets out a duty to provide information:

*“By order of the Pollution Control Authority, the person who has, does or implements anything that may pollute or lead to waste problems without prejudice to the duty of confidentiality is obliged to provide the Pollution Control Authority or other public bodies with the information necessary for implementation of tasks under the act. When special reasons so require, the Pollution Control Authority may demand that the information be provided by anyone who performs work for the person who has a duty to provide information pursuant to the first sentence.”*

Pursuant to the second paragraph, the information mentioned in the first paragraph may also be required from other public authorities without prejudice to the duty of confidentiality that otherwise applies.

### **4.3 Pollution Regulation**

The Pollution Regulation provides detailed rules to supplement the general rules found in the Pollution Control Act. The Norwegian Government refers in its ToC to certain provisions of the Pollution Regulation that fully or partially transpose the requirements of the Mining Waste Directive.

Chapter 30 of the Pollution Regulation is of relevance to the Directorate's preliminary assessment and views set out in this letter. This Chapter covers pollution from the production of crushed stone, gravel, sand and shingle.

Section 30-12 sets out the requirement for producers of crushed stone, gravel, sand and shingle to establish waste plans: *"If the company generates mineral waste that is stored for more than 3 years or disposed of, a plan must be made for handling this waste. The plan must be able to be submitted to the Pollution Control Authority for inspection."*

## 5 The Directorate's preliminary assessment

### 5.1 Introduction

The Directorate has carried out a conformity assessment of Norway's implementation of the Mining Waste Directive based on the ToC submitted by the Norwegian Government on 31 January 2020.

The Directorate concludes that the Norwegian legal order and administrative practices are not in line with the applicable requirements for the implementation of directives.

Pursuant to Article 7 of the EEA Agreement, the authorities of the Contracting Parties have the choice of form and method of implementation when making the provisions of a directive part of their internal legal order.

According to the EFTA Court's judgement in Case E-15/12, with reference to Article 7 of the EEA Agreement, *"provisions of directives must be implemented with unquestionable binding force and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty (...). EEA States must ensure full application of directives not only in fact but also in law."*<sup>14</sup> In that regard, *"it must also be borne in mind that it is clear from case law with regard to the implementation of directives that mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of an EEA/EFTA State's obligations under the EEA Agreement."*<sup>15</sup>

### 5.2 Norway's implementation of the Mining Waste Directive

The Directorate's assessment in this section of the letter follows the numerical order of the Mining Waste Directive's provisions listed above in Section 3.

#### 6.2.1 Scope of application

Chapter 17 of the Waste Regulation excludes from its scope the two following waste streams: (i) the waste from the production of crushed stone, gravel, sand and shingle and (ii) the disposal of non-hazardous waste generated from the prospecting of mineral resources, and waste resulting from the extraction, treatment and storage of peat. The Directorate is of the preliminary view that these exclusions are not in line with Article 2(2)

<sup>14</sup> Case E-15/12 *Jan Anfinn Wahl v. the Icelandic State* [2013] EFTA Ct. Rep. 534, paragraph 51. Compare, *mutatis mutandis*, Case C-159/99 *Commission v Italy* [2001] ECR I-4007, paragraph 32.

<sup>15</sup> Case E-15/12 *Jan Anfinn Wahl v. the Icelandic State* [2013] EFTA Ct. Rep. 534, paragraph 53. See, in particular, Case C-259/01 *Commission v France* [2002] ECR I-11093, paragraph 17, and case law cited.

of the Mining Waste Directive for the reasons detailed hereafter in subsections 5.2.1.1 and 5.2.1.2.

#### *5.2.1.1 Waste from the production of crushed stone, gravel, sand and shingle*

Waste from the production of crushed stone, gravel, sand and shingle is covered by Chapter 30 of the Pollution Regulation. The Norwegian Government explained in the ToC and at the package meeting of 23 October 2020 that the national provisions for this waste stream have been adopted before the transposition of the Mining Waste Directive into the Norwegian legal order, and that it has not been deemed necessary to update them when transposing the Mining Waste Directive as this waste stream is of limited amount and poses little to no risk of pollution.

The Directorate notes however that Chapter 30 of the Waste Regulation shows lack of compliance with the Mining Waste Directive. The Directorate notices for instance that Section 30-12 of the Pollution Regulation foresees the preparation of a waste plan only if the waste facility generates mining waste that is stored for more than 3 years or disposed of. This provision is not in line with Article 5(1) of the Mining Waste Directive, which does not condition the submission of a waste management plan to storage duration. Chapter 30 of the Waste Regulation also fails to transpose the objectives and minimum requirements for the waste management plan foreseen by Article 5(2) and (3) of the Mining Waste Directive.

The Directorate considers that waste from the production of crushed stone, gravel, sand and shingle falls under the scope of application of the Mining Waste Directive.<sup>16</sup> The Norwegian Government has not disputed this in its exchanges with the Directorate.

In light of the above, the Directorate is of the preliminary view that the Mining Waste Directive is not adequately transposed in Norway with regard to waste from production of crushed stone, gravel, sand and shingle.

#### *5.2.1.2 Disposal of non-hazardous waste generated from the prospecting of mineral resources, and waste resulting from the extraction, treatment and storage of peat*

The Norwegian Government explained in the ToC that the non-hazardous waste generated from the prospecting of mineral resources, and waste resulting from the extraction, treatment and storage of peat is of limited amount and poses little to no risk of pollution. The Directorate notes that Article 2(3) second paragraph of the Mining Waste Directive allows to reduce or waive the requirements of the Mining Waste Directive for this waste stream, provided that the competent authority is satisfied that the general requirements, set out in Article 4 of the Mining Waste Directive, are met.

The Directorate observes that the Norwegian legal framework does not subject the exemption of this waste stream to an assessment by the competent authority of the fulfilment of these general requirements. On the contrary, it provides only a general exemption in Section 17-2 e. of the Waste Regulation.

The Directorate takes the preliminary view that the approach taken by Norway fails to ensure the full applicability of the Mining Waste Directive.

#### *5.2.2 Definitions*

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<sup>16</sup> Considering as described above that the Mining Waste Directive applies to “*management of waste resulting from the prospecting, extraction, treatment and storage of mineral resources and the working of quarries*” and that only waste which “*does not directly result from those operations*” is explicitly excluded from the scope of the Mining Waste Directive (Article 2(1) and (2)(a)).

The Norwegian Government explained in the ToC that not all of the 29 definitions of the Mining Waste Directive are implemented in Chapter 17 of the Waste Regulation. The Directorate identified 21 missing definitions.<sup>17</sup> At the package meeting of 23 October 2020, the Norwegian Government explained that some definitions have not been transposed as their meaning were considered straightforward (e.g. the definition of “unpolluted soil” in Article 3(4) of the Mining Waste Directive), and that some other definitions have been transposed in either other chapters of the Waste Regulation or in other provisions of applicable sectoral legislation.<sup>18</sup>

The application of definitions from other chapters of the Waste Regulation, or other applicable sectoral legislation, to Chapter 17 of the Waste Regulation is not always apparent in the said chapter. The Norwegian Government did not provide an overview of references to the definitions of the Mining Waste Directive that are implemented elsewhere than in Chapter 17 of the Waste Regulation.

In the absence of demonstration that all definitions of the Mining Waste Directive have been implemented, the Directorate sees a risk of non-compliance.

Based on the above, the Directorate takes the preliminary view that Norway has failed to fully and adequately implement Article 3 of the Mining Waste Directive.

### 5.2.3 Waste management plan

#### 5.2.3.1 *Objectives of the waste management plan*

Article 5(1) of the Mining Waste Directive requires that the operator draws up a waste management plan “*for the minimisation, treatment, recovery and disposal of extractive waste, taking into account the principle of sustainable development*”. Article 5(2) further specifies the objectives of the waste management plan.

The Norwegian Government explained in the ToC that:

- the objectives set in Article 5(1) and partly (2) of the Mining Waste Directive are implemented into Section 17-7 of the Waste Regulation;
- some objectives of the waste management plan are covered in other sectoral legislation relevant for mining waste facilities, such as the Product Control Act<sup>19</sup> and the Mineral Act;<sup>20</sup>
- some of the objectives must also be assessed and documented in the environmental impact assessment pursuant to the Regulation on impact assessments;<sup>21</sup>
- the objectives set out under Article 5(2)(a) of the Mining Waste Directive, “*to prevent or reduce waste production and its harmfulness, in particular by considering...*”, are amongst others covered by guidance documents under the Mineral Act and the Regulation to the Mineral Act. These guidance documents, issued by the Directorate for Mineral Management, include requirements for the proposal of an operating plan, which is required for the granting of an operating license<sup>22</sup> under the Mineral Act;<sup>23</sup>

<sup>17</sup> The definitions of the Mining Waste Directive that have not been transposed by Norway are Article 3(1), (4), (6), (7), (10), (11), (12), (13), (14), (16), (17), (18), (19), (20), (21), (22), (23), (25), (26), (28), (29).

<sup>18</sup> Such as the Pollution Control Act, the Pollution Regulation and the Mineral Act.

<sup>19</sup> Reference is made between Section 3a of this act and Section 5(2)(a)(v) of the Mining Waste Directive.

<sup>20</sup> Reference is made between Section 2 of this act and Section 5(2)(iv) of the Mining Waste Directive.

<sup>21</sup> Reference is made in the ToC to Sections 20 and 21 of this act.

<sup>22</sup> In Norwegian: “driftskonsesjon”.

- the objectives in Article 5(2)(a) of the Mining Waste Directive are not exhaustively listed in Chapter 17 of the Waste Regulation as it was considered sufficient to implement only the overall objectives of Article 5(1) of the Mining Waste Directive<sup>24</sup> and that, in practice, the Pollution Control Authority lays down conditions in the permit to ensure that all the objectives of the waste management plan are met.<sup>25</sup>

By letter dated 28 September 2018<sup>26</sup> and at the package meeting of 23 October 2020, the Norwegian Government added that: (i) mining waste facilities are subject to several approvals, permits and licenses; (ii) these are granted by different competent authorities on the basis of various acts and regulations; and (iii) all involved authorities seek to ensure compliance with the objectives of the Mining Waste Directive.

The Directorate disagrees with the Norwegian Government's interpretation and subsequent approach for the implementation of Article 5(2) of the Mining Waste Directive. With reference to the wording of Article 5(2)(a) of the Mining Waste Directive, being that the objectives of the waste management shall be "*to prevent and reduce waste and its harmfulness, in particular by considering...*" (emphasis added), the Directorate takes the preliminary view that, as a minimum, the listed objectives should be transposed into the Norwegian legislation.

In the preliminary view of the Directorate, the national provisions and guidance documents referred to by the Norwegian Government do not reflect the level of detail required by Article 5 of the Directive. They furthermore provide an incoherent framework as the requirements are scattered through several provisions without appropriate references ensuring that they will be considered and therefore applied by all involved authorities.

As a consequence, the Directorate takes the preliminary view that Norway has failed to adequately implement the objectives of the waste management plan pursuant to Article 5(2) of the Mining Waste Directive. The Directorate's concerns related to Norway's administrative practices for the approval of the waste management plan are further raised in Section 5.3.2 of this letter.

#### 5.2.3.2 Review of the waste management plan

To date, the review procedure for the waste management plan foreseen by Article 5(4) of the Mining Waste Directive is missing from the Norwegian legislation.

This is acknowledged by the Norwegian Government. It informed the Directorate at the package meeting of 23 October 2020 that a legislative proposal adding this review procedure into Section 17-7 of the Waste Regulation had been sent on public consultation.<sup>27</sup> The Directorate understands that the public consultation process was closed on 25 November 2020, and that the legislative proposal was planned to be adopted early 2021.

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<sup>23</sup> Guidance document of 20 February 2018 ([Veileder - Krav og hensyn til fysiske omgivelser ved forvaltning og bruk av mineralressurser](#)) issued by the Norwegian Directorate for Mineral Management (Direktoratet for Mineralforvaltning) on the basis of Section 1-8 of the Regulation to the Mineral Act. Guidance document of 20 February 2018 ([Veileder Krav og hensyn til fysiske omgivelser ved forvaltning og bruk av mineralressurser](#)) issued by the Norwegian Directorate for Mineral Management (Direktoratet for Mineralforvaltning) on the basis of Section 2 of the Mineral Act.

<sup>24</sup> See Article 5(2) (a)(i) to (v), (b), and (c)(i) to (iii).

<sup>25</sup> Pursuant to Sections 11 and 16 of the Pollution Control Act, cf. Section 11-4 of the Waste Regulation.

<sup>26</sup> Our reference: Document No: 932890.

<sup>27</sup> The Norwegian Environment Agency's public consultation of its legislative proposal can be accessed (only in Norwegian) [here](#).

The legislative proposal reads as follows:

*“The waste management plan shall be re-evaluated every five years and / or amended, as necessary, if there are significant changes in the operation of the waste facility or the deposited waste. Any changes must be notified to the Pollution Control Authority.”*

The Directorate notes that the proposed provision would be compliant with Article 5(4) of the Mining Waste Directive. However, to the knowledge of the Directorate, the provision has not yet been adopted at the time of this letter.

The Directorate welcomes Norway’s planned amendment of Section 17-7 of the Waste Regulation, and invites Norway to provide an update on the timing for the adoption of this amendment.

#### 5.2.4 Application and permit

##### 5.2.4.1 *Requirements to apply for permits*

Pursuant to Article 7(1) of the Mining Waste Directive, no waste facility shall be allowed to operate without a permit granted by the competent authority. Each EEA State is left with the choice of whether the requirements under Article 7 are to be covered by a single permit or by several permits.

The Norwegian legal framework requires operators to apply for permits when their facilities “*may cause pollution or have an unsightly effect*”, pursuant to Section 17-4 of the Waste Regulation. Moreover, pursuant to the same national provision, this permit “*shall be an integral part*” of the permit issued pursuant to Section 11 of the Pollution Control Act by the Pollution Control Authority (“the pollution permit”).

The Directorate understands the approach undertaken in Norway that any mining facility is assumed to possibly cause pollution. However, the Directorate notes from a formal point of view a discrepancy between the Mining Waste Directive’s and the Norwegian provisions. While the Mining Waste Directive requires permitting for any waste facility, the Norwegian regime requires permitting only in case the mining waste facility “*may cause pollution or have unsightly effect*”.

In the preliminary view of the Directorate, the permit regime foreseen by Norway leaves potentially a degree of discretionary power to the competent authority which is not foreseen by the Mining Waste Directive. While recognising Norway’s discretionary power to design the permit regime, e.g. by combining the permit pursuant to the Mining Waste Directive with the pollution permit, the Directorate takes the preliminary view that the requirements to apply for permits under the Norwegian legislation are not aligned with Article 7(1) of the Mining Waste Directive. The explicit requirement of permitting for any waste facility should not be left to the discretion of competent authorities.

##### 5.2.4.2 *Approval of the waste management plan in the permitting process*

Article 7(2) of the Mining Waste Directive requires the application for a permit to operate a waste facility to contain, inter alia, “(c) *the waste management plan pursuant to Article 5.*”

The Directorate understands that Norway chose to implement this requirement into two provisions. First, Section 17-5 d. of the Waste Regulation requires the application for a permit to contain a “*proposal for a waste management plan*”. Section 17-6 c. then requires the permit to contain an “*approved waste management plan*”. The Norwegian Government explained in the ToC that the proposal for a waste management plan has to

be submitted with the application for a permit, and that the final waste management plan has to be approved before operation of the mining waste facility commences. It also explained at the package meeting of 23 October 2020 that the final content of the waste management plan may depend on information that the operator obtains following the granting of other permits/licenses that are necessary for the operation of mining waste facilities. As a consequence, permits granted under Section 17-4 of the Waste Regulation may be granted under the condition that the proposal for a waste management plan, submitted with the permit application, is updated and approved.<sup>28</sup> The approval of the waste management plan is typically the last step before a mining facility can start its operations.

It follows from the complaint received by the Directorate that permits have been granted for the disposal of mining waste in Norwegian fjords without waste management plans being included in the permit application, as required by Article 7(2)(c) of the Mining Waste Directive. This is not disputed by the Norwegian Government, which confirmed in its letter of 16 October 2017 that no waste management plans were produced with the permit applications for the dumping of mining waste in Førde and Reppar fjord, since the information relevant for the waste management plan was considered to be covered in other documents obtained in the application process.<sup>29</sup>

The Directorate takes the preliminary view that the approach of the Norwegian Government in this respect may lead to an inadequate application of the Mining Waste Directive. First of all, the public participation on the waste management plan is questionable. The Norwegian Government explained at the package meeting of 23 October 2020 that two public consultations take place: one on the draft waste management plan submitted along the application, and a second one on the final draft waste management plan. The Directorate notes that the latter public consultation is not reflected in the Norwegian legislation, and is thus left to the administrative practices.

Secondly, although Article 5(5) of the Mining Waste Directive allows for the combination of plans produced pursuant to other national or EU/EEA legislation in order to develop the waste management plan *“where this obviates the unnecessary duplication of information and the repetition of work by the operator, on the condition that all requirements under paragraphs 1 to 4 are met”*, it appears that such approach is not reflected in the Norwegian legal framework. It creates therefore a risk of legal uncertainty that the Mining Waste Directive requirements and objectives with regard to waste management plans are not fulfilled.

Finally, the two-step approach applied by Norway for the approval of the waste management plan further reinforces the Directorate’s concerns that the Norwegian framework does not guarantee compliance with the objectives of the waste management plan, as stated above in Section 5.2.3.1.

For the above reasons, the Directorate takes the preliminary view that Norway has failed to adequately implement Articles 5(5), 7(2)(c) and 8(1) of the Mining Waste Directive.

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<sup>28</sup> Pursuant to Sections 11 and 16 of the Pollution Control Act, cf. Section 17-4 of the Waste Regulation.

<sup>29</sup> Our reference: Document No: 878329.



### 5.2.4.3 Review of the permit

Article 7(4) of the Mining Waste Directive requires the State to take the necessary measures to ensure that competent authorities periodically reconsider and, where necessary, update permit conditions, in case amongst others there are substantial changes in the operation of the waste facility or the waste deposited.

The Norwegian Government explained in the ToC that the review of the permit granted under Chapter 17 of the Waste Regulation is governed by the process applicable to the overall permits granted under Section 11 of the Pollution Control Act, the former permit being an integral part of the latter pursuant to Section 17-4 of the Waste Regulation. Thus, Section 18 of the Pollution Control Act is relevant for the permitting of mining waste facilities.

In the preliminary view of the Directorate, this provision is however not compliant with Article 7(4) of the Mining Waste Directive. Section 18 of the Pollution Control Act does not foresee the review of the granted permits in case of substantial changes in the operation of the facilities of the waste deposited, as required by Article 7(4) of the Mining Waste Directive.

At the package meeting of 23 October 2020, the Norwegian Government explained that in case of substantial changes in the operation of a waste facility, the activity is no longer considered to be covered by the permit and, thus, the operator is required to request a new/updated permit. While the Directorate welcomes the administrative practices, it considers that it needs to be reflected in the Norwegian legal framework to ensure full compliance with Article 7(4) of the Waste Mining Directive, as detailed below.

For the sake of completeness, the Directorate notes that the definition of “*substantial change*” in Article 3(2) of the Mining Waste Directive has not been transposed into Chapter 17 of the Waste Regulation.

### 5.2.5 Construction and management of waste facilities

Article 11(3) of the Mining Waste Directive imposes upon the operator i) a duty of notification no later than 48 hours of events likely to affect the stability of the waste facility, ii) a requirement to implement the internal emergency plan, where applicable and follow any other instruction from the competent authority as to the corrective measures to be taken, and iii) reporting obligations. The competent authority is to determine the reporting frequency, which shall be “*in any event at least once a year*”.

The Norwegian Government explained in the ToC that Article 11(3) of the Mining Waste Directive is implemented, inter alia, by Section 17-6 e. of the Waste Regulation. The Norwegian Government has further explained that reporting conditions are laid down in all permits,<sup>30</sup> and refers to a template.<sup>31</sup> The Directorate observes that Section 17-6 e. of the Waste Regulation merely states that the permit shall include reporting requirements. This general reporting requirement does not specify the purpose and frequency of the reporting, as required by Article 11(3) of the Mining Waste Directive.

As regards the implementation of the operator’s notification duty in case of any events likely to affect the stability of the waste facility, the Norwegian Government has provided additional references in the ToC to Section 39 of the Pollution Control Act, the Regulation of 9 July 1992 No 1260 (“the Acute Pollution Regulation”)<sup>32</sup> and to the Regulation of 18

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<sup>30</sup> Pursuant to Sections 11 and 16 of the Pollution Control Act, cf. Section 17-4 of the Waste Regulation.

<sup>31</sup> “Konsesjonsmalen” pkt. 11.5.

<sup>32</sup> FOR-07-09-1992-1260, Forskrift om akutt forurensning.

December 2009 No 1600 (“Dam Security Regulation”).<sup>33</sup> However, the applicability of these regulations to the management of mining waste is not clear as there are no cross-references between the provisions of these regulations and Chapter 17 of the Waste Regulation. For the sake of completeness, the Directorate notes that Section 39 of the Pollution Control Act does not fully reflect the duty to notify under Article 11(3) of the Mining Waste Directive: while the latter requires a notification no later than 48 hours, Section 39 of the Pollution Control Act requires a notification “*immediately*”.

Considering that the provisions referred to above do not ensure reporting by the operator at least once a year, the notification of broader range of events that could affect the stability of the waste facility and the notification in less than 48 hours, the Directorate takes the preliminary view that Norway has failed to adequately implement the notification and reporting obligations of Article 11(3) of the Mining Waste Directive.

#### 5.2.6 Closure and after-closure procedures for waste facilities

Article 12(6) of the Mining Waste Directive imposes notification and reporting obligations on the operator, and follow any other instruction from the competent authority as to the corrective measures to be taken. The Norwegian Government referred in its ToC to Section 17-6 e. of the Waste Regulation for the implementation of these obligations. It also stated that the specific requirements are further specified in the permit. In the preliminary view of the Directorate, the requirements of Article 12(6) of the Mining Waste Directive should be reflected in the legislation in order to ensure a complete transposition of the Mining Waste Directive’s requirements and cannot be left solely to administrative permitting practices.

Based on the above, the Directorate takes the preliminary view that Norway has failed to adequately implement Article 12(6) of the Mining Waste Directive.

#### 5.2.7 Financial guarantee

Article 14(1) of the Mining Waste Directive provides that the competent authority shall, “*prior to the commencement of operations*”, require a financial guarantee from the operator of a mining waste facility. This financial guarantee shall ensure, inter alia, that: “*(b) there are funds readily available at any given time for the rehabilitation of the land affected by the waste facility, as described in the waste management plan pursuant to Article 5 and required by the Article 7 permit.*”

Pursuant to Article 14(3) of the Mining Waste Directive, the size of the financial guarantee “*shall be periodically adjusted*” in accordance with any rehabilitation work needed to be carried out on the land affected by the waste facility, as described in the waste management plan.

The Norwegian Government explained in its ToC that Article 14(1) of the Mining Waste Directive is implemented into Section 17-8 first paragraph a. and b. of the Waste Regulation. The Directorate notes that Section 17-8 first paragraph requires the operator to “*at all times have a satisfactory financial guarantee*”, however it does not explicitly require the financial guarantee to be in place “*prior to the commencement*” of operations as Article 14(1) of the Mining Waste Directive so requires. At the package meeting of 23 October 2020, the Norwegian Government explained that the financial guarantee must be approved before the operations of a mining waste facility can commence, however this practice is not enshrined in the legislation. The Directorate has concerns that the Norwegian provision leaves a degree of flexibility and thus uncertainty as regards the timing of when the financial guarantee is required. For the sake of completeness, the

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<sup>33</sup> FOR-12-18-2009-1500, Forskrift om sikkerhet ved vassdragsanlegg (damsikkerhetsforskriften).

Directorate also notes that Section 17-8 first paragraph b. does not include a reference to the waste management plan upon which the financial guarantee should be based.

Moreover, the Directorate observes that Article 14(3) of the Mining Waste Directive has not been transposed. The Norwegian Government explained in the ToC that the waste facility must, as a minimum every five years, assess whether the guarantee is adequate and report to the Pollution Control Authority. The Directorate thus understands that the periodical adjustment of the size of the financial guarantee is ensured by the competent authority through laying down conditions in the permit issued under Section 11 of the Pollution Control Act, cf. Section 17-4 of the Waste Regulation.<sup>34</sup>

Based on the above, the Directorate takes the preliminary view that Norway has failed to implement Article 14(1) and (3) of the Mining Waste Directive. The explicit requirements under these provisions should be enshrined in the national legislation and cannot be left to the discretion of competent authorities.

#### 5.2.8 Inspections by the competent authority

Article 17(1) of the Mining Waste Directive requires the competent authority to carry out inspections of the waste facility in order to ensure that it complies with the relevant conditions of the permit. These inspections shall be conducted “*prior to the commencement of deposit operations and at regular intervals thereafter, including the after-closure phase.*”

There is no reference to a corresponding national provision in the ToC submitted by the Norwegian Government. The Norwegian Government explained at the package meeting of 23 October 2020 that the pollution control authorities conduct risk-based inspections regularly, and that conditions laid down in the permit will also ensure that the waste facility complies with its obligations under the Mining Waste Directive. However, to the knowledge of the Directorate, the obligation imposed upon the competent authority to carry out these inspections is not enshrined in the Norwegian legislation.<sup>35</sup>

Based on the above, the Directorate takes the preliminary view that Norway has failed to fully implement Article 17(1) of the Mining Waste Directive.

#### 5.2.9 Cross-references to environmental requirements of relevant EU/EEA law

The Directorate makes a general observation that the Norwegian implementing legislation appears to not contain references in the Mining Waste Directive to other relevant EU/EEA law, including to: (i) the Water Framework Directive,<sup>36</sup> (ii) Directive 2008/98/EC (“the Waste Framework Directive”),<sup>37</sup> and (iii) Directive 2004/35/EC (“the Environmental Liability Directive”).<sup>38</sup>

The Norwegian Government explained at the package meeting of 23 October 2020 and in its ToC that the various acts and regulations governing the different aspects of mining waste operations apply in parallel, and confirmed that cross-references are generally not provided as the areas of responsibilities are different and distributed between several competent authorities.

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<sup>34</sup> The Norwegian Government has attached to the ToC templates on account pledges in respect of blocked bank deposits (landfills), and templates on terms for on demand bank guarantees in permits pursuant to Section 11 of the Pollution Control Act.

<sup>35</sup> Reference is made in the ToC to the pollution control authority’s general duty of supervision, which also covers waste management, pursuant to Section 48 of the Pollution Control Act.

<sup>36</sup> See, inter alia, Articles 2(2)(c), 5(3)(g), 11(2)(a), 12(5) and 13(4) of the Mining Waste Directive.

<sup>37</sup> See Article 7(3)(b) of the Mining Waste Directive.

<sup>38</sup> See Article 15 of the Mining Waste Directive.

The Directorate takes the preliminary view that, for the sake of completeness and in order to ensure the fulfilment of relevant environmental requirements under other relevant EU/EEA law, the Norwegian provisions that implement the Mining Waste Directive should clarify the applicability of other relevant EU/EEA law mentioned above.

### **5.3 The Norwegian Government's administrative practices for managing mining waste**

As described above, and based on the submissions and explanations from the Norwegian Government in correspondence and at the package meeting of 23 October 2020, the Directorate understands that:

- mining waste facilities are subject to several approvals, permits and licenses, to be granted on the basis of various acts and regulations by different competent authorities;<sup>39</sup>
- there is no fixed order in which the operator of a mining waste facility has to apply for and obtain its approvals, permits and licenses, as the complete set of necessary permits depends on the characteristics of the individual mining waste facility;
- information relevant to assess a permit application under Chapter 17 of the Waste Regulation may depend on information to be obtained by other competent authorities in the frame of other permits; and
- the competent authorities work closely together in order to share the relevant information and ensure that the requirements of the Mining Waste Directive are met.

It follows from the Directorate's assessment above that numerous requirements of the Mining Waste Directive are either not implemented in the Norwegian legal order or are implemented in sectoral legislation falling outside of the scope of competence of the competent authority entrusted with the task to grant permits under the Mining Waste Directive (the Pollution Control Authority). As a consequence, the adequate implementation of the Mining Waste Directive is left to administrative practices, based on the permit conditions and the cooperation between the authorities that are competent for the granting of approvals, permits and licenses for mining activities. The Directorate has identified that this approach is applied for the following provisions of the Mining Waste Directive: Articles 5(2), 7(2)(c), 8(1), 11(3), 12(6), 14(1) and (3), and 17(1).

The Directorate considers, in accordance with the constant case law of the EFTA Court<sup>40</sup> and the European Court of Justice,<sup>41</sup> that the execution in conformity with the provisions of a directive by administrative authorities cannot, in itself, present the clarity and level of detail required to satisfy the requirement of legal certainty. Simple administrative practices, by nature modifiable at the will of the administration, cannot be considered as leading to an execution of the obligations upon EEA States in the context of the transposition of a Directive.

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<sup>39</sup> In accordance with a zoning plan approved by the municipalities based on the Planning and Building Act (LOV-2008-06-27-71, Lov om planlegging og byggesaksbehandling (plan- og bygningsloven)), and partly based on the environmental impact assessment pursuant to the Regulation on impact assessments. An operating licence must be granted by the Directorate for Mineral Management pursuant to the Mineral Act. A license must be issued by the Norwegian Water Resources and Energy Directorate pursuant to the Water Resources Act (LOV-2000-11-24-82, Lov om vassdrag og grunnvann (vannressursloven)). A pollution permit must be granted by the Norwegian Environment Agency pursuant to the Pollution Control Act, thereunder the Waste Regulation.

<sup>40</sup> Case E-15/12 *Jan Anfinn Wahl v. the Icelandic State* [2013] EFTA Ct. Rep. 534 and Case E-1/10 *Periscopos AS v. Oslo Børs ASA; Erik Must AS* [2009-2010] EFTA Ct. Rep. 198.

<sup>41</sup> C-767/19 *European Commission v Kingdom of Belgium* [2019] ECLI:EU:C:2020:984, paragraph 57 and C-46/11, *European Commission v Republic of Poland* [2012] ECLI:EU:C:2012:146, paragraph 28.

The absence of legal certainty created by such an approach is illustrated by the complaint referred to above, touching upon some of the issues in this letter. The complainants allege that the permits for the disposal of mining waste in Førde fjord<sup>42</sup> and Ran fjord<sup>43</sup> in 2015, and in Reppar fjord in 2016,<sup>44</sup> were not granted in accordance with the Mining Waste Directive, also with respect to legal certainty requirements. Leaving the handling of mining waste facilities, including the permitting and the approval of the waste management plans, to administrative practices do not allow parties outside of the administration and the operators of the mining waste facilities to apprehend whether or not the said facilities are operating in accordance with the Mining Waste Directive.

As a consequence, the Directorate takes the preliminary view that the Norwegian administrative practices in this respect do not give comfort that the above mentioned articles of the Mining Waste Directive are complied with and subsequently breach Article 7 of the EEA Agreement.

## 6 Summary of the Directorate's preliminary views

As set out in Section 5.2 of this letter, the Directorate takes the preliminary view that Norway has failed to adequately implement, or transpose at all, several provisions of the Mining Waste Directive, namely: Articles 2(2), 3, 5(2) and (4), 7(1) and (4), 8(1), 11(3), 12(6), 14(1) and (3), and 17(1).

While the Directorate recognises that many of the provisions of the Mining Waste Directive are to a certain degree implemented in the Norwegian legal order, it observes that they are fragmented and spread across various acts and regulations, or even in guidance documents, other than Chapter 17 of the Waste Regulation that governs the management of mining waste. Thus, the Directorate takes the preliminary view that there is not a sufficient clarification to be found to ensure full implementation and application of the provisions of the Mining Waste Directive.<sup>45</sup> Additionally, there are no coherent and consistent cross-references between the relevant pieces of sectoral legislation and Chapter 17 of the Waste Regulation, which increases the risk of non-compliance considering the many competent authorities involved.

Moreover, the national implementing provisions often do not reflect the level of detail of the more specific requirements of the Mining Waste Directive. In particular as regards the approval of the waste management plan, the objectives are not explicitly enshrined in the legislation, contrary to what Article 7 of the EEA Agreement requires in order to make the Mining Waste Directive binding as to the result to be achieved and to ensure the full application of the Mining Waste Directive.<sup>46</sup>

Thus, the Directorate is left with the overall impression that Norway's approach to implement the Mining Waste Directive relies heavily on administrative practices in order to ensure compliance with the more specific requirement and objectives of the Mining Waste Directive, instead of having explicitly implementing these into its national legal

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<sup>42</sup> Nordic Mining ASA was granted a permit to dump 250 million tons of mining waste into Førde fjord on 5 June 2015 by the Ministry of Climate and Environment.

<sup>43</sup> Rana Gruber AS was granted its initial permit in 1975, and its current permit granted in 2012 was updated for increasing the yearly dumping of mining waste in Ran fjord from 1.7 to 3 million tons on 13 May 2015 by the Ministry of Climate and Environment.

<sup>44</sup> Nussir ASA was granted a permit to dump 25 million tons of mining waste into Reppar fjord on 19 December 2016 by the Ministry of Climate and Environment.

<sup>45</sup> Case E-1/10 *Periscopos AS v. Oslo Børs ASA; Erik Must AS* [2009-2010] EFTA Ct. Rep. 198, paragraph 51. Case E-15/12 *Jan Anfinn Wahl v. the Icelandic State* [2013] EFTA Ct. Rep. 534, paragraph 51.

<sup>46</sup> Case E-15/12 *Jan Anfinn Wahl v. the Icelandic State* [2013] EFTA Ct. Rep. 534, paragraph 49-50.

order, contrary to what Article 7 EEA requires. The Directorate observes that this approach applies to the following provisions of the Mining Waste Directive: Articles 5(2), 7(2)(c), 8(1), 11(3), 12(6), 14(1) and (3), and 17(1).

In the preliminary view of the Directorate, the approach taken by Norway is insufficient for the purpose of implementing the provisions of the Mining Waste Directive, as it leaves a high level of discretion to the competent authorities, thus increasing the risk of misapplication of the requirements of the Mining Waste Directive. Administrative practices are in nature alterable and therefore do not present the clarity and level of detail required to satisfy the requirement of legal certainty.<sup>47</sup> Thus, the Directorate takes the preliminary view that since the Norwegian administrative practices for managing mining waste are not reflected in the Norwegian legal order, they cannot as such be regarded as constituting the proper fulfilment of Norway's obligations under the EEA Agreement as required by Article 7 of the EEA Agreement.<sup>48</sup>

## 7 Conclusions

Based on the preliminary assessment and reasoning of the Directorate as set out in the above, the Directorate is of the preliminary view that the Norwegian Government has failed to ensure compliance with its obligations arising from the Mining Waste Directive in two respects. Firstly, several provisions of the Mining Waste Directive are not adequately implemented, or transposed at all, into the Norwegian legal order (Articles 2(2), 3, 5(2) and (4), 7(1) and (4), 8(1), 11(3), 12(6), 14(1) and (3), and 17(1)). Secondly, the Norwegian Government's administrative practices for managing waste from extractive industries do not give comfort that the requirements and objectives of the Mining Waste Directive are met (Articles 5(2), 7(2)(c) and (4), 8(1), 11(3), 12(6), 14(1) and (3), and 17(1)). Subsequently, the Directorate takes the preliminary view that the Norwegian Government has also breached Article 7 of the EEA Agreement, by failing to implement the Mining Waste Directive with the specificity, precision and clarity necessary to satisfy the requirements of legal certainty as to the result to be achieved.

In light of the above, the Norwegian Government is invited to submit its observations on the content of this letter by *6 November 2021*. After that date, the Authority will consider, in light of any observations received from the Norwegian Government, whether to initiate infringement proceedings in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and Court of Justice.

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>47</sup> C-767/19 European Commission v Kingdom of Belgium [2019] ECLI:EU:C:2020:984, paragraph 57.

<sup>48</sup> Case E-15/12 *Jan Anfinn Wahl v. the Icelandic State* [2013] EFTA Ct. Rep. 534, paragraph 53.