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Dear Sir or Madam,

Subject: Own initiative case concerning environmental controls under the Water Framework Directive

1 Introduction

Directive 2000/60/EC establishing a framework for Community action in the field of water policy¹ ("Water Framework Directive" or "WFD") requires Norway to, among other things, "*protect, enhance and restore all bodies of surface water*"², subject to the conditions and exceptions of that Directive. To that end, the Directive requires Norway to have in place sufficient environmental controls.

This case concerns the environmental controls over hydropower plants, and whether these comply with the requirements and objectives of the Water Framework Directive, solely.

For the sake of clarity, this case does not concern property rights, EEA energy law, or any aspects related to the sale of electricity, to the granting of concessions for hydropower or the generation of electricity by hydropower.

By this letter, the Directorate sets out its preliminary view that the Norwegian Government has failed to correctly implement the Water Framework Directive, for the following reasons:

1. Articles 11(3)(e) and 11(5) of the WFD are insufficiently transposed into Norwegian law.
2. The Norwegian legal framework does not provide for a periodic review of the relevant controls for hydropower facilities as required by Article 11(3)(e) of the WFD.
3. When data indicates that the relevant environmental objectives are unlikely to be achieved, the revision of hydropower permits is too slow to effectively implement Article 11(5) WFD.

2 Correspondence

By a letter dated 6 May 2022 (Doc No 1262901), the Internal Market Affairs Directorate ("the Directorate") of the EFTA Surveillance Authority ("the Authority") informed the

¹ OJ L 327, 22.12.2000, p. 1–73.

² Article 4 of the WFD.

Norwegian Government that it had opened an own initiative case to investigate the application of the Water Framework Directive and concerns relating to the robustness of the current Norwegian measures in place to eliminate and/or reduce the environmental effects of hydroelectric power plants on water bodies in Norway pursuant to that Directive. In that same letter, the Directorate requested information from Norway.

By letter dated 29 September 2022 (Doc No 1326045), the Norwegian Government replied to the Directorate's letter.

3 Legal framework

3.1 EEA Law

The Water Framework Directive was incorporated into the EEA Agreement by Joint Committee Decision No 125/2007 of 28 September 2007. It entered into force on 1 May 2009 for the EEA EFTA States, which was also the deadline for the transposition of the WFD by those states.

Article 4(1) lists the environmental objectives of the WFD. It provides that, in making operational the programmes of measures specified in the River Basin Management Plans, the EEA EFTA States must, among other things:

- *“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” (Article 4(1)(a)(ii) of the WFD);*
- *“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” (Article 4(1)(a)(iii) of the WFD);*
- *“achieve compliance with any standards and objectives at the latest 15 years after the date of entry into force of this Directive, unless specified in the Community legislation under which the individual protected areas have been established” (Article 4(1)(c) of the WFD).*

The abovementioned deadlines are adapted to the EEA Agreement by adaptation (b) of point 13ca of Annex XX to the EEA Agreement. Accordingly, the deadlines shall for the EEA EFTA States be understood to run from the date of entry into force of Joint Committee Decision No 125/2007 (1 May 2009).

Article 11 of the WFD reads, insofar as relevant:

- 1. Each Member State shall ensure the establishment for each river basin district, or for the part of an international river basin district within its territory, of a programme of measures, taking account of the results of the analyses required under Article 5, in order to achieve the objectives established under Article 4. Such programmes of measures may make reference to measures following from legislation adopted at national level and covering the whole of the territory of a Member State. Where appropriate, a Member State may adopt measures applicable to all river basin districts and/or the portions of international river basin districts falling within its territory.*
- 2. Each programme of measures shall include the ‘basic’ measures specified in paragraph 3 and, where necessary, ‘supplementary’ measures.*

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

(...)

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

(...)

5. *Where monitoring or other data indicate that the objectives set under Article 4 for the body of water are unlikely to be achieved, the Member State shall ensure that:*

- the causes of the possible failure are investigated,*
- relevant permits and authorisations are examined and reviewed as appropriate,*
- the monitoring programmes are reviewed and adjusted as appropriate, and*
- additional measures as may be necessary in order to achieve those objectives are established, including, as appropriate, the establishment of stricter environmental quality standards following the procedures laid down in Annex V.*

Where those causes are the result of circumstances of natural cause or force majeure which are exceptional and could not reasonably have been foreseen, in particular extreme floods and prolonged droughts, the Member State may determine that additional measures are not practicable, subject to Article 4(6).

...

3.2 National law

3.2.1 Legislative transposition of the WFD

In its notification of the national measures implementing the WFD, ("Form 1") of 23 April 2009 (Doc No 516263), the Norwegian Government indicated that the WFD had been transposed through *Forskrift om rammer for vannforvaltningen*³ ("the Norwegian Water Regulation"), which entered into force on 1 January 2007.

Section 25 of the Norwegian Water Regulation reads, insofar as relevant:⁴

§ 25. Programme of measures

The water region authority shall, in collaboration with the water region committee, review and, if necessary, update the programme of measures for the individual water region every six years. The programme of measures shall cover all sectors and shall be based on completed analyses and assessments. The programme of

³ FOR-2006-12-15-1446.

⁴ The Directorate's own translation.

measures shall be in accordance with national guidelines and state planning guidelines issued in accordance with Section 6-2 of the Planning and Building Act.

The programme of measures shall summarise all relevant measures to achieve the environmental objectives, and that are established in or in accordance with the implementation of relevant EEA rules in Norwegian law, or in accordance with Norwegian laws and regulation in force, as set out in annex VI, part A on basic measures.

The programme of measures shall also include all relevant types of measures that are additionally proposed to achieve the environmental objectives, including the means specified in Annex VI, part B on supplementary measures.

The programme of measures shall include, among other things:

(...)

e. control with the withdrawal of fresh water and groundwater and storage of surface water,

(...)

There must be an estimate of the costs of and indication of the legal basis for carrying out the measures included in the programme of measures.

Decisions on the implementation of individual measures included in the programme of measures are taken by the responsible authority pursuant to the relevant legislation.

If the results of monitoring or other data indicate that the established environmental objectives in a water body will not be achieved, the reason for this shall be clarified and new measures shall be considered.

The measures shall be operative no later than three years after the programme of measures is established.

3.2.2 The Norwegian licensing system for hydropower facilities

The below description is based on the Norwegian Government's reply of 29 September 2022. The Norwegian Government is invited to correct and/or clarify as appropriate.

New hydropower projects above a certain threshold must obtain a license to construct and operate under either Section 3 of the Water Course Regulation Act⁵ or Section 8 of the Water Resources Act⁶.

Licenses issued pursuant to the Water Course Regulation Act may be revised after 30 years (Section 8 of the Water Course Regulation Act). These licenses must contain rules on manoeuvring (*manøvreringsreglement*), setting out the minimum and maximum permissible water levels in the reservoirs (Section 16 of the Water Course Regulation Act). The rules on manoeuvring may be revised if these lead to significant harmful effects to public interests (Section 16(3) of the Water Course Regulation Act).

⁵ Vassdragsreguleringsloven, LOV-1917-12-14-17.

⁶ Lov om vassdrag og grunnvann (vannressursloven), LOV-2000-11-24-82.

Licenses issued pursuant to the Water Resources Act may be modified pursuant to Section 28 of the Water Resources Act, if “special circumstances” apply.

Older hydropower facilities that did not require a license pursuant to former legislation are not required to obtain a license under current legislation. The relevant authorities may, “in special circumstances” decide to summon such facilities for licensing (Section 66(3) of the Water Resources Act).

Hydropower facilities which do not contribute to significant harm or inconvenience to any public interests in the water body are not required to obtain a license pursuant to Sections 8 and 18 of the Water Resources Act, as further described in section 4.3.2.1. below.

All licenses issued or revised after 1990 contain “standard environmental terms” whereby the authorities have a legal mandate to impose environmental measures. Those environmental measures do not include changes to the minimum and maximum water flow (the rules on manoeuvring).

4 The Directorate’s assessment

4.1 Introduction

Having examined the Norwegian Government’s reply of 29 September 2022, the Directorate takes the preliminary view that Articles 11(3)(e) and 11(5) of the WFD are both incorrectly transposed into Norwegian law and incorrectly applied in practice.

4.2 The failure to correctly transpose Articles 11(3)(e) and 11(5) of the WFD into national law

4.2.1 Article 11(3)(e) of the WFD

Article 11(3)(e) of the WFD appears to be only partially transposed into Norwegian national law through Section 25(4)(e) of the Norwegian Water Regulation.

Article 11(3)(e) of the WFD requires that the programme of measures include “*controls over the abstraction of fresh surface water and groundwater, and impoundment of fresh water, including a register or registers of water abstractions and a requirement of prior authorisation for abstraction and impoundment. These controls shall be periodically reviewed and, where necessary, updated. Member States may exempt from these controls, abstractions or impoundments which have no significant impact on water status.*”

Section 25(4)(e) of the Norwegian Water Regulation requires that the programme of measures include controls with the withdrawal of fresh water and groundwater and the storage of surface water.

However, that section does not set out the following elements of Article 11(3)(e) of the WFD:

- A register or registers of water abstractions and a requirement of prior authorisation for abstraction and impoundment.
- A requirement to periodically review and, where necessary, update the relevant controls.
- The possibility to exempt from controls abstractions or impoundments which have no significant impact on water status.

As for the latter element, the Directorate notes that the exemption from controls is within the Member States’ discretion. As such, the Norwegian Government is free to take the view that the exemption shall not be applied in Norway. However, if the exemption is to be

applied, its legal basis and conditions must be adequately transposed into national law. The Norwegian Government is invited to explain whether it considers this element to be transposed into other sectorial legislation, such as Sections 8 and/or 18 of the Water Resources Act.

Based on the above, the Directorate takes the preliminary view that Article 11(3)(e) of the WFD is not adequately transposed into Norwegian law.

4.2.2 Article 11(5) of the WFD

Article 11(5) of the WFD appears to be only partially transposed into Norwegian law through Section 25(7) of the Norwegian Water Regulation, which provides:

If the results of monitoring or other data indicate that the established environmental objectives in a water body will not be achieved, the reason for this shall be sought clarified and new measures shall be considered.

Article 11(5) of the WFD requires the Member State to ensure that, where monitoring or other data indicate that the objectives are unlikely to be achieved:

- the causes of the possible failure are investigated,
- relevant permits and authorisations are examined and reviewed as appropriate,
- the monitoring programmes are reviewed and adjusted as appropriate, and
- additional measures as may be necessary in order to achieve those objectives are established, including, as appropriate, the establishment of stricter environmental quality standards.

Firstly, Section 25(7) of the Norwegian Water Regulation appears to be triggered where monitoring or data indicate that the environmental objectives *will not be* achieved. By contrast, Article 11(5) WFD is triggered where monitoring and data indicate that the objectives *are unlikely to be* achieved. As such, the Norwegian transposition seems to set a higher standard for the data than that set out in Article 11(5) WFD.

Secondly, the Norwegian transposition does not appear to require that:

- relevant permits and authorisations are examined and reviewed as appropriate;
- the monitoring programmes are reviewed and adjusted as appropriate;
- additional measures as may be necessary in order to achieve the environmental objectives are established, including, as appropriate, the establishment of stricter environmental quality standards.

Based on the above, the Directorate takes the preliminary view that Article 11(5) of the WFD is not adequately transposed into Norwegian law.

4.3 The lack of periodic reviews of the relevant controls

4.3.1 Preliminary remarks on the requirements of Article 11(3)(e) of the WFD

At the outset, Article 11(3)(e) of the WFD requires “controls” over the abstraction of fresh surface water and groundwater, and impoundment of fresh surface water, which *include*:

- “a register or registers of water abstractions”, and
- “a requirement of prior authorisation”.

Moreover, that Article requires periodically reviewing and, where necessary, updating these controls (permits or other forms of prior authorisations).

The Directorate notes that pursuant to the wording of the provision (“these controls shall be periodically reviewed”), the periodic review must be both mandatory and periodic. In other words, triggering the review cannot to be made subject to administrative discretion or to individual requests. Rather, the review must be triggered by the mere passage of a given time period.

As such, this requirement has a preventive purpose and may be considered a specific expression of the precautionary principle and the principle that preventive action should be taken, enshrined in Article 73(2) of the EEA Agreement, as well as in Article 191(2) of the Treaty on the Functioning of the European Union (“TFEU”).

The Directorate notes that Article 11(3)(e) of the WFD does not specify exactly how regularly the periodic review must take place. Nevertheless, the provision must be read in light of the overall objective of the WFD, namely, to achieve, by coordinated action, ‘good status’ and or ‘good ecological potential’ of all EU surface waters by 2015 (2024 for EEA EFTA States).⁷

As such, it is the understanding of the Directorate that the periodic review must sufficiently regular to fulfil the preventive and precautionary purpose of Article 11(3)(e) of the WFD and the overall objective of the WFD.

4.3.2 The lack of periodic reviews of controls pursuant to the Water Framework Directive in relation to hydropower facilities in Norway

As explained by the Norwegian Government in its reply, the Norwegian license system is the single most important legal measure to control the behaviour of hydropower operators, in relation to the achievement of the environmental objectives of the Water Framework Directive. The Directorate thus understands that Norwegian licenses must be considered to be the relevant “controls” within the meaning of Article 11(3)(e) of the WFD.

In such circumstances, the Directorate takes the view that Article 11(3)(e) of the WFD requires that those hydropower licenses are periodically reviewed, and where necessary, updated.

In Norway, the licensing rules, including the requirement to obtain and retain a license, vary from facility to facility, depending on their size, impact and the legal framework in place at the time of their construction, as further outlined in sections 4.3.2.1. and 4.3.2.2 below.

4.3.2.1 Unlicensed hydropower facilities

Some hydropower facilities are not subject to licensing due to a lack of significant harm or inconvenience to public interests. According to the Norwegian Government, “public interests” in this context includes the environment. The Directorate notes that Article 11(3)(e) of the WFD allows for exemption from controls where there is no significant impact on water status. However, the Directorate also points out that this exemption must be adequately transposed into national law, as stated in section 3.2 above.

Other hydropower facilities are not subject to licensing because it was not a legal requirement under Norwegian legislation as applicable at the time of their construction.

The Directorate finds it difficult to consider that sufficient “controls” within the meaning of Article 11(3)(e) of the WFD are in place in respect of unlicensed hydropower plants.

⁷ CJEU, Case C-461/13 *Bund für Umwelt und Naturschutz Deutschland*, para. 37.

As explained by the Norwegian Government in its reply, the legal measures applicable to unlicensed hydropower operators are the following:

- The operator is required to act with due care (Section 5 of the Water Resources Act). The authorities may compel rectifications and levy fines in the event of violation of this duty.
- The operator is required to release a minimum water flow (Section 10 of the Water Resources Act).
- For facilities not subject to licensing under current legislation, the operator must construct in line with the presented design.
- The authorities may summon the facilities for licensing (Section 66 of the Water Resources Act), if “special circumstances apply”.

As regards the second point, the Directorate notes that pursuant to Section 66(4) of the Water Resources Act, certain older facilities appear to be exempt from the requirement to release a minimum water flow.

The Norwegian Government is invited to explain whether and how it considers the above measures to constitute “controls” within the meaning of Article 11(3)(e) of the WFD.

In any case, the Directorate notes that none of these measures contain a requirement of prior authorisation, nor are they subject to periodic review. Consequently, the Directorate takes the preliminary view that they do not fulfil the requirements Article 11(3)(e) of the WFD in that respect.

4.3.2.2 Licensed hydropower facilities

Licenses issued under the Water Resources Act may be reviewed only if “special circumstances” apply pursuant to Section 28 of the Water Resources Act.

For such licenses, there does not appear to be any periodic review as required by Article 11(3)(e) of the WFD.

Licenses issued under the Water Course Regulation Act may be reviewed after 30 years.

The Directorate finds that this review does not sufficiently satisfy the requirements of Article 11(3)(e) of the WFD.

Firstly, the review is not automatic, but subject to administrative discretion. As such, there is no guarantee that a review will take place after 30 years, and thus cannot be qualified as periodic.

Secondly, the Directorate considers that a review frequency of 30 years risks leaving excessive time between each periodic review. As explained above, the periodic review must be sufficiently regular to give effect to the preventive and precautionary purpose of Article 11(3)(e) of the WFD and not undermine the overall objective of the WFD.

A review frequency of 30 years might fail to do so.

In line with the precautionary principle and the principle that preventive action should be taken, the periodic review serves to ensure that the relevant controls remain effective and that any new risk of not achieving the WFD objectives may be identified and addressed.

In a period of 30 years, there is a significant risk that environmental conditions will change considerably, especially considering the aggravating effects of climate change. An excessive review frequency may compromise the identification of new environmental issues and risks leaving these unaddressed.

According to Article 11(1) of the WFD, the purpose of the programme of measures is “to achieve the objectives established under Article 4”. To that aim, the requirement in Article 11(3)(e) of the WFD forms part of the ‘basic measures’ which are the minimum requirements to be complied with in the programme of measures.

For the EEA EFTA States, the time limit for attaining the environmental objectives in Article 4(1) of the WFD is 1 May 2024. Subject to the conditions in Article 4(4) of the WFD, that time limit may be extended for a maximum of two further updates of the river basin management plan, that is, at the latest by 1 May 2036. Further extensions beyond that date are only permissible for reasons of natural conditions (Article 4(4)(c) of the WFD).

If the basic measures of the programme of measures are to be effective, including the relevant controls, they must in principle be capable of achieving the required results at the very latest by 1 May 2036, 18 years after the time limit for publishing the first river basin management plans as per Article 13(6) of the WFD. The Directorate questions how a review frequency of 30 years is suited to achieve the environmental objectives within this timeline.

The Directorate therefore invites the Norwegian Government to explain how a review frequency of 30 years is suited to ensure that the controls are effective and that new environmental issues may be identified and addressed in time to achieve the environmental objectives of the WFD.

4.4 The revision of licenses is excessively lengthy

4.4.1 Preliminary remarks on the requirements of Article 11(5) of the WFD

Article 11(5) of the WFD establishes an extraordinary review procedure triggered by monitoring or data indicating that the objectives under Article 4 of the WFD are unlikely to be achieved. When this review is triggered, the Member State must ensure that relevant permits and authorisations are adjusted as appropriate.

Article 11(5) of the WFD must be distinguished from Article 11(3)(e) of the WFD. Article 11(5) of the WFD requires *ad hoc* reviews, as appropriate, where data indicates a risk of failure to meet the environmental objectives. By contrast, Article 11(3)(e) requires a periodic review of controls triggered by the mere passage of time, without this being triggered by specific data.

Whereas Article 11(3)(e) of the WFD serves a preventive purpose, the review under Article 11(5) of the WFD serves a reactive purpose. For that review to be effective, it must be sufficiently swift to be able to address any issues and achieve the environmental objectives of the WFD.

4.4.2 The processing time for revision of hydropower licenses

As stated on page 18 of the Norwegian Government’s reply, the average processing time for revision of licenses is 11 years. The Directorate understands this to be the average processing time of the revision cases listed in Annex 6 of the Norwegian Government’s reply. Most of these revision cases were opened on the basis of requests from municipalities, NGOs or other interested parties to put in place environmental measures.

As the Directorate understands it, the average processing time of 11 years thus relates to cases opened based on concerns that the objectives under Article 4 of the WFD were unlikely to be achieved.

Such a lengthy process calls into question the achievement of the environmental objectives, even when time extensions under Article 4(4) of the WFD are applied. Consequently, there is a risk that the review process in Article 11(5) of the WFD is rendered ineffective.

The Directorate therefore invites the Norwegian Government to explain how the permit reviews, with an average processing time of 11 years, sufficiently ensure that the identified environmental issues are addressed in time to achieve the environmental objectives of the WFD.

Pending the Norwegian Government's explanation, the Directorate takes the preliminary view that Norway has failed to implement and give full effect to Article 11(5) of the WFD.

5 Conclusion

Following its initial assessment, the Directorate takes the preliminary view that:

1. Articles 11(3)(e) and 11(5) of the WFD are insufficiently transposed into Norwegian law.
2. The Norwegian legal framework does not provide for a periodic review of the relevant controls for hydropower facilities as required by Article 11(3)(e) WFD.
3. When data indicates that the relevant environmental objectives are unlikely to be achieved, the review of hydropower permits is too lengthy to effectively implement Article 11(5) WFD.

In light of the above, the Norwegian Government is invited to submit its observations on the content of this letter by 7 June 2024. 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.